

# Dynamics of Legal Recognition in Indigenous Peoples Under Law of Forestry Construction

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## Abstract

Political developments and the struggle of indigenous peoples and indigenous as well as supporters in the national and international levels, created the ILO Convention No. 169 commonly known as the "Convention on Indigenous People Right", namely the convention on indigenous peoples and indigenous people in independent countries. The Convention was approved by 328 countries, one State against and 49 countries abstained, which underlines the implementation of human rights in general for the community customary law, also establishes the right to determine the identity, as well as determining the appropriate education of their values. They are entitled to decide the shape and development priorities, including the right to refuse development. ILO Convention 169 states customary law communities have the right to land and natural resources. Recognition of indigenous peoples, especially the juridical recognition is inseparable from the political dynamic, both in the context of national politics, cultural and political development in general. Therefore, some rules legislation issued sometimes showing obscurity recognition, or even to the efforts denial to the existence of indigenous peoples. State law and local law is the legal system that in reality there is. The state does have the right to make the adjustment to its citizens, but it does not mean that the existing legal system in the community should be replaced in its entirety by the legal system of the country. Especially when you consider that the law is the identity of a community. The placement of state law as the law is the most correct, the implications are not given the place for another law in state law. Even if the existence of other laws recognized, but still was placed on a view that inferior when compared with the laws that come from the state. Therefore, a state law that paradigmatic positivism does not see legal pluralism as a necessity and not be used as the main ideology.

Keywords: customary law community, recognition, forestry law, legal pluralism

## A. BACKGROUND

The international community realized that besides the existence of people who already have advanced civilization (modern), there are also other groups such as the people who live and customary law are outside the modern community and has its own system and its civilization. Although sociological and anthropological existence of these communities is a reality. But politically existence is not recognized, so that the rights contained in those communities are often violated in the interests of the other communities, especially for modern society.

The attention and recognition of the international community belonging to the United Nations to the customary law community, a new two-decade perceived albeit through a long struggle and tireless of customary law communities worldwide with sepenuhnya course supported by non-governmental organizations (NGOs). Attention is quite significant by the international community to the existence of customary law community for the first time seen with the adoption on 9 August by the UN as the "Day of Indigenous and tribal peoples of the World", the determination is carried out by the UN in 1982, and on August 9, 1982 as well conducted the first trial "Working Group on indigenous Peoples Community law". Then in 1993 the United Nations set as a community of customary international law by the Indonesian government changed to the traditional society. Then the UN General Assembly had set the year 1995-2000 as the "decade of international customary law communities."<sup>1</sup>

Determination dated August 9 as "day of the Indigenous peoples' World" in 1982 after previously formed "Working Group on Indigenous and tribal peoples"<sup>2</sup>. Organizationally presence Working Group on Indigenous and tribal peoples is under the Human Rights Commission of the structure under the ECOSOC. There are two working agendas of the Working Group of Indigenous Peoples this law is to listen and inform the situation of indigenous communities in relation to human rights and to draft an international declaration.<sup>3</sup> Since the establishment of the Community Working Group on customary law, customary law community from all over

<sup>1</sup> Hubertus Samangun dalam Sandra Kartika & Chandra Gautama (Penyunting), *Menggugat Posisi Masyarakat Adat Terhadap Negara*, Prosiding Sarasehan Masyarakat hukum adat Nusantara, Diterbitkan Atas Kerjasama Panitia Bersama Sarasehan dan Kongres Masyarakat hukum adat Nusantara 1999 Dengan Lembaga Studi Press Dan Pembangunan (LSP), Yogyakarta, Cet-I, 1999, Hal. 133-134.

<sup>2</sup> Menurut Hubertus Samangun momentum Internasional tersebut tidak terdengar gaungnya di Indonesia, *Ibid*, Hal. 133.

<sup>3</sup> Jens Dahl, *Masyarakat hukum adat Di Dunia Eksistensi Dan Perjuangannya*, Penerbit IWGIA Dan Institute Dayakologi, Pontianak-Indonesia, 2001, Hal. 128

the world are able to voice any problem for which there is in this group include various violations and conducted on the customary community groups. There is a working system that is different between the working groups of indigenous people to the working of the existing institutions under the auspices of the United Nations. The difference is they (the customary law community) together with representatives of the government of their country which officially can freely express all the problems that exist on them.

One of the important results of the Working Group on Indigenous Peoples are produced "Draft Declaration on the Rights of indigenous Peoples" which consists of 45 Articles. There are some important chapter regarding the existence of indigenous communities especially with regard to its rights issue, among others, Article 3 which says that: "Indigenous and tribal peoples have the right to self-determination. Based on that, they have the right to decide freely their political status and freely pursue their economic, social and cultural development".

In addition to the recognition of the right to self-determination, the declaration also addresses the protection of the collective rights of indigenous peoples. This is reflected in Article 6 of the declaration which says: "Indigenous and tribal peoples have the collective right to live in freedom, peace and security as a distinct society". Whereas Article 8 says that: "Indigenous and tribal peoples have the collective and individual rights to care and develop the identity and characteristics of different, including the right to declare themselves as indigenous people and their recognized as well."

With regard to the relationship between the land and the area where they live, the declaration of the rights of customary communities also set it as contained in Article 10 which says that "customary law society can not be forcibly removed from the ground or their territories, the transfer will not take place without the free and informed consent and declared itself by customary law community concerned and after agreement on compensation and fair or if possible option to go back again ". Land and the region is very important for the people of customary law, every society customary law related to their original territory. inseparable unity of land owned by indigenous people and to limit "since time remembered". One chapter with regard to the concept of the relationship between indigenous people and their lands and territories is Article 26, which says: "Indigenous and tribal peoples have the right to own, develop, control and work the land and territories, including the total environment of the soil, air and water, the seas near the coast, sea ice, flora and fauna and other resources they traditionally own, occupy or use ".

Although it still requires a long struggle that the Draft Declaration to be approved by the UN General Assembly, but that obviously the defense of the customary law community in international forums, particularly through international bodies, namely the United Nations is an effort that is very advanced. Tracing back, actually before the formation of "Working Group on Indigenous and tribal peoples" in 1982, the existing international recognition of the rights of ethnic minorities. This recognition for the first time recognized through the ILO (International Labour Organization), which is an organization under the auspices of the United Nations, especially through the first convention that was made in 1957 or better known as ILO Convention 107.<sup>1</sup> In the convention governed the treatment of indigenous peoples and communities customary law, ie the community or tribe in which countries have an identity and norms of life that is different from the general public.

With the development of politics and the struggle of indigenous peoples and indigenous as well as supporters in the national and international levels, created a shortage in the ILO convention 107 that is increasingly felt, so that in 1989 produced his successor, namely ILO Convention No. 169 commonly known as the "Convention on Indigenous People Right", namely the convention on indigenous peoples and indigenous people in independent countries. The Convention was approved by 328 countries, one State against and 49 countries abstained, this convention to be the consensus and norms of behavior globally. ILO Convention 169 in addition to underlining the implementation of human rights in general for the community customary law, also establishes the right to determine the identity, as well as determining the appropriate education of their values. They are entitled to decide the shape and development priorities, including the right to refuse development. In addition, ILO Convention 169 also states customary law communities have the right to land and natural resources.

In relation to the plurality of laws governing forests, with the ILO Convention 169, the plurality admit the existence internationally. Although it is not stated explicitly, but with the determination and recognition of existing rights in local communities means also recognizes the legal system governing the forest. This is because at the community or local residents who live around the forest has its own forest management system, which is internationally recognized such rights.

On the other hand, WHO and UNESCO as an international institution whose existence under the UN also have considerable concern to indigenous peoples. Forms of concern, among others, for example in 1998 the WHO as an international organization in charge of health issues worldwide, has received the "Decade of Indigenous and tribal peoples" and appealed to all members to take positive steps to improve the health status of

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<sup>1</sup> Ibid, hal 132.

customary law communities, after consultation with the community customary law as well as the assistance of WHO. As well as with UNESCO as an international body in charge of education, science and culture, in 1998 has organized an international symposium that discusses the places hallowed or sacred by indigenous peoples.<sup>1</sup>

## B. RECOGNITION CONSTRUCTION OF INDIGENOUS PEOPLES IN NATIONAL FOREST LAW

At the global level, the position of the local population (community customary law) has been changing rapidly for over 20 years. Declarations and policies related to it have been received by the multilateral institutions and donor agencies. The institutions concerned with the preservation of the environment has also adopted a policy relating to the local population.<sup>2</sup>

Changes at the global level is shared by Indonesia, it is as stated by Gerald A. Persoon, that in Indonesia, as part of the process of democratization, discourse related to the local population has changed, though Indonesia is still not fully prepared to accept the international discourse, Minority groups began referring to the debate on the claims of the right on natural resources. Changes in policies regarding the locals away from development programs that nature. Also open opportunities for the development of forms of new leadership among these groups, because of the conditions in the world as well as interaction with the official agencies require other abilities in terms of communication skills.<sup>3</sup>

In the national context, the recognition of indigenous peoples, especially the juridical recognition can not be separated from political dynamics, both in the context of national politics, cultural and political development in general. Therefore, some perturan legislation issued sometimes showing obscurity recognition, or even to the efforts denial to the existence of indigenous peoples. For example regarding the issue of terms used, before the term "Indigenous and tribal peoples' socialized in Indonesia in 1993 by a group calling itself the Network Defense of the Rights of Indigenous and tribal peoples (JAPHAMA) consisting of traditional leaders, academics and NGO activists met in Tana Toraja, various terms presumably already known to identify groups of people who are considered to have a different system than the public at large (modern society), such as ethnic minorities, indigenous peoples (indigenous tribes), indigenous people, the indigenous (native people), even the term which shows the distorted and biased impression of a wide range of interests and ideologies also rise to the surface as the mountain (mountain people) or forest (forest people). Therefore, the meeting agreed that the term appropriate to translate "indigenous peoples: in the context of Indonesia is 'customary communities', meaning that when we talk about the rights of indigenous people in Indonesia, the benchmark is the rights of indigenous people universally valid.

Juridically there is not a single unitary term used to translate the term indigenous peoples in the Indonesian language. In the Basic Agrarian Law, Mining and Forestry Law still uses the term "of Indigenous People", in Act No. 10 of 1992 used the term "Group Who Has the typical Livelihoods". Different terms are also used in the decree of the Minister of Social Affairs No. 5 / HUK / 1994, which uses the term "Tribe Remote and Isolated Communities", while Koentjaraningrat as a leading anthropologists use the term "ethnic group pursued developing".<sup>4</sup> Even the Ministry of Transmigration and Resettlement use the term "moving and shifting Peladang wild", "Squatters jungle" to the term communities living around the forest.

Of the various terms contained in several provisions of the legislation that exists, it appears that the Indonesian government still see the people who live around the forest as "isolated tribes" or "isolated communities" to describe a group of people who live outside the administrative area formally, they are considered to be living in a "pre-village" outside the official classification of the village. In the perspective of the policy of nationalism of these groups are believed to face severe challenges to the program of national integration, so that the Ministry of Social Affairs officially portray these groups as: "The group of people who lived, geographically remote, isolated and socially culturally alienated and or still underdeveloped compared to the community Indonesian people in general".<sup>5</sup> Customary law is the community of people living in one area that has its own legal system. Meanings such terkadang intent that distinguishes between indigenous people and that is not is seen from the existence and the law, if a society has a legal system and still implement the law in the governance of social life, then presumably it can be said that these communities are indigenous peoples. In addition, the meaning of which see the indigenous people and will avoid the legal characteristics of a variety of negative impressions and biases various views, especially political bias.

<sup>1</sup> Sandra Kartika & Chandra Gautama (Penyunting), *ibid* Hal. 135.

<sup>2</sup> Gerard A.Persoon (Leiden University), *Isolated Islanders or Indigenous People: The Political Discourse and its Effects on Siberut (Mentawai Archipelago, West-Sumatra)*. This article is a revised version of the paper presented at the panel 'Interdependencies of International, National and Lokal Law' at the 2nd International Symposium of Journal ANTROPOLOGI INDONESIA: 'Globalization and Local Culture: A Dialectic towards the New Indonesia', Andalas University, Padang, 18-21 July 2001.

<sup>3</sup> *Ibid*

<sup>4</sup> Koentjaraningrat. *Masyarakat Terasing di Indonesia*, Jakarta; Inpress. 1993. Hal. 64.

<sup>5</sup> Lihat SK Mensos No No. 5 /HUK/1994.

As the issue of the term, recognition of the rights that exist in customary law communities, especially the legal system, the various laws demonstrate the diversity of attitudes. For example Act of 1945,<sup>1</sup> prior to the amendments only contain a few provisions concerning human rights issues, especially the right to work and to a decent living (Article 27), right of association, assembly and expression (Article 28). Also its recognition of this right is not intact, because it is placed again on the extent of such laws recognize and regulate it. No other rights in the 1945 Constitution before the amendment is freedom of religion (Article 29) and the right to education (Article 31).

However, after amendment, though not explicit, recognition and protection of human rights as an individual and community rights as a group or a community is given a place in the 1945 Constitution, in the sense of not only the right to get a job and a decent living, the right to organize, assemble and secrete mind, the right to embrace and choose the religious and educational rights are to be recognized, but also a wide range of rights that already recognized universally by societies internationally by the Constitution amendment acknowledged, namely as contained in Article 28, first paragraph (3) that says: "the cultural identity and people's rights are respected in line with the times and civilizations". Why Article 28I Paragraph (3) is considered to provide recognition and protection for the existence of customary law community, this is not another community because customary law may be known as one of the cultural identities that exist on them.<sup>2</sup>

Before do that, an amendment to the Constitution of 1945, the recognition of universal human rights has been started in 1998 that is, when the Decree of the People's Consultative Assembly (MPR) No. XVII / MPR / 1998 on Human Rights. MPR has a high significance for society customary law, after the inclusion of Article 41 which recognizes the existence of indigenous people and to all the wisdom it contains.<sup>3</sup>

Then the recognition of the existence of indigenous people and to all the wisdom of cultures, legal systems and diversity of natural resource management, specifically gained political momentum and juridical right in 2001, with the issuance of Decree No. IX / MPR / 2001 on Agrarian Reform and Management Natural resources. In MPR No. IX / MPR / 2001, in particular Article 5 (j) expressly says that reform in the field of law Agricultural and natural resource management needs to be done to hold the principle: "recognize and respect the rights of indigenous people and cultural diversity of the nation on agrarian resources and natural resource management."

Political law contained in the MPR were also followed by other laws. As described above, that in relation to the existence of customary law community, it turns out the law as a political agreement between the people and the rulers show the nuances of diverse, diversity is seen from the non-recognition, he acknowledges implicitly to the form of an explicit recognition of the existence of society customary law. Nuances such diverse presumably can be seen from some of the products of legislation which are directly or indirectly related to the customary law community, among others, can be seen in the principal laws agrarian, key legislation forestry legislation village administration, law OF regional government and laws of human rights.

One of the national product in the form of legislation that has been linked indirectly to the existence of indigenous communities namely, Law No. 5 of 1960 on the Basic Agrarian Law. It says it has no direct connection because the laws are not directed specifically against customary law community, but in the legislation there are some article that talked about the existence of customary communities. This is because, the government basically realized that the arrangement of agrarian in Indonesia can not be separated with the issue of land that has long been dominated by a particular community.

There is some clause in the law that if analyzed have relevance to indigenous and tribal communities, among other things:

- a. Article 3 states: "bearing in mind the provisions of Articles 1 and 2 implementation of customary rights and similar rights from communities of indigenous, along by the fact still exist, must be such that in accordance with the national interests and the state, which is based on the unity of the Nation and must not conflict with the laws and regulations of higher".
- b. Article 5 of Law No. 5 of 1960, which specifies that: "Customary law applies to the earth, water and air space is the common law, this does not contradict national interests and the state, which is based on the unity of the Nation, with socialism Indonesia as well as with regulations contained in this Act and other laws, something with regard to elements that rely on religious law".

<sup>1</sup> Berdasarkan Ketetapan MPR No. III/MPR/2000 tentang sumber hukum dan tata urutan peraturan perundang-undangan, Pasal 2 menyebutkan bahwa Tata urutan Peraturan Perundang-undangan di Indonesia adalah sebagai berikut: Undang Undang Dasar 1945 Republik Indonesia, Ketetapan Majelis Permusyawaratan Rakyat RI, Undang-Undang, Peraturan Pemerintah Pengganti Undang-Undang, Peraturan Pemerintah, Keputusan Presiden, Peraturan Daerah.

<sup>2</sup> Pengakuan akan Hak-Hak Asasi yang secara universal diakui oleh Masyarakat Internasional ini terlihat dalam dimasukkan BAB XA tentang Hak asasi manusia mulai dari Pasal 28 sampai dengan Pasal 28J Undang-Undang Dasar 1945 (Amandemen).

<sup>3</sup> Pasal 41 Ketetapan MPR No. XVII/MPR/1998 adalah identitas budaya masyarakat tradisional termasuk hak atas tanah ulayat dilindungi, selaras dengan perkembangan zaman.

However, if done further research then in the legislation there is a conflict substantively. This conflict is seen on the one hand, as in the second article of the above, the existence of indigenous communities are recognized, but on the other side of existence is not recognized. This can be seen in the explanation of the law which says that: People are prohibited from using their collective rights to impede the provision of the right to cultivate. The official explanation of the Act further provides that space and great for entrepreneurs who have been granted the right to attempt to ignore the existence of indigenous peoples.

Act first made by the government in the New Order era that are directly related to the presence of indigenous communities is Law No. 5 of 1967 on Basic Forestry Law. Is said to be directly related to customary law community, because as we know that in territorial customary law communities generally live around forests, and even between the forest and customary law community already is a unit in his life. Severe economic conditions in the first period of the New Order government as well as the need for large capital in developing, making the drafter of development at the time saw it as a major asset in the search for capital construction and as a driver of economic growth in Indonesia. Upon consideration mention in the Government issued Law No. 5 of 1967 About the Forestry Law.

The question is how the attitude of Act No. 5 of 1967 on Forestry to the existence of law and indigenous peoples. Answering these questions, then you need to know that the birth of this legislation can not be separated from the constitutional legal basis in the form of Article 33 UUD 1945 (before amendment). Implementation and direct translation of the constitutional basis in the context of forestry can be found in Article 5 of the law which says that:

- 1) All forests in the region of the Republic of Indonesia, including the natural resources therein shall be controlled by the state.
- 2) The master of the country in subsection (1) gives the authority to (a) establish and manage the planning, allocation, provision and use of forests in accordance with its function in providing benefits to the people and country, (b) regulate forest management in the broadest sense, (c) determine and regulate legal relations between persons or entities with forests and organize actions on forests.

Configuration law as aforesaid is duty resource ideology that gives priority to the state to regulate the mechanisms of domination and exploitation as a source of income and foreign exchange. The state becomes the sole ruler of the forest, the right to determine all aspects relating to the forest as outlined in state law. The consequence of ideological domination tends to ignore the mechanisms that are owned by local communities, limiting access and the interests and rights of local communities over natural resources that exist around them, and in turn will displace local communities, including traditional and local knowledge that is reflected from different social and cultural traditions of those that have historically lived around the forest.

Furthermore, how mastery ideology is manifested in the Act NO. 5 of 1967 can be seen in 2 and Article 17. Article 2 which he said that that the country's forests are all forest area unencumbered property rights. Whether it is property rights, the right to cultivate and so forth. Whereas Article 17 states that: "The implementation of the rights of communities, customary law and its members as well as the rights of individuals to benefit from the forest, directly that based on something the rule of law, all reality is still there, should not interfere with the achievement of purposes objectives set forth in this law. Adhering to the above national objectives, then in Act No. 5 of 1967 explicitly does not recognize the existence of indigenous peoples. Do not even admitted the existence of indigenous peoples and indigenous forest that is on them clearly be seen from Article 6 of Government Regulation No. 21 of 1970 On Concessions Hutandan forest product harvest concessions (HPH and HPHH), as the implementing instrument of Act No. 5 of 1967, which says that:

- 1) The rights of indigenous communities and their members to collect forest products that are based on a rule of customary law, so far as the reality is still there, its implementation needs to be regulated so as not interfere with the implementation of forest exploitation.
- 2) Implementation referred to in paragraph (1) shall seizing Rightsholders Forest Concessionaires are required to pass this implementation in these rights, which is governed by an order as a result of consultation between the rights holders and the customary law, with the guidance and supervision of the forest department,
- 3) For the sake of public safety in the forest area that is being done in the context of forest management, the implementation of people's right to collect forest produce which frozen.

There is one thing that is quite interesting from Article 6, paragraph 2 of Regulation No. 21 of 1970 that that there is a delegation of authority from the state to employers to determine the presence or absence of indigenous people and to all his wisdom in managing the forest. Delegation of authority as stipulated in Article 6, paragraph 2 of Regulation No. 21 of 1970 clearly demonstrates the close relationship between the state and entrepreneurs (capitalism) so that the ideology of power that exist in the country voluntarily handed over to the employer (capitalism).

Negation of the existence of customary law communities are only two devices contained in state law as mentioned above, through the Government Regulation No. 28 of 1985 on the Protection of Forests reiterated the

country's stance on indigenous peoples. Even in the government regulation of those who take the forest without permission is regarded as a criminal offense. This can be seen in Article 9 of Government Regulation No. 28 of 1985 which says that:

- 1) addition of forestry officers or those whose duties or interests justified is in the forest area, anyone prohibited from carrying tools commonly used for cutting, cutting and splitting of trees in the forest area.
- 2) Every person is prohibited felling trees in the forest without permission from the authorities.

State proved to have a negative perspective to the existence of indigenous communities especially with regard to the field system/their farm. What is done by customary communities in farming who move from one place to another was rated by the state as a form field that could endanger the existence of forests, and even valued as a source of damage to forests. Therefore, through the Minister of Forestry Instruction No. 088 / Kpts-V / 1988 on Shifting Control Switch, limit access and the rights of indigenous people to do the farming tradition that has been done for generations.

Regarding the issue of shifting cultivation (shifting cultivation or slash and burn), it is almost 80% of customary law communities (indigenous peoples) Tau Taa Wana in Kalimantan livelihood by farming, but it is true that the activity of farming that exist in customary law society Tau Taa Wana The can damage forests, as pointed out by many people, so the rule of law (instructions of the Minister of Forestry No. 088 / Kpts-V / 1988 on Shifting Control Switch) that has implications far customary law of public access to forests, even denying them the right to life.

The attitude of the state law against the existence of indigenous communities, who have been described in Law No. 41 of 1999 in which the existence of this law as if to show attitude rather advanced in comparison with the previous law, because the law (Law No. 41 / 1991), the existence of indigenous forest communities recognized by the State, because it is specifically the existence of indigenous people and to all his wisdom stipulated in this law, as set out in Chapter IX on indigenous people which comprises one chapter.<sup>1</sup>

However, once again the question is, whether the Act No. 41 of 1999 which was passed during the reform era has provided a parallel between the employer (capitalism) with indigenous peoples. A question quite appropriate for the proposed recall at the time this law was made, which the Indonesian state was to make corrections to various forms of rights violations committed by the regime before and is actively promoting the rights of the community both individual rights and the rights of groups (community customary law).

Regarding the issue of indigenous forests, Article 1, paragraph 6 of this law says that the indigenous forest is a state forest located in the area of indigenous peoples. Viewing the contents of the article looks dominance of the state over the indigenous forest is clearly visible, that the indigenous forests are recognized and declared unilaterally by the state as state forest, something absurd of that Article. In such case known in the perspective of legal pluralism, there are fundamental differences of appearance of these indigenous forests and forests of this country, even the existence of indigenous forests long before the state as a political entity there. Therefore, the statement that indigenous forests as State forests clearly shows the concept of state power over the people, so that the rights that exist in customary law communities, forests, for example, are not recognized.

This condition as reaffirmed in Article 67 paragraph 2, which says that the inauguration of the existence and abolishment of customary law communities as referred to in paragraph (1) shall be stipulated by local regulation.<sup>2</sup> The statement explicitly Article 67 paragraph 2 of this leads to the understanding that the existence of indigenous communities could be eliminated by state law (local laws), and even if the existence of indigenous communities are recognized, then all the activities done to the forest can only be done if it does not contradict with the enactment this law (Article 1 paragraph 1 b).

The question is what is the main purpose of the Act No. 41 of 1999's. From the explanatory legislation, it appears that the purpose of this law is that the forest is a development capital (capitalism) has an important role in the supply of industrial raw materials, sources of income, creating jobs and employment opportunities. From these explanations it can be concluded that the state under Act No. 41 of 1999 on Forestry Law provides full protection and favor of the existence of state laws and employers (HPH / Capitalism) when compared with Community law and customary law.

As a community whose existence long before the country is there, then indeed customary law communities can also be known through a system of government that is developed in accordance with the ideals and the ideal that exists in the structure of thinking of each. But just because it espoused the concept of centralism and not pluralism, the plurality of local government system by Law No. 5 of 1979 on Village Government is not recognized, because they have to immerse themselves in village government system introduced in the legislation. Therefore, the existence of Law No. 5 of 1979 is a law that the most destructive of

<sup>1</sup> Lihat Pasal 1 angka 6 UU No. 41 Tahun 1999 tentang Kehutanan yang mengatakan bahwa: "Hutan adat adalah hutan Negara yang berada dalam wilayah masyarakat hukum adat"

<sup>2</sup> Lihat alienia 2 dan 7 Penjelasan Undang-Undang Nomor 41 Tahun 1999 Tentang Kehutanan

the existence of indigenous people in Indonesia. This law does not recognize the role of traditional leaders of indigenous communities, customary government rejected comprehensively in this legislation.<sup>1</sup> Village administration system has been made uniform throughout Indonesia by mimicking the pattern in Java. The village head entered in the structure of state government, and structurally at that time (the new order) village heads should be subject to the district and so on.

One of the real implications of the legislation for the people of Tau Taa Wana is the presence of traditional institutions of society Tau Taa Wana become weak, their existence is no longer independent, even weak society where traditional institutions Tau Taa Wana peaking at the time in Tojo Una- una and North Morowali, Central Sulawesi was formed entity referred to as custom assemblies at the district level, where members are the people who received the blessing of the government or the State.

In the reform era, various laws that exist in the era or earlier times (especially during the New Order) evaluation, various laws were not assessed in accordance with the spirit of reform, such as the values of democracy, human rights and other changes or revisions or revoked altogether and replaced with a new one. This policy is taken so that the keselarasan between the political changes that occurred (reform) to the law for guidance in berprilakunya.

In relation to the community customary law, Law No. 22 Year 1999 on Regional Government as one of the laws that were made in the days of the reform and the repeal Act No. 5 of 1979 on b the same thing, though not specifically address the problem of 'Community law indigenous', but the substance of this legislation is already aware of the existence of customary law communities, especially the system of government, so that under Article 1 letter (o) Act No. 22 of 1999 says that a "village or referred to under the other, hereinafter referred to village is the unity of the legal community who has the authority to regulate and manage the interests of local communities based on the origin and the local customs are recognized in the National Government system and are in the district ".

Indeed, reading textually to Article 1 letter (o) it would not provide clarity as to whether that article recognizes the existence of customary law communities or not, but if viewed contextually, especially the word "interests of local communities based on the origin and local customs" then the Article presumably can be attributed to the existence of customary law communities which have long been familiar with the system of government respectively. But once again this recognition should be along the system of government in accordance with the system of national government.

Furthermore, Act No. 22 of 1999, replaced by Act No. 32 of 2004 regulating the same thing about local government. It looks as if there is such a significant progress of this law, as in the explanation of this law recognized the existence of a plurality or diversity of local government system in Indonesia. Even in Article 1, paragraph 12 stated that the village is the unity of the legal community who has the authority to regulate and manage the interests of local communities based on the origin and the local customs, and that seemingly reaffirmed by Article 2, paragraph 9 which recognizes the existence of the village administration diverse the. However, similar to the previous law, the law still recognizes all customary governance system is not prohibited by national government system. This means that the differences that exist in customary governance system with the system of government, which is characteristic of pluralism is not recognized by state law.

Tracing the political developments and laws, especially those dealing with the recognition of human rights, the explicit recognition of the various human rights, including the rights of indigenous people in Indonesia are nominally began only in 1999, ie when the enactment of Law No. 39 Year 1999 on Human Rights. Special to the existence of indigenous communities formal legal basis can be found in Article 15 of Law No. 39 of 1999, where Article The state recognizes the existence of the community for the rights of his development both individually and collectively.

Recognizing the struggles of customary communities in their struggle to dignity and rights available to it, as well as the various issues that arise in respect of various issues of tenure there, then the government at least had issued a legal device that tries to accommodate the issue of the existing traditional institutions on customary law community is, firstly, the Minister Regulation No. 3 of 1997 on empowerment, preservation of traditional institutions and traditions in the area. The latter regulation is indeed gave de jure recognition to indigenous people and to all the customs, traditions and existing structures, but because the laws only form of ministerial regulations, which when viewed from the legal system, has a position which is weak when compared with other laws that higher (legislation), made in practice what is desired by the latter regulation can not be realized, means the claim of indigenous peoples based Permendagri that always uncontested by the state regulation of higher

<sup>1</sup> Di Indonesia sesungguhnya ditemukan beragam nama dan system pemerintahan lokal, di Mingkabau misalnya dikenal dengan Nagari; Dusun dan Marga di Palembang; Gampong dan mukim di Aceh; Huta, Sosor dan Lumban Di Mandailing Tapanuli Selatan dan Utara; Kuta di Karo Sumatra Utara; Jorong di Sumatera Barat; Negeri di Sulawesi Utara dan Maluku; Kampung di Kalimantan; Ngata, Ngapa, Boya dan Lipu Selawesi Tengah; Lembang di Toraja Sulawesi Selatan; Temukung di NTB; YO di Sentani Irian Jaya dan lain sebagainya. Lihat Matheus Pilin, Mendedah Kehutanan Komunitas, Penerbit Debut Press, Yogyakarta, 2002, hal . 56.

social status.

Second, through the Minister Agarari/Head of National Land Agency Number 5 of 1999 explicitly recognizes the existence of indigenous people and the rights that exist on it all the reality is still there, and like other positiv law (eg Act No. 41 of 1999 on forestry) that the recognition and public statements where there is to be determined in advance by local regulations.

Special inclusion of the word 'customary communities' in various legislations visible impression that the formal existence of a local law has been recognized by the law of the state itself, but when viewed critically recognition is still impressed symbolic or terms used by Satjipto Rahardjo recognition "ritoris". Because according to Satjipto Raharjo, the recognition shows the bias and interests of the vast country. For example, the inclusion of the phrase "...along as alive", in almost every state law that recognizes the local law should not be read and viewed quantitatively-rational, but more with empathy and participatory. Should the existence of local law are not visible from the outside but it needs to be participatory.

Likewise with the phrase "...according the development of society", according to Satjipto Rahardjo these requirements should not be interpreted both economically and politically, but from the perspective of the local community. This needs to be done, because if his interpretation is only seen from the perspective of economics and politics alone, it would be risky to impose (imposing) the interests of the giant in the name of "community development". Another problem also arises from the recognition of the country's laws are always the inclusion of the phrase "in accordance with the principle of the Homeland". According Satjipto Rahardjo, between the Homeland and the customary law community is one body, they can not be confronted by a dichotomous or black and white. Likewise, the words "regulated by law" problematic if the local legal issue is only seen in the perspective of "rules and logic". Because in this way will only hinder the ongoing processes of productive within the community.<sup>1</sup>

Some products state law that explicitly recognize the existence of legal and local communities, but the nature of the law can not apply directly, because they are needed again executing device, and it happens to other implementing sometimes showing impartiality of the law and indigenous peoples. It is not yet or no consistency in the recognition of a state law against the existing laws and indigenous people and to all the knowledge available to it. When viewed from the perspective of their own state law, which requires the existence of both vertical and horizontal synchronization just not visible, it means that there is a political vagueness of the law contained in the law of the country.

### C. LEGAL PLURALISM IN THE LAW OF FORESTRY

Pluralism is no longer a loose discourse in the field of life, to him has become a kind of ideology and morality life of the existence of natural (physical world) and human (social world). If pluralism drawn on ontology space science, then this is where pluralism gained a strength, force whose existence is actually based on a true social reality, not teredusir by facts and other values, and without exception pluralism is also evident in the field of law. However, despite the existence of legal pluralism has been uncontested, raised a fundamental question is whether the legal pluralism that is a necessity with all ethics-as acknowledging differences, rejecting absolutism, recognizing relativity, equality, recognizes the other as well as the existence and creation of communications-made also ideologies in the development of the legal system in Indonesia.

It is not easy to find answers to these questions. If the question was referred to the understanding of the phenomenology, then the answer to the phenomenon and noemena can show a different side. Side of the phenomenon as a side that looked from the outside, for example, what is shown by the legislation to provide answers to these questions are positive. However phenomenon side, as the inner side of the regulation, though some doubt on the positive answer. Moreover, if the search for answers to the question neomena side is connected with the ethical side of pluralism as an ideology, in the form of recognition of diversity, equality and the refutation of relativism and absolutism.

In addition to see how the real ideology of pluralism, which will serve as the foundation in building law in Indonesia, how relational built between state law by local laws, as well as how exactly the characteristics of state law by using analysis of hermeneutics existentialist, namely how to view an object (state law) more emphasizes how the existence of objects with corelation with the subject as a provider and creator of the object. Legal pluralism in forestry see their clarity, even gained the recognition of international law since the world forestry congress, with the theme "Forests for People" in 1978. This Congress has changed the perspective of the international community in forest management. One of the outcomes of the conferences was introduced as well as the acceptance of the concept of forest management based on community. The decision makers around the world, not only in Indonesia realize that most know about the forest management are those who live in and around forests.<sup>2</sup> This means that for the first time the existence of a local community forest management system

<sup>1</sup> Satjipto Rahardjo, *Hukum Dalam Jagat Ketertiban*, Penerbit UKI Press, Jakarta 2006, hal 120-121

<sup>2</sup> Anonim, "Social Forestry: Refleksi Kehutanan Pasca Reformasi". Workshop Social Forestry, 10 September, 2002, Cimacan, Bogor.

recognized internationally.

International public awareness of the importance of forest management system that is based on it at least triggered by two things, the first emergence of the awareness that the various problems posed by advanced technology in forest management can damage human survival itself. Both the opening of consciousness of the international community see the wisdom of various forest management systems that exist in communities living around the forest. In the interests of further analysis, especially regarding the issue of violence as the social implications of meeting the legal state and local laws in the forestry sector, which focuses on two legal systems both operate, work in the community, which is state law and local laws that exist on society Tau Taa Wana (Pangale) governing forestry.

#### 1. A Study of Law in the Forestry

Theoretically, there are at least four models of forestry resources, namely: common pool resources, state property, private property and common property.<sup>1</sup> Common pool resources in the community have freedom in managing forest resources around them in order to meet their needs regardless of the needs of other members of society as well as the carrying capacity of resources is concerned. The problem is highly dependent on the wisdom of local communities in managing forest resources. If the management does not underlie the wisdom of looking at forest resources, it will be produced "tragedy of the common" which is a form of destruction of resources due to excessive utilization. In contrast to the first, the form of State Property placing the state as the central control of forest resources. Forests "owned or controlled" by the state, and this state property in the country played an important role in the management of forest resources.

However, placing the country as the main organizer of forest resources can also be problematic, especially concerning the service functions as the main functions of a government. In addition, the limited resources available to the state to take over management, making the role of the state can not be optimal in managing, the distribution of usefulness forest products in many communities.

Diametrically dealing with state property, private property instead put the private sector as the primary management of forest resources. Granting rights to the private sector is essentially a way out of the various weaknesses in the model state property. However, the pattern left to private management turned out to cause various objections and problems, including the first, handover management rights are considered excessive; second, because the private purpose is to maximize profits, then the forest management activities often do not heed the principles of environmental preservation. Because for concessionaires, preservation efforts always seen as an increase in costs; third, concession holders are not adaptive to the traditions, customs, values of local communities living around the forest.

Base the various problems arising from the management of the three systems mentioned above, the management of forest resources based on common property assessed can reduce various issues arising from the three other management systems. This is because the participation of local communities in forest resource management system is a necessity, thus ensuring the sustainability of forest and permanent preservation of forest ecological functions can be created with the participation of local communities around the forest.

Viewed on a theoretical model of management of forest resources as mentioned above, as well as provisions in the forestry sector (Act No. 41 of 1999), can presumably be said that the model of forest management in Indonesia shows three models namely state property, as well as private property common property. Although all three models will serve as a model in forest management in Indonesia, but the state property is the main model in forest management system, which the state placed a major role in managing forest resources. It is said that, because the two existing systems, namely private and common property is a model whose occurrence is also out of the country. Or in other words the system of management of natural resources in Indonesia is centralized, which places the state as the main actor or role.

The historicity of centralized management of natural resources (forest) is actually already happened since the days of the Dutch East Indies, namely the issuance of *domeinverklaaring* 1870 as legislation (*wet*) first to provide a foundation of centralism management of forest resources. Since the issuance of the 1870 *Domeinverklaring*, the seizure of indigenous lands and people's land by the Dutch government, as well as the exploitation of forests (especially in Java) is done on a large scale. Although it is independent, it turns out the concept of forest management centralism is still adhered to by the state, it is seen by the issuance of Law No. 5 of 1967 which was later replaced by Act 41 of 1999, and the establishment of **Perum Perhutani** in 1972, is an attempt to strengthen the concept of centralization of forest management that is based on "state and capital-based forest management".

As legal pluralism, the question is how the attitude taken by law against the local laws governing the forest? If we look at the Law No. 5 of 1967 governing forests, from Article 21 and Chapter 8, it turns out there is only one article that directly mention of indigenous (local laws governing the forestry-pen), Article 17. The full

<sup>1</sup> Djuhendi Tadjudin, "Hutan Kemasyarakatan, Mimpi Polisi Hutan Vs KebuTuhan Masyarakat", [Http://www.arupa.or.id/papers/35.htm](http://www.arupa.or.id/papers/35.htm)., Tanggal 13 Februari 2014.

contents of Article 17 of Law No. 5 of 1967 is as follows: "The implementation of the rights of communities, customary law and its members as well as the rights of individuals to benefit from the forest either directly or indirectly based on something legal regulations along by the fact still exist, should not interfere achievement of the objectives referred to in this law ".

There are some records that would be drawn from that article, the first visible characteristic of countries that centralism in the regulation of forest issues means the state that the main actors in the system of forest management. Second, of the same article also would be drawn a record that in fact legal pluralism is not given a place by Law No. 5 of 1967, even if legal pluralism is recognized, the recognition of a symbolic nature. Say so, because of the existence of local laws on forestry can only remain in effect throughout its existence does not interfere with the achievement of the objectives set forth in the laws of the state itself. Normative attitude like this, clearly shows that it is the state law is more important than the local law, the legal pluralism that is to say, with all the ethical not recognized by state law.

Judging from the period, may be said, that the law is a product of the old order, an order or age rated by many as there are a lot of errors and irregularities in the implementation wheels of government, until finally the order is replaced by a new regime called as a new order, which aims to make corrections to a previous order. There is one reality of the absurd of the new order is as an order that aims to correct the mistakes made by the old order, but in reality the new order still use various laws issued by the old order, for example, Law Number 5 Year 1967 on Forestry.

Almost the same fate with the old order, the new order in the end gained a strong reaction and peaked in 1998, namely the moment when the new order is overthrown by the order of the reforms. The ouster of this new order departs from the assessment irregularities of various areas of life, whether they are constitutional, political and power. As a form of reaction from the previous order, the order reforming trying to do a review of the whole order of life of the nation including legal products. One of the results of the study and evaluation of product legislation that is in the New Order era was the replacement of Act No. 5 of 1967 by Law No. 41 of 1999 on Forestry.

The same question would be raised as well, that is how the position taken by the Law No. 41 of 1999 on forestry to local laws governing forestry issues. Is legal pluralism ideology also embraced by Act No. 41 of 1999. It appears there "sort of progress" (solid line-pen) in Law No. 41 of 1999 when compared to the previous law (Law No. 5 of 1967 ) which mentions and recognition of the existence of indigenous forests as contained in Article 1, paragraph 6.

Said to be "sort of progress", because although indigenous forests are explicitly mentioned in Article 1, paragraph 6, but essentially indigenous forests is not recognized for certain, because Article 1, paragraph 6 itself says indigenous forest is "state forest that is located within a customary community "meaning indigenous forests still equated with the state forest. In terms between indigenous forests and state forests are two different things, in which the state forest is a forest that is located on land not encumbered land rights (Article 1, paragraph 4).

In the perspective of legal pluralism, by declaring that indigenous forest is a state forest that is located within a customary community (Article 1, paragraph 6), it can be concluded that Law No. 41 of 1999 have yet to recognize and embrace pluralism absolute (strong pluralism), but pluralism apparent (weak pluralism), because between the state law and local laws in the forestry sector are not seen as having equal dignity of the same, which is one of the basic assumptions of pluralism itself.

## 2. A Study Anthropology Law to the Local Laws

In legal anthropology, the problem appears a bias that never denial whereby when the emergence of the desire to do the definition or meaning of the laws that exist in society. As the legal definition given by Radcliffe Brown as an homage to the structural functionalist positivist in providing legal sense. Law says is a systemic social control through the application of the force of politically organized society.

This bias is seen which gave a legal sense, Radcliffe Brown went on the legal system of western society at the time was already well acquainted with the country. This means that if the legal sense of Radcliffe Brown we use in view of law in society customary law, then obviously various normative provisions complied with by the public can not be regarded as a legal form, because legal requirements as desired by Radcliffe Brown stretcher are not met.

Likewise, when the state wishes to engage in the conceptualization and definition of the various terms that will be set forth in state law does not escape from this bias problem. In a paradigmatic perspective bias that occurs due to the paradigmatic differences in looking at the issue, and the paradigmatic bias is then able to bring three forms of bias that is evident in a variety of issues to be governed by state law. The third bias is the first "ideological-philosophical bias" second "sociological bias" and the third "judicial bias".

Biased "ideological-philosophical" occurs when the formulation or the concept of the law given by the state law is not based on how a community but rather based on a perspective few people at the time of the ruling in formulating and formulate these laws. Almost identical to the first, "sociological bias" can be said to be a logical consequence of bias at the first stage, ie when the emerging concept is not departed from the values,

norms prevailing in society. While the "judicial bias" means that the various concepts, meanings and institutions created by state law is not based on institutional and legal institutions that already exist in society.

The emergence of three kinds of bias in this law because of differences in values and norms, paradigms, as well as between state ideology embraced by the people or society. For example positivism paradigm espoused by the state has put the country on a dominant role in people's lives. With the power and authority available to him, the country freely undertake the construction of the various issues to the determination of whether or not a behavior. Despite earlier establishment of the Act has been through a process of hearings, dissemination and socialization and jointly discussed with members of the House as a form of representation of the people in a country, but it remains the resulting Act reflects the role of the state towards its people.

Biases can be seen for example in the legislation issued by the state. For example in the case of dam forest concept of property rights or management rights over forests. As stipulated in Article 1 paragraph 2 of Law No. 41 of 1999 on Forestry, the notion of forest only refers to the sense of unity ecosystem in the form of landscape with biological natural resources dominated by trees in their natural environment, one and the other can not be separated, The concept of the forest is clearly different from the concept of a forest as Tau Taa Wana people understand it.

Although it does not provide meaning or definition, but the Tau Taa Wana people understand the forest is part of him, and he is part of the forest itself. This means the forest for society Tau Taa Wana not only an overview of the landscape with natural resources, but the forest is also understood as their identity, their life is dependent on forests and forest to itself is also conceived and constructed as a manifestation of God's existence, namely "Pue" in this world.

Similarly, the concept of property rights, there is a difference between state law by the public's understanding Tau Taa Wana. The concept of ownership of the right material is very nuanced formalism per se, in the sense that ownership is associated with the presence or absence of evidence of ownership, especially in the form of a certificate/license issued by the state as the supreme authority through procedures and institutions that have been determined. While in anthropological perspective, the concept of ownership in the community Tau Taa Wana is closely associated with the acquisition of substantially, not formal ownership of an object and this can be done by opening the woods yet believed not owned or opened by someone else.

Bias other things, a sociological bias in state law is seen when the concept of "illegal logging" given to the forest communities who conduct illegal logging activities (absence of permission from the state). This concept is considered by forest communities, especially communities Tau Taa Wana as a concept that has been at odds with the values and their perspectives on the forest. Because the forest for them is a place where all the meaning of life is found, ranging from making a living, looking for drugs, even forest rated where they can perform their religious rites relationship with the creator. So it was felt strange to them if their logging activities undertaken to meet the needs of everyday life as a form of manifestation of the existence of humanity they are rated by the state as a form of crime.

The emergence of this prejudice by Johnson caused by, the first picture of the differences between groups, the value of which belonged to another group seems very master of minorities, their third and fourth stereotypes superior their feelings in their own group. Meanwhile, according to Zastrow emergence of prejudice in certain groups being first projections or attempt to maintain the characteristics of themselves to excess, both frustration, aggression, disappointment and lead to defiance, a third dealing with inequality and kerendahdirian, fourth arbitrariness, fifth historical reasons sixth, unfair competition and lead to exploitation of the seven ways of excessive socialization, and the eighth is looking at another group with a cynical view.<sup>1</sup>

While stereotypes arise due to cultural differences between the cultures of people or groups who see the culture of the person or group visits. When a group or a community of indigenous seen by ethnic or other groups who have a variety of different cultures, which means that the perspective or the perspective of the person who has a different culture (Outlook forward), then usually measure used is the size of the culture of the people who saw the, Very different if in view the existence of a community using cultural systems and approaches that exist in the community (INLOOK forward), then the result will be different from the first, various kinds of wisdom, as well as a very high value to be found within the community.<sup>2</sup>

#### D. DYNAMICS RELATED OF STATE LAWS AND LOCAL LAW

In relation to pluralism, there is an important issue to be studied is how exactly the relationship that is built between the laws of the state on the one hand, with the local laws on the other side. This is important, because the relationship can basically be viewed as a form of relationship between the state and the people,

<sup>1</sup> Alo Liliweri, WS., 2001, *Gatra-gatra Komunikasi Antar Budaya*, Bandung: Remaja Rosdakarya, Hal. 176

<sup>2</sup> Pendekatan fenomenologi menjadi sangat urgen dalam melihat bagaimana sesungguhnya keberadaan suatu kelompok atau suku tertentu, karena pendekatan fenomenologi sejak awal sudah berusaha menjauhkan diri dari prasangka-prasangka teoritis yang selalu terbuka terhadap "bias ideologi". Hilangnya prasangka-prasangka yang muncul dalam suatu penelitian yang menggunakan fenomenologi dikarenakan seorang peneliti sejak awal melakukan reduksi dalam aktivitas penelitiannya, baik reduksi editis, fenomenologis sampai pada reduksi transendental.

between the ruler (powerful) with controlled (powerless), even the relationship can also be seen as a form of relationship between the owners of capital (Capitalism) by the worker or workers, There are at least two models form relationships that occur. First, the relationships that are autonomous, meaning that each of these laws stand alone, and run in accordance with the respective system. Second, a relationship that is interaction with each other is a form of relationship where the interaction and relationships between the different legal systems.

