

Protection of Indigenous Peoples Rights after the Enforcement Of Village Law in Indonesia

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Abstract

The State recognizes and respects the unity of indigenous peoples with their conditional rights. The protection of indigenous peoples in sectoral legislation related to natural resources gives state power as Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia through the right of state control and indigenous peoples governance in the form of customary villages by applying legal pluralism. The constitutional protection is not in line with the condition of indigenous peoples in the control and management of agrarian resources. They are always defeated with various arguments for economic growth and investment. The existence of Law of the Republic of Indonesia Number 6 Year 2014 on Village has given recognition of customary village institutions, but still weak in terms of utilization of natural resources owned.

Keywords: protection, indigenous peoples, traditional rights

I. Introduction

Article 33 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia states that “the earth, water and natural resources contained therein are controlled by the State and used for the greatest prosperity of the people”. This basic norm implies that the existence of earth, water and space and the richness contained therein are the gifts of God Almighty, controlled by the state but such control is solely used to realize the welfare of all Indonesian people. It is expected that such control will have an impact on legal certainty, legal protection, justice and prosperity for the people.

The Second Amendment of the 1945 Constitution of the Republic of Indonesia in Article 18B paragraph (2) affirms that the state recognizes and respects the unity of indigenous peoples¹ along with their traditional rights as long as they are alive and in accordance with the development of society and the principle of the Unitary State of the Republic of Indonesia. This means that the state recognizes the collectivity of indigenous peoples' traditional rights (values, local norms, traditions, beliefs) including tenure rights as long as they are alive, are adhered to as part of the culture, but such recognition shall be in harmony with the development of society and the principle of the Unitary State of the Republic of Indonesia. The concept of recognition above reflects the recognition of conditionally constitutionality.²

The realization of Article 33 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia is ideally aimed at “protecting the whole nation and the blood of Indonesia and promoting the common prosperity” which is realized through the implementation of national development oriented to pursue the target of economic growth development³ implemented through investment activities. In the framework of economic growth, the procurement of land for development for the public interest which in the empirical practice implicates evictions to marginalize the values of local wisdom in the management of agrarian resources generating many vertical conflicts between indigenous peoples and business actors/investors and the government. This condition makes indigenous peoples classified as second class in the discourse of citizen protection with various variants of stereotype including traditional, stupid, threatening/disruptive investments that in many disputes tend to be the losers.

Further management of agrarian resources is regulated in Law of the Republic of Indonesia Number 5 Year 1960 on Basic Agrarian Law which places the state as the highest authority of all people authorized to administer the designation, use, supply and maintenance of the earth, water and space; determine and regulate the legal relationships between people and the earth, water and space; determine and regulate the legal relationships

¹ The official term used in various regulations is the Customary Law Society as the equivalent of *Rechtsgemeenschap/adatrechtsgemeenschap*. The term *Masyarakat Adat* refers to a number of international agreements as an equivalent of *indigeneous people*.

² Decision of the Constitutional Court of the Republic of Indonesia Number 35/PUU-X/2012 recognizes indigenous peoples as "rights bearers" and legal subjects of their customary territories.

³ Cost of development that is not taken into account and is a negative result of the national development process, among others: the loss/increasingly limited sources of economic life of the community in the region (economical cost); damage and degradation of natural resources (ecological cost); as well as damage to the social and cultural life of indigenous peoples in the region (social and cultural cost). See I Nyoman Nurjaya. (2008). *Pengelolaan Sumber Daya Alam dalam Perspektif Antropologi Hukum*. Jakarta: Prestasi Pustaka. p.3-4.

between persons and legal acts concerning earth, water and space.¹ This authority is a representation of private authority and public authority.

In principle, Basic Agrarian Law is a prismatic law that describes the principles of social value that is modern and traditional in accordance with the plurality of Indonesian society, the elaboration of modern social values is reflected in the principle of individualization of land tenure, intensive use of land, equality of access to land rights, the provision of ownership for large-scale business development in the agricultural and industrial sectors with certain limitations. On the other hand, the explanation of traditional social values is reflected in principles such as the social function of land rights, the limitation of the maximum land tenure, the obligation to maintain soil fertility, the prohibition of absentee land tenure, pressure on soil productivity does not cause damage to the function and physical abilities of the land, the special treatment of the weak and marginalized groups through the distribution of land, prevention of dominance in land tenure and concession and the prohibition of monopoly.²

In normative terms based on the Regulation of the Minister of Home Affairs of the Republic of Indonesia Number 52 Year 2014 on Guidelines for the Recognition and Protection of Indigenous People, indigenous peoples are citizens of Indonesia who have distinctive characteristics, living in harmonious clusters according to their customary law, have a bond to the ancestral origins and/or similarities of residence, there is a strong relationship with the land and the environment, and the value system that determines the economic, political, social, cