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Perception of Rights to Control the Land Over Natural Resources in Indigenous People of Papua, Indonesia

Frans Reumi
Senior Lecturer At Faculty of law, University of Cendrawasih, Papua - Indonesia

Abstract
The nature of indigenous peoples' lives on land and forests (natural resources) is based on the concept of customary law namely "cosmic", meaning the balance relations among fellow individuals or groups of indigenous people, both internally and externally, their natural environments, and God as the creator with the universe, in the atmosphere of communal and democratic life. However, by the development of time, lives of indigenous people who own the lands and forests (natural resources) in accordance with culture and customary law have started to face problems, causing a potential conflict or prolonged dispute due to differences in the perception of the right to control land over natural resources by indigenous peoples with the Basic Agrarian Law (BAL), Bureaucrats (government), and companies, especially in "mastering and possessing words" which are occupied in Article 18B paragraph (2) and Article 28I paragraph (3) and Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia as well as Article 3 and 5 of Law No 5 of 1960 (BAL), Article 399 of Law No 23 of 2014, Article 43 of Law No. 21 of 2001, Special Regional Regulation No 21 of 2008, Special Regional Regulation No.22 of 2008 and Special Regional Regulation No.23 of 2008. All of these regulations have not been optimally implemented as a form of answer to the potential conflicts / disputes of indigenous peoples over land and forests. Therefore, there needs to be a land policy at the district level that is closer to the indigenous people, land and forests in the Papua Province.
Keywords: Right to Control, Land, Forests, Indigenous Peoples

1. Introduction

As part of Indonesia's natural environment, Papua Island is one of the 26th provinces and the largest island in Indonesia which has tropical forests with the largest natural resources in Indonesia along with the island of Borneo. Further compared to the largest islands in the world, the island of Papua is the second largest island in the world after the island of Greenland in Canada. The land area is 410,660 km2 and stretches more than 1500 km from the east end to the west end. The island of Papua compared to other provinces in Indonesia is the largest provinces. It is even sized around three and a half times wider than the island of Java. The island of Papua has a land area of almost ten times the area of Switzerland or the Netherlands.

Papua Island has four types of ecological typologies namely 1) highland ecology, 2) pre-mountain ecology and pre-valleys, 3) lowland ecology (lakes, rivers and swamps), 4) coastal-and-island ecology. Whereas ecosystems, starting from the ecosystem of swamps, mangroves, lowlands, highlands, subalpin to the alpine ecosystem where there is a glacier equator is one of the three tropical snow regions in the world besides Kalimanjaro in Africa and the Andes in South America. in terms of ecosystem aspects, it consists of starting from the swamp, mangrove, lowland, highland, subalpin ecosystem to the alpine ecosystem where there is a glacier equator which is one of the three tropical snow regions in the world besides Kalimanjaro located in Africa and the Andes in South America. In addition, Papua is one of the largest owners of tropical forests and lowland forests and it has the most complete ecosystem in Southeast Asia, with a high diversity of ecosystems and types of biota in the world.

The diversity of ecosystems and the high diversity of living natural resources is also accompanied by the diversity of ethnic or ethnic groups in Indonesia. Overall, the island of Papua, formerly called the Island of New Guinea, is known to have a diversity of tribes and cultures that have an impact on the capital of Indonesia's national cultural development. The last report released by Summer Institute Linguistics (SIL) stated that a quarter of the languages found in Papuan island increased from 240 to 250-251[1] and in 2012 it increased to 272 languages which are identical to tribes or indigenous peoples on the Land of Papua which hold the authority of the management of Land Natural Resources. Therefore, Papua has no definite figures regarding the number of indigenous people or tribes that inhabit the new Land of Papua which has two Provinces, namely the Provinces of Papua and West Papua. Meanwhile, the tribal divisions as referred to are only based on the division of languages which are assumed that one tribe has one language.

In fact, there is still one tribe that have two languages. This number has reached half the number of languages in Indonesia which are approximately 742 languages, after Papua New Guinea there were 867 languages. According to BPS Census, there are 1.340 ethnic groups in Indonesia. Moreover, it is believed that there are still more tribes in the provinces of Papua and West Papua that have not been discovered. Some of the

[1] See https://www.sil.org/language-development, accessed October 21, 2018.

tribes are well-known in the world, such as the Dani (in the valley of Balim) which becomes famous for their mummies or Asmat tribes with their carvings and dances. Regardless the classified tribes, there are still many other tribes that are still unknown based on the ecological typology of tribal cultures in the Land of Papua. For each indigenous community that inhabits a particular area that is spread throughout the land of cultural ecology in the Land of Papua, there are various types or typologies of ecosystems within the territorial genealogic as indigenous peoples in the Land of Papua. Not only live in the large cities, indigenous peoples in the Land of Papua also lives behind mountains, in valleys, in the middle of swamps, on the shores of the sea and islands and also in dense forests which are very close to the nature. Many of the tribes have not been in contact with the outside world. The only way to sustain life is to create a system with a lifestyle that is in harmony with the conditions and availability of natural resources around the ecological area that it inhabits. Thus, the type or ecological typology of different ecosystem environments has helped shape the culture of each of the different indigenous peoples or tribes in the Land of Papua.

The experience of interacting closely with nature has provided in-depth knowledge to tribal groups as part of indigenous peoples in the Land of Papua in the management of their local resources. Indigenous people or tribes in the Land of Papua (hereinafter referred to as indigenous Papuans), already have traditional knowledge to process natural resources of land, plants and animals to fulfil all their living needs such as food, medicine, clothing, and housing. It must be admitted that indigenous People of Papuan have lived thousands of years in the island of Papua. With that traditional knowledge, they can be considered as scientists who know best about the natural environment throughout the level of development of their civilization.

These types of knowledge have a great potential and are very relevant to the lives of indigenous Papuans today, although their usefulness has yet to be known. For example, the knowledge of Indigenous People of Papua in rural area concerning traditional medicines. It has not been well documented but it has important impacts for treatment. Research in one of the provinces of Papua New Guinea has found that 127 types of medicinal plants are used to cure 54 types of diseases.[1] It is believed that the western hemisphere of New Guinea or Papua, at least also has the same potential that has not been studied further.

In addition to the knowledge of traditional medicine, indigenous Papuans living in forest areas have developed land management practices as well as the utilization of various kinds of forest products, which often contain traditional wisdoms (local wisdoms) which are environmentally friendly. The application of the principle of preservation of forest resources can be seen from the belief in the existence of a sacred forest or *seboanayi* in the indigenous people or the *Amungme* tribe,[2] which symbolizes the Land as a Mother / Mama who raises the *Amungme* community or tribe with its natural resources including Copper and Gold mines in mining area of PT. Freeport Indonesia in the *Mimika* district of Papua Province. From observation, this traditional natural resource management system is also accompanied by a complex land ownership system with a customary system of governance. Both of these systems develop together and are closely integrated in the social system. The integration of this system can make indigenous peoples in the Land of Papua survive for thousands of years. The problem now is that the existence and role of indigenous Papuans in managing resources sustainably have not received attention and space in the national forest utilization and management planning system, so the same problem also occurs in the allocation and management of conservation areas in Papua. Attentions to all conservation areas in the Land of Papua are coming from the indigenous peoples within it whose sense of ownerships of land are very strong with the culture and customary law. Similarly, the national and marine national park areas also have several villages within the area. This is partly due to government and local government policies in the forest management sector which assume that the management of forest resources is traditionally primitive, inefficient and destructive (damaging, demolishing or destroying) to the environment, which is supposed to be emotional (understanding the mind or the world of indigenous People of Papua has a concept of natural environment wisdom from generation to ethics.

In such conditions, the issues relating to the management of natural resources in the Land of Papua within the administrative regions of Papua and West Papua Provinces cannot be separated from the rights and ownership of the existing land or customary land of the Papuan people, particularly with the policy of the government and regional governments intended to spur development in the Land of Papua for sustainable physical development. The inclusion of investments and various development programs that use the land of local indigenous peoples has caused so many problems that lead to prolonged conflicts and disputes in indigenous communities in the Land of Papua. One source of these problems is that the lack of understanding and the ignorance of the "Difference in Perception of Indigenous Peoples in Tanah Papua in terms of Management of Natural Resources concerning Land, when faced with various land rules in terms of Laws, Government Officials

[1] See Ronald Y. Jorim, et.al., "an Ethnobotanical Survey of Medical Plants Used in the Eastern Highlands of Papua New Guinea", *J Ethnobiol Ethnomed.* 2012; 8: 47. Published online 2012 Dec 18. doi: 10.1186/1746-4269-8-47.
[2] Frans Reumi, *Customary Law of the Land of the Amungme and Kamoro Tribes in Timika Papua: Efforts to Identify the Customary Rules of Land Based on Indigenous Knowledge, Kinship systems and Customary Law Institution,* Ministry of Research and Technology Republic of Indonesia and LIPI, 2004, p. 123.

and Indigenous Peoples". Whereas, for indigenous People of Papua in accordance to their customary law, such land is not a commodity. It is not something that can be traded or leased. Instead, the lands that can be used in transaction are grant land, inherited land, service land, village land, garden land, hunting land, sago and coconut hamlets. and so forth. Land is something that is considered sacred due to the symbol given as a human (mother) and bloodshed. This means that the land is likened to a mother who is so closely related to her child. Land is the identity and sign of one's existence.

This perception is the basis for the formation of patterns of interaction in the system of customary rules, the basis of life, the development of a nation's culture of indigenous peoples in the Land of Papua. On the other hand, development has caused many indigenous Papuan groups in the two provinces to lose their livelihoods in the form of land, forests and waters which have become a struggle for national and international investors. This can occur because the process of regulating land allotment by the government and regional governments does not involve indigenous people of Papuan who hold the authority over natural resources over land. It is also due to the weak position of the Papuan indigenous peoples' perception of land in the context of national formal law stated that it will be applied as long as it does not conflict with national interests. The lack of information about traditional natural resource management systems and the perception of indigenous Papuans about land is one of the causes of indigenous peoples being excluded from the development process today.

Thus, the knowledge and local wisdom of indigenous Papuans is very much needed, among others: (1) As an important input in agrarian reform in Indonesia, especially for indigenous Papuans within the two provincial government areas (Papua and West Papua); and (2) To look for a better natural resource management system so that it does not harm Papuan ethnic groups who are very pluralistic.

For this reason, based on the description above it is reflected that "there are still differences in perceptions between indigenous peoples, government officials (bureaucrats), companies and laws, occupied by Article 18B paragraph (2) and Article 28I paragraph (3) and Article 33 paragraph (3) of 1945 Constitution of the Republic of Indonesia as well as Article 3 and 5 of Law No. 5 of 1960 (BAL), Article 399 of Law No. 23 of 2014 concerning Regional Government, Article 43 of Law No. 21 of 2001 concerning Special Autonomy for Papua Province, Special Regional Regulation No. 21 of 2008 concerning Sustainable Forest Management, Special Regional Regulation No.22 of 2008 concerning the Protection and Management of Natural Resources of the Papuan Customary Law Community, Special Regional Regulation No. 23 of 2008 concerning Customary Rights of the Customary Law Society and Individual Rights of the Papuan Customary Law Community.[1]

2. Perception of Rights to Control the Land over Natural Resources in Indigenous People of Papua, Indonesia

2.1. The Nature of Ownership of Indigenous Peoples

In essence, the rights of indigenous Papuans towards land, territory and natural resources are naturally owned rights that are constitutive and become the will and sovereignty of indigenous peoples who are autonomous, permanent and sustainable. Natural ownership (naturalist possession) is a concept of pure facts that is not dependent or based on legal provisions. In addition, "*possesio naturalis*" is a material law, because ownership rights are obtained before the existence of legal (formal) provisions as stipulated in the statutory provisions of the law. It is different from legal ownership (*juristic possesio*) that the formal law will produce legal rights to the subject and object (objects) to be guaranteed and protected. For example, the ownership of indigenous People of Papua over land, territory and natural resources is based on historical facts and the law "has existed and persisted" before and after the "colonial" nations occupied and controlled the ownership of the indigenous people. However, historical and legal facts prove that the ownership of indigenous People of Papua over their lands, territories and natural resources has experienced "systematic destruction" and deprivation of the rights of indigenous peoples.

The concept of ownership in the context of resources means as a primary social institution that has a structure and function to regulate resources which are based more on habits, prohibitions and family. Therefore, institutions or regulations in the system of ownership or control of shared resources cannot be separated from the existence of social orders that have binding power for each individual member of the community. Normatively, Akimichi Tomoya said that ownership rights (property rights) have connotations as having (to own), entering (to access) and utilizing (to use).

The nature of indigenous People of Papua's ownership towards land, territory and other natural resources is not only understood in the context of economic ownership but also in spiritual and juridical relations. The indigenous People of Papua maintain historical links and spiritual relations with their natural resources in the area where they live. If natural resources are disturbed, let alone alienated by the State or the government or third parties, then what will be threatened is not only the economic life of the indigenous people, but also the overall existence of the life of the indigenous people themselves. Based on the style of indigenous peoples which is

[1] See Samsun Ismaya, *Introduction to Agrarian Law*, Graha Ilmu, Yogyakarta, 2011.

religio-magical and the importance of the position of the land for indigenous People of Papua, it is clear that indigenous peoples can be sure will preserve their customary land including objects of customary rights, namely plants and everything above or contained in their communal land including forests.[1]

Therefore, the nature of the ownership of indigenous People of Papua is not only limited over land objects, but also for other natural resource objects namely all that are on the ground (such as trees, animals, rocks that have economic significance); (in the soil in the form of excavated materials), and also along the coast, as well as those on the surface of the water, in water and parts of land that are inside, which are protected by customary law as the living law.

2.2. State Domain and State Control Rights

The position of the 1945 Constitution of the Republic of Indonesia as the basic legal norm of the Republic of Indonesia regulates the legal relations of the administration of the state against the rights of the people of Indonesia, to protect, advance, educate the nation's life, and participate in carrying out world order. Because of the basic rights (will and sovereignty) of the Indonesian people which became "prime-movers" and "inner-orders" in the life of the nation and state of Indonesia which had previously been treated inhumane and unfair by the colonizing nations. For this reason, with the independence of Indonesia, which is united, sovereign, fair and prosperous, the people of Indonesia are the holders or owners of sovereignty in the Unitary State of the Republic of Indonesia.

The provisions in Article 33 (3) of the 1945 Constitution of the Republic of Indonesia constitute the main foundation for the constitutional way of thinking of the organizers of the Republic of Indonesia in managing and running the national economic system to increase the prosperity and welfare of the people of Indonesia. So that the production branches which are important for "the State" and which "control the livelihood of many people" are controlled by the state, including the earth, water and natural resources contained therein controlled by the state and used for the greatest prosperity of the people. For this reason, the economy is structured as a joint venture based on the principle of kinship by building or forming cooperatives which are considered as joint business entities of the Indonesian people, including companies that do not control the livelihoods of many people in the hands of people.

The 1945 Constitution of the Republic of Indonesia does not formally and legally formulate the notion of state control, giving rise to multiple interpretations and "constitutional bias" in implementing legal principles in understanding the state controlling right in relation to social, cultural, economic and political issues as well as law in organizing the government of Indonesia. On that basis, the formulation of a legal product (constitution) that can lead to multiple interpretations will open up the space for "legal voidness or legal reproach". Thus, it results to the uncertainty of the law itself, because the formulation of basic norms in the constitution is ambiguous (more than one or multiple), mainly related to the basic principles of state law which are the normative reference. If faced with the basic demands of the people as holders of state sovereignty which are always sacrificed with policies and laws in the administration of the Republic of Indonesia, the state controlling rights is only a formulation of concept outside the official text of the constitution. In fact, it is used to justify the "arbitrary power" in the administration of state government. As the results, up until recently, the issues of constitutive rights of citizens, especially indigenous peoples, have not been guaranteed and protected in the history of our constitutional arrangements.

The aforementioned problem will naturally influence and become a fundamental and ongoing problem with the legal relations among indigenous peoples in their ownership of land, territories and natural ownership (naturalist possession) and from generation to generation in their respective territories. Then, there is a new forum which is labeled "State" as the highest power organization of the people who through the legal system claim to be "sole owner and ruler" to determine the legal status of indigenous peoples' rights to their lands, territories and natural resources which they naturally, permanently, and sustainably (hereditary) own.

Then, if we look back at the provisions of the BAL within Article 2 paragraph (1), it has set limits on the right to control the state to earth, water and space, including the wealth contained in it is at the highest level controlled by the State, as an organization of power for all people. Then in paragraph (2) it gives the authority "full" to the State which is beneath the Government in terms of: (1) regulating and organizing the designation, use, supply and maintenance of the earth, water and space; (2) determine and regulate legal relations between people and earth, water and space; (3) determine and regulate legal relations between people and legal actions concerning the earth, water and space. Then this authority is emphasized in paragraph (3) which states that it is used to achieve the greatest prosperity of the people in the sense of happiness, prosperity and independence of people and the state of law of Indonesia which is independent, fair and prosperous. Based on the Government's authority, then paragraph (4) authorizes the centre Government in the exercising the authority to delegate such authorities to the autonomous regions (local governments) and customary law communities if it is deemed to be

[1] See Ronald G. Petocz, *Nature Conservation and Development in Irian Jaya,* Pustaka Grafitipers, Jakarta, 1987.

necessary and does not conflict with national interests according to the provisions of Government Regulations.

Based on the principle of understanding of the State's controlling rights over natural resources, the Constitutional Court of the Republic of Indonesia believes that the principle that must be put forward is understanding the sovereignty of the people, where the people must be recognized as the subject of law and the source of the owner and at the same time the highest authority in the life of the state. The highest authority includes the definition of collective public ownership mandated to the State to be used for the greatest prosperity of the people from Sabang to Merauke.

2.3. Rights of Indigenous People

The rights of indigenous peoples precede the existence of the state, or these rights existed in advance, developed and established before the state implemented jurisdiction covering indigenous peoples' territories.[1] Therefore, indigenous peoples do not have to show themselves as the first person in an area, but it is important that indigenous peoples have implemented all their rights within the area before any other party claims and before the state takes care of the area effectively. This is because human rights are considered innate rights because their dignity is not a gift from a government or state and the State only has the obligation to fulfil, protect and respect its citizens. The rights of indigenous peoples are rights that are mainly related to the way of life and protection of the ownership and control of land, territory and natural resources. Modern countries and their economic systems often threaten the collective rights of indigenous peoples to land, territories and resources and those who are authorized by the state to seize community lands or indigenous peoples' lands. This protection is given because it is considered to be in the interest of a minority who does not have the power to fight against the power of the majority. This is also influenced by the perception of the use of the word "controlled and possessed" by actors making decisions or policies on land and forests (SDA), often leading to differences in perceptions between indigenous peoples, governments, laws (BAL), companies / entrepreneurs.

There are at least two rights inherent in indigenous peoples' unity, namely the existence of both individual (property rights) and collective property rights (communal rights, entitlement rights) over land and other natural resources including water, rivers, forests, animals, sea and coastal areas and so forth. In order for indigenous peoples as a whole or individually to be able to play a role in maintaining and using their rights to natural resources to produce something better, the right to live healthily in order for them to be able to work, the right to have an environment that is able to produce life needs, the right to determine whether or not another party (investor) can manage natural resources in areas controlled by customary communities with free and prior informed consent must also be given to them.

The rights of indigenous peoples in the management of natural resources as human rights have a broad scope, not only the right to manage legal resources in enjoying these matters for traditional ownership and control so that their survival will be guaranteed. The relationship between indigenous peoples and their natural resources or customary rights is a constitutive condition for the existence of indigenous people who always adhere to the concept of "cosmic". This means that the relationship between the community and land or natural resources is the core of the communal concept. The communal concept was born from natural rights. Then in a modern country or constitutional democratic state, communal right as natural right is converted into natural law in its positive law.[2] Customary adoption as a right in positive law is an attempt to reconcile modern law that is used to regulate life (secondary rules) with the original law in the community (primary rules). The position of indigenous peoples who are weak politically and economically compared to private and government entrepreneurs has resulted in the easy takeover of natural resources by the government without going through a fair legal process, or even without any compensation.

Legal consequences in the form of violations of customary communal rights usually occur in the destruction of customary lands and forest and / or claiming ownership of indigenous peoples' land. Modern countries with strong economic partners can quickly take the lands of indigenous peoples. The rights of indigenous peoples approved by the United Nations and NGOs are the rights relating to political and economic autonomy, and must be balanced with the interests and rights of individuals and other groups. The rights of indigenous peoples are not considered absolute, because the rights granted must still pay attention to the balance between group rights and individual rights, which temporarily becomes the struggle for indigenous peoples against objects of customary rights to land and forests.

3. Difference in Perception of the Right to Own Land over Natural Resources in Indigenous Peoples, Government Officials, and BAL 1960

3.1. Perceptions of the Indigenous People

Basically, indigenous peoples' perceptions of land rights and their natural resources are viewed in their entirety

[1] See Cornelius Tangkere, *State Responsibility in the Protection and Promotion of the Rights of Indigenous Peoples in the Human Rights Perspective*, Dissertation, UNHAS, 2013.
[2] See Abrar Saleng, *Capita Selecta: Natural Resources Law*, Membumi Publishing, 2013.

covering the earth, water, space, and natural resources contained in them. This perception is based on an ecosystem that has a close relation with the principle of interdependence. This existence has values that are centered on land as the basic force of life of indigenous peoples. The views of indigenous peoples on land rights are property rights that cannot be sold because they have values from several interests, namely: political, economic, socio-cultural, religious and health which are still inherent in the perceptions of the indigenous People of Papua. Normatively, the concept of ownership rights of indigenous peoples has the power of reciprocity. Individual property rights become very strong, if their position is in joint property rights. If individual property rights are faced out, then the ownership rights of the alliance become very strong. Land ownership cannot be transferred in the form of land sale and purchase as adopted by BAL 1960. Construction of property rights has been established by ancestors of indigenous peoples in accordance with living and developing values and manifested in a system of ownership, rights to control and use of land and natural resources of the indigenous people of Papua.

Looking back in the reign of the Netherlands New Guinea, its high-ranking employees had written the results of their research in a report on the rights of indigenous people over land in New Guinea. It was stated that all this time, what are known to be the most important rights are contained in the genealogical-patrilineal family fellowship which are keret, tuma, gelet and others. Such rights in Indonesia are called *Inlandsbezitrecht*. In New Guinea, this kind of right is called *Papuas Bezitsrecht*, which is land rights with very strong individual characteristics. Once someone opens a land, then it has become an individual property for someone who has opened the indigenous community. For thicket forest land, every family member who are willing to open it must obtain permission from the head of the alliance who controls an area of land. In the view of the indigenous People of Papua, they recognize land and forests that have been opened and are being worked on along with the land with thickets that have never been opened, but remain within the territories of indigenous People of Papua. The results of research and workshops conducted by YKPHM Papua turned out to find a view of the ownership rights of indigenous peoples in contrast to customary rights and rights granted by the state according to the 1960 BAL normatively. According to the indigenous People of Papua, the land rights held by them are both individual and communal property rights, because the land rights of indigenous Papuans are not given by the state based on the 1960 BAL. But the rights of the earth, water, space and natural resources are contained in it have been obtained and mastered based on ownership rights from generation to generation with the strongest and most fulfilled character. Human relations in indigenous groups with earth, water, space, and natural resources contained in it are in the form of legal relations that are controlled by property rights, because they contain all value systems which include political economy, socio-cultural, health, and religious interests as part of the ethnographic portrait of indigenous People of Papua today.

3.2. Perception of Government Officials (Bureaucrats)

It is inevitable that government officials at both the central and regional levels have political power in dealing with development issues with the community, so that they can freely provide interpretations of what is meant by customary rights. District / municipal government officials in Tanah Papua in several meetings have interpreted communal rights, meaning that the public rights held by the head of the alliance and land rights have been adopted in the 1960 BAL into customary rights held by the state as the highest organization of political power. Normatively and empirically in the provinces of Papua and West Papua, it can be observed that the opinion of government officials in the provincial government, regency / city in the Land of Papua partly states that indigenous peoples are not legal subjects. Therefore, they do not have wealth, as the legal subject referred to the Civil Code (*KUHPerdata*), namely people and legal entities. Consequently, if there is a development project within a certain jurisdiction of indigenous People of Papua, then in accordance with the principle of prioritizing the public interest, the customary rights of indigenous peoples must be adjusted to the public interest and should not conflict with higher regulations. The indigenous Papuans are given a recommendation, namely the construction of public facilities for the public interest as well.

Such perceptions of the government and local government do not benefit the indigenous Papuans, but benefit the outside parties (investors) to be able to obtain land and other natural resources, because there is collusion with government officials. So that nationally, in some regency / city regional government officials in the land of Papua in the south, north, west, east and are behaving like in the Kalimantan province which clearly does not recognize the existence of indigenous peoples and their customary rights. According to the government and local government, customary rights of indigenous peoples have been upgraded into communal rights and must no longer think of regional customary rights or communal or tribal customary rights. Such an attitude is partly reflected in the indigenous People of Papua.

The statements of officials like this greatly influence the opinions of local government officials in Papua and West Papua Provinces in providing interpretations of what is meant by customary rights according to their perceptions, not the perceptions of indigenous People of Papua concerned with the potential of land and other natural resources. The perception of government officials is very confusing to the indigenous Papuans and as if

the land rights of indigenous Papuans are determined by the relevant district / city government officials in the Land of Papua.

3.3. Perception of the 1960 BAL

The referral perception of the 1960 BAL on the principle of the right to control the land clearly gives the understanding that the state controls the land in accordance with the provisions of Article 33 paragraph (3) of the 1945 Constitution. This people's prosperity is an important mandate contained by the 1960 BAL. Moreover, the formulation of the land rights that have not been registered and controlled by the community is regulated in Article 3 of the 1960 BAL concerning customary rights.

Basically, customary rights are the rights held by the concerned indigenous peoples to control land, forests and the environment. The formulation in Article 3 of the 1960 BAL states that customary rights are the right to control the land held by the customary law community - the customary law community insofar as it still exists and must be adapted to broader development interests, national unity, and may not conflict with legislation - other higher orders. If there is a broader development for the public interest, then the indigenous people must adjust to the development for the public interest, because the nation's unity must not be destroyed by the interests of groups and individuals. The provisions in Article 2 of the 1960 BAL stated that the highest customary rights are held by the state which will be used for the greatest prosperity of the people. The interests of groups and individuals must be defeated for the sake of development for public interest. Customary rights are considered as property rights of indigenous peoples, but its definition is not contained in the general explanation, but only contained in the explanation of articles per article. It is said that what is meant by customary rights is what is in the customary law library called *Beschikkingsrecht*. That is the theory of land rights which was stated by van Vollenhoven, who wrote a lot about indigenous communities in the archipelago.

In his view, the rights to land held by indigenous peoples and their members are the right to control the land, because they do not have ownership rights. The concept and view of this theory was adopted as an understanding of communal rights. While customary rights themselves are adopted from the Minangkabau language, meaning the right to control over an environment of land held by the head of the alliance. There are two types of land classified from its legal status, namely the Non-State Land and the State Land. The former type includes all the lands that are controlled by the people in accordance with property rights. The latter type includes all the lands that are controlled directly and indirectly by the state. The lands that are directly controlled by the state covers the non-owned lands which are called the free state land, whereas the lands that are indirectly controlled by the state are called the non-free state land. Lands which belongs to the category of the non-free state land are the free state lands that have been given to someone with the cultivation or building rights; the free state lands that have been given to agencies or institutions with usage rights and lands owned by the societies which its rights have not been converted into rights that are recognized by the law. On the basis of this view, all land rights recognized by laws such as Property Rights, cultivation rights, building rights are the same as the land rights granted by the state to every Indonesian citizen. These types of rights can be transferred as in the form of buying and selling and may be aborted at any time because they are dealing with development for the public interest.

The implementing regulation to revoke these types of rights has been regulated through the Law on Revocation of Right to Land No.20 / 1961 concerning Revocation of Right to Land and Property Above it, as an organic law that is anchored in Article 18 of the 1960 BAL about institutions revoking land rights. This law does not have implementing regulations, but on behalf of the government, the Ministry of Internal Affairs issued Minister of Internal Affairs Regulation No.14 / 1975 concerning land acquisition, then replaced with Presidential Decree No. 55/1993 concerning Land Procurement for Development for Public Interest. Another thing is the presence of the Agrarian and Spatial Planning / Head of BPN Number 5 of 1999 concerning Guidelines for Settling Communal Rights for Customary Law Communities, in conjunction with the ATR / BPN Regulation No. 9 of 2015 which one year later replaced with Permen ATR / BPN No. 10 of 2016 concerning Procedures Determination of Communal Rights on Land of Indigenous People and Communities in Certain Areas. These implementing regulations place the position of community land rights at the lowest and weakest level. Therefore, a very important issue is deliberation which is prioritized in the procurement of land for development of public interest.[1]

4. Potential Conflicts of Interests of the Right to Control the Land over Natural Resources

Development growth, for example, in the provinces of Papua and West Papua, is running very fast. However, this does not escape the conflicts that arise between indigenous Papuans and the government and regions as well as other outside parties such as investors, companies or entrepreneurs, who will exploit land and natural resources in the mining, forestry, agriculture, plantation, marine sectors and others which so far have been very

[1] Diantoro Bachriadi, Erpan Faryadi, dan Bonnie setiawan, (Ed), *Agrarian Reform: Political Change, Disputes, and Agenda for Agrarian Reform in Indonesia,* Faculty of Economy, University of Indonesia, 1997, p.199.

dominant in controlling the livelihood of indigenous People of Papua. The potential of land and other natural resources according to the interests of national development will be actualized into real economic power through large-scale investment activities to support the interests of national economic development. On the other hand, there are groups of indigenous Papuans who have very close links based on property rights with land resources and other resources in a single ecological environment or ecosystem.

Agrarian issues for indigenous Papuans are very serious. Although the 1960 BAL exist as the parent of all the agrarian rules, it has not able to become a reference and determining factor in overcoming various problems that arose around agrarian issues in indigenous People of Papua. In reality, agrarian problems continue to emerge, among others:

1. Conflict of interest due to the different point of views regarding rights on land and natural resources, where BAL considers the rights of indigenous people over land as communal rights meaning rights to control. Meanwhile, indigenous people oppose this assumption, because they prefer to consider their legal relations with land and natural resources as property rights. These types of land cases occurred in urban and rural or village areas. For instance, in urban areas like the cities and district in Jayapura, the indigenous people demand compensation over their lands which were previously controlled by the government of the Netherlands New Guinea and after Papua returned back to Indonesia those lands and buildings then used by the Indonesian government. For examples in the case of Hanok Hebe, Ohee, the case of the Post Office and Giro Abepura land, a case of land at the Cenderawasih University which was sued by the Hebeibulu-Yoka and Hedam Ayapo indigenous groups. Indigenous people demand these land rights because they feel they have never relinquished their land rights to the government of the Netherlands New Guinea. The prosecutions of these cases did not receive a good response from the government to respect the land rights of indigenous peoples.
2. Concentration of land tenure to large plantations and private entrepreneurs. For example, the concentration of land ownership by Arso's oil palm plantations on a large scale, where the Arso indigenous people did not participate in the process of transferring land rights.
3. The wider process of land confiscation in mining areas that expels local people. Mining itself drains local resources without providing benefits to local people and even damaging the environment. This problem occurs in the mining area of PT. Freeport Indonesia in Tembagapura Papua. These agrarian cases emerged as a result of the demands of the Amungme indigenous people in Tembagapura and people suffered casualties and human rights violations.[1]
4. The control of forest resources by HPH companies that do not bring benefits to indigenous peoples and damage ecosystems, where indigenous people still depend heavily on the forest and the surrounding environment. For example, it happened to the Mooy indigenous people in Sorong where more than 10,000 hectares of land and forests were given to PT. Sustainable Plywood without compensation.

These conflicts of interests occurred as a result of the implementation of the 1960 BAL which had different views with indigenous peoples regarding land rights which included the earth, water, space, and natural resources contained in it. The 1960 BAL considers customary land rights as communal rights whereas the people consider it as property rights. These differences of opinion form the basis of various conflicts between indigenous peoples and outsiders (investors), giving rise to cases of forest control, depletion of mineral resources, large concentrations of land control towards large companies that do not bring benefits to indigenous People of Papua and even cause cases of human rights violations in Tembagapura Timika, Papua Province.

5. Conclusions

It can be concluded that:

1. There are differences in perceptions between the customary legal system regarding the rights to land and natural resources of the indigenous people of Papua and the national legal system namely the 1960 BAL. The view of the 1960 BAL states that rights to land and natural resources of indigenous peoples are communal rights (*ulayat* rights) meaning rights collective control is not a property. Whereas according to the customary legal system, indigenous peoples' lands are shared and contained property rights held by the strongest and most fulfilled clans held for generations within the tribe, clan / *keret*, and msin family.
2. The position of ownership rights on land and natural resources of indigenous peoples in the 1960 BAL is very low and weak. Therefore, in the context of the implementation of national development, indigenous peoples' land rights as customary rights must not conflict with other higher regulations. Although the higher legislation does not reflect the principle of people's sovereignty that should be.
3. In terms of the implementation of national development related to private and government investments in various development sectors in relation to agrarian issues, those activities do not provide the

[1] See Human Rights Fact Sheet, Issue III, National Human Rights Commission, Jakarta, no year, p. 123.

maximum benefits for the welfare of the people living in the concerned jurisdiction lands and forests which being exploited such as mining and forest concessions (HPH).

4. Most of the rights to control over lands are being concreted in one hand which are government officials and entrepreneurs who invest in development in Papua and West Papua. This process is taken place without deliberations and consultations with the community which is actually important in determining the boundaries of the rights over land and natural resources. This land tenure is carried out in all development activities related to agrarian issues.
5. The customary rights of indigenous Papuans must be affirmed as Communal Privileged Rights to the earth, water, space, and natural resources contained therein, and the existence of the relevant customary law community must be recognized in the 1960 BAL as a subject of civil law. The recognition was added as paragraph (2) Article 3 of the 1960 BAL with general explanations and article by article explanations.

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