In this second relationship, also can be categorized more in two forms, the first form of interaction that dominate each other and trying to negate each other with each other. However, keep putting the law of the country above everything else. In its first form is usually a state law occupies a dominant position when compared with the local laws. This is according to Hooker due to several reasons, namely:

- a. The national legal system (the state law-pen) politically more powerful because it has the ability to destroy the system of indigenous peoples.
- b. The rule made by the country's legal system is absolutely valid and customary law system can remain in force as long as permitted by the state legal system and implemented in accordance with the form required by the state.
- c. Any depiction or customary legal studies undertaken (possibly mean Hooker here is a study done by the jurists or legal bearers of other countries) must follow the legal classification adopted by the state legal system.<sup>1</sup>

A second variant of the shape of this interactive relationship is the establishment of relationships communicative nature. In a relationship communicative, interaction or relationship that occurs is not a relationship that are mutually exploitation and domination between each other, but form a relationship that is based on ethical values that exist on pluralism itself, which acknowledge differences, rejecting absolutism, accept relativism, recognized the concept of equality and the presence of others (the others), as well as dialogue and communication.

This last form of relationship that is ideal, in the sense of a relationship that should be realized. This is because, both the legal system, which is state law and local law is a legal system that in reality there is. The state does have the right to make the adjustment to its citizens, but it does not mean that the existing legal system in the community should be replaced in its entirety by the legal system of the country. Especially when you consider that the law is the identity of a community.

However, if an ideal relationship is in reality also takes place between the state law (Law No. 41 of 1999) with a local law (Pangale). Shape relationship between state law by local law does not show ideal conditions as described above (a third pattern), but form relationships and relational mutually dominating and exploitative (the second pattern) which is a form and pattern of relationship that is positivistic, hegomonik , exploitative, discriminative.

#### 1. Relational Positivistic

Have to distinguished between the terms of positive law with positivism as the flow of legal philosophy. Terminology positive law (*ius constitutum*) refers to the notion of law prevailing in society at a time in a certain place, while positivism as a philosophical school of law viewed and discussed the law with the basics of philosophy of positivism as the main perspective. Indeed, between the two have fundamental differences, but they also sometimes have a close relationship. The closeness of this relationship can be seen from the enactment of positive law (especially the State Law) biasaya based on positivism as its main foundation.

State law in a country is very important, but it coincided with the importance of positive law, ie a positivistic terbangunlah relational relational form which is only based on the properties of a clear, visible, measurable and observable. This opinion is based on the basic assumption that there is within the paradigm of positivism see an explanation of the nature rasionallah accepted as true. While in law only the law issued by countries that are considered to have the face of an actual law.

Thus, in reality the Law No. 5 of 1967 also in Law No. 41, 1999 in lieu of Law No. 5, 1967, shows the attitude positivistik to ignore the existence of other laws that customary law (law Local), due to local laws / customs assessed its existence is not from the state as the highest authority in the country, and the emergence of indigenous assessed do not meet the requirements of formal procedures that have been determined in the law-making process. Even if its existence is accepted by the State Law, then the local law / Customary must first obtain legal recognition and entry into the country through the process of formalization first.<sup>2</sup>

<sup>1</sup> John Griffiths, Dalam Andi Akbar dll (Penterjemah), *Pluralisme Hukum, Sebuah Pendekatan Interdisipliner*, Penerbit Perkumpulan Untuk Pembaharuan Hukum Berbasis Masyarakat Dan Ekologis (Huma), Jakarta, 2005, hal 81.

<sup>2</sup> Sikap positivistik ini secara tegas dapat dilihat dalam Peraturan Menteri Agraria/Kepala BPN No. 5 Tahun 1999. Memang kemunculan Peraturan Menteri Agraria ini berawal dari derasnya perjuangan masyarakat hukum adat dalam memperjuangkan eksistensi diri dan hak yang ada padanya, serta berbagai persoalan yang muncul sehubungan berbagai persoalan penguasaan tanah yang ada, maka pemerintah melalui Peraturan Menteri Agraria/Kepala Badan Pertanahan Nasional nomor 5 Tahun 1999 secara eksplisit mengakui keberadaan masyarakat hukum adat dengan hak-hak yang ada di atasnya. Namun perlu dicatat bahwa dalam Peraturan Menteri ini, pengakuan akan keberadaan tanah/hutan adat diakui sepanjang memenuhi beberapa

## 2. Relational hegemonic

As a concept, explicitly the term hegemony has always been associated with a Marxian Antonio Gramsci who during his lifetime had experienced failure of socialist revolutions that have allegedly occurred in Western Europe between the years 1910-1923 and witnessed how the organizations of the working class and the socialist movement was crushed by fascism in 1922-1937.<sup>1</sup>

As the flow of critical bermazhabkan (Marxist), Antonio Gramsci also concerned with capitalism. But the works of Antonio Gramsci judged differently with works by Mark Classical, just to see how the influence of capitalism in determining human life. Antonio Gramsci going further by trying to show the role of the modern state of thinking in acquiring and maintaining power over the majority. If Mark with the concept of historical materialism came to the conclusion mode of production (mode of production) in economic define human life, Antonio Gramsci actually see the survival of the individual within a country is determined by the interference of state institutions-executive, legislative, judicial and such –to the private area being assessed.

In one of the works are quite famous as "Prison Notebooks" Antonio Gramsci tried to reflect on why and how a modern state can get a consensus on power to the majority of people the concept of a liberal state is judged to have the freedom and autonomy were great and exclusive.<sup>2</sup>

As a concept, according to A. Gramsci hegemony refers to the understanding of the socio-political situation, in his terminology is called "moments" in which philosophy and social practice together in a state of balance, the dominance of the concept of reality that spreads through society in an institution and manifestations individuals. The influence of the 'spirit' can be a form of morality, customs, religion, political PRINCIPLE principles and all social relations, especially intellectually.<sup>3</sup> Or in relation to capitalism, simply Hegemony wanted to explain how the modern capitalist society is organized and together with the state in order to draw strength to take control of the group.<sup>4</sup> Various social institutions, religion, tradition, morality and practices are maintained and operated in society must be reorganized in order to function for the state.

In relation to pluralism various spheres of life, it ensures that the hegemony of the plurality metamorphose into complementary and aimed at uniformity. With the harmonization effort is intended that individuals and communities can and should adapt itself to the interests of the state. Similarly, in order to maintain state power and dominance over other groups, the state developed a variety of systems and institutions of social, political, cultural, which can lead to the loyalty of individuals, groups or communities in the country, so that all have a functional meaning to the state.

In the effort to maintain its hegemony against other groups, the law without exception becomes the means and media are considered to have a great ability to that effort. This means that in the context of hegemonic legal tradition, it is seen how the state law is a law made in order to strengthen the relationship between state capitalism groups with the aim of confirming the intimate relationship (state and capitalism), in order to keep control of the group.

The nature and the character of law this hegemonic presumably also be seen in the state laws on forestry that permit employers to conduct forest management in large numbers, the goal is not another form of capital accumulation for the owners of capital and aims to strengthen the role of the state for the little people.

Various terminology, terms, the concepts introduced by the government and the license holder to the public when the area will be used as forest industry. Starting from the direct influence on the improvement of living and economic tarap forest communities, increasing local and national sources of income, which in turn will directly or indirectly increase the welfare of the community. Similarly, the employment opportunities that will be open wide course will provide a positive impact on revenues and improvement of the economic life of the local community. All of these are some of the characteristics of the many features and ways of thinking capitalism, materialism and positivism.

## 3. Relational Exploitative: Domination Capitalism

Departing from the above description that a state law that paradigm positivism is essentially a paradigm of power, said that because the paradigm of positivism in the beginning was the paradigm used in the world of

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kreteria, diantaranya sepanjang hal tersebut memang masih ada, memperlihatkan batas-batas yang jelas, serta sedapat mungkin sudah dituangkan dalam Peraturan Daerah. Bandingkan juga dengan penjelasan dari Undang-Undang Nomor 41 Tahun 1991 dalam alenia ke-10 mengatakan bahwa "...dengan demikian masyarakat hukum adat sepanjang menurut kenyataannya masih ada dan diakui keberadaannya". Pengakuan yang dimaksud oleh penjelasan ini adalah hukum lokal tersebut telah diberi bentuk positif oleh hukum negara.

<sup>1</sup> Peter Beilharz, *Teori-Teori Sosial, Observasi Kritis Terhadap Para Filosof Terkemuka (Sigit Jatmiko -Alih Bahasa)*, Penerbit Pustaka Pelajar, Yogyakarta Cet-Ii 2003. Hal 201.

<sup>2</sup> Nazar Patria dan Andi Arief, *Antonio Gramsci: Negara dan Hegemoni*, Penerbit Pustaka Pelajar Yogya, Cet-II, Thn 2003. Hal 12

<sup>3</sup> Nazar Patria dan Andi Arief, *Antonio Gramsci: Negara dan Hegemoni*, Penerbit Pustaka Pelajar Yogya, Cet-II, Thn 2003. Hal 12

<sup>4</sup> *Ibid.* Hal. 31.

natural science (naturwissenschaften). "Naive realism" as ontology putting the object of research is no "there" beyond the subject, and with axiology "free value (value free)" where the object to be controlled. Ontology "naive realism" is what makes the paradigm of positivism be exploitative, it means the existence of objects for the benefit of research subjects and not to the object itself. Conditions as described above occurs also on a state law that berparadigmakan positivism. Moreover, by strengthening the hegemony of state law by capitalism is the system of social life arising from the production method to separate the workers from the means of production.

As it is known, that capitalism is a part of the movement of individualism that cause a tremendous impact on all levels of human life.<sup>1</sup> Ownership individual (individual ownership), the market economy (market economy), competition (competition) and profit (profit),<sup>2</sup> the basic pillars that build the ideology of capitalism, so in practice capitalism is a method or system of production that emphasizes the accumulation, concentration, and centralization of capital on employers or owners of capital, while in the labor reserve capitalism produces industrieeel-armee or ranks of the unemployed and generate verelendung or melaratkan workers.<sup>3</sup>

Basing on the pillars as well, making the greedy capitalism in viewing and managing the economic resources available, including natural forest resources in it. Therefore, if capitalism settle and blend in legislation, making the legislation is exploitative in seeing the object. This is because the values upheld in the legislation are the values of capitalism exploitative.

The state law to exert control over the existence of local law, the recognition of the existence of local law hung on to the extent state law to admit it. Throughout local laws do not conflict with state law, as long as it also exists, but if it is judged can interfere with the purpose of state law, then the local law denied its existence.

In this position, the presence of local laws to be helpless against the laws of the country, even with a meeting or berhadapannya between local law with state law, by Satjipto Rahardo posited as inserting a goat (local law) into a cage with a lion (the state law ).<sup>4</sup>

#### 4. Relational Discriminatory

The tradition of discriminatory laws actually implications continuation of the legal traditions of the hegemonic, meaning that the law always doing siding on a group either openly or concealed with various arguments in it, and taking sides as a form of discrimination actually be possible as a form of axiology has, but the problem is partiality the almost happened to the strong (powerful).

Law on Forestry very clearly shows help his investors (Capitalism), and ignoring the existence of forest communities as communities who do not have the power (fowerless). Indigenous forest dwellers can change its status into a browser and even thieves forest products, simply because they are taking and processing of forest products that are not based on the consent of state law.

Claims forest management by indigenous people on the basis of the rights that have historically been recognized by customary law must submit and lose to them (HPH / Capitalism) is based on a license granted by the state, especially if the issue of rights claims be resolved through the judicial system state , This means that through the existing system, the judicial system of the country would be in favor of the clump same law, which comes from the state.

This discriminatory attitude would be restored on the fundamental issue, namely positivism paradigm espoused by the country's legal system, it is also of course the country's judicial system. The problem is that in this positivism paradigm, state law or state judicial system will find it difficult to accept and acknowledge the existence of local law has the nature and origin of the different state law.

Positivistic tradition is able to survive for so long after apokalipsi supported by tradition, ie a tradition denial of legal form, whether it is on people's habits, customary law, or religious law, throughout the existence of other laws that have not been dipositifkan in the form of state law.

Placement of state law as the law is the most correct, the implications are not given the place for another law in state law. Even if the existence of other laws recognized, but still was placed on a view that inferior when compared with the laws that come from the state. Therefore, a state law that berparadigmakan positivism does not see legal pluralism as a necessity and not be used as the main ideology.<sup>5</sup>

## E. CONCLUSIONS

<sup>1</sup> William Ebenstein Dan Edwin Fogelman (Alex Jamadu - Alih Bahasa), Op Cit. Hal. 148

<sup>2</sup> Ibid. Hal 148-151

<sup>3</sup> Sukarno, Indonesia Menggugat: Pidato Pembelaan Didepan Pengadilan Kolonial di Bandung, Penerbit CV. Haji Masagung, Jakarta, Cet-3 Tahun 1989. Hal 14

<sup>4</sup> Satjipto Rahardjo, Hukum Dalam ....., Op.Cit., hal. 113.

<sup>5</sup> Lihat misalnya Pasal 17 UU No. 41 Tahun 1999 yang mengatakan "Pelaksanaan hak-hak masyarakat, hukum adat dan anggota-anggotanya serta hak-hak perseorangan untuk mendapatkan manfaat dari hutan baik langsung maupun tidak langsung yang didasarkan atas sesuatu peraturan hukum sepanjang menurut kenyataannya masih ada, tidak boleh mengganggu tercapainya tujuan-tujuan yang dimaksud dalam undang-undang ini."

1. The historicity of centralized management of natural resources (forest) is actually already happened since the days of the Dutch Indies, namely the issuance of domeinverklaaring 1870 as legislation (wet) first to provide a foundation of centralism management of forest resources. Since the issuance of the 1870 Domeinverklaring, the seizure of indigenous lands and people's land by the Dutch government, as well as the exploitation of forests (especially in Java) is done on a large scale. Although it is independent, it turns out the concept of forest management centralism is still adhered to by the state, it is seen by the issuance of Law No. 5 of 1967 which was later replaced by Act 41 of 1999, and the establishment of Perum Perhutani in 1972, is an attempt to strengthen the concept of centralization of forest management that is based on "state and capital-based forest management '.
2. The state law is seen when the concept of "illegal logging" given to the forest communities who conduct illegal logging activities (absence of permission from the state). This concept is considered by forest communities, especially the indigenous law as a concept that has been at odds with the values and their perspectives on the forest. Because the forest for them is a place where all the meaning of life is found, ranging from making a living, looking for drugs, even forest rated where they can perform their religious rites relationship with the creator. So it was felt strange to them if their logging activities undertaken to meet the needs of everyday life as a form of manifestation of the existence of humanity they are rated by the state as a form of crime. When a society customary law is seen as a community that has a variety of different cultures, perspective or point of view of the person who has a different culture (Outlook forward), then usually measure used is the size of the culture of people who see it. Very different if in view the existence of a community using cultural systems and approaches that exist in the community (INLOOK forward), then the result will be different, assorted wisdom, as well as a very high value to be found within the community.
3. The law of the state to exercise control over the existence of local law, the recognition of the existence of local law hung on to the extent state law to admit it. Throughout local laws do not conflict with state law, as long as it also exists, but if it is judged can interfere with the purpose of state law, then the local law denied its existence. In this position, the presence of local laws to be helpless against the laws of the country, even with a meeting or berhadapannya between local law with state law, by Satjipto Rahardo posited as inserting a goat (local law) into a cage with a lion (the state law ).
4. Claims forest management by indigenous people on the basis of hereditary rights recognized by customary law must submit and lose to them (HPH / Capitalism) basing on permission granted by the state, especially if the issue is resolved through the right claims system state judiciary. This means that through the existing system, the judicial system of the country would be in favor of the clump same law, which comes from the state. This discriminatory attitude would be restored on the fundamental issue, namely positivism paradigm espoused by the country's legal system, it is also of course the country's judicial system. The problem is that in this positivism paradigm, state law or state judicial system will find it difficult to accept and acknowledge the existence of local law has the nature and origin of the different state law.
5. Legal positivism berparadigmakan countries do not see the legal pluralism as a necessity and not be used as the main ideology. If the legal pluralism acknowledged, but legal pluralism is false or only symbolic, because the existence of other laws are hung to the legal recognition of the state itself, and not see it as a form of law that is aligned with state law, the truth is only applicable state law even nature absolute.

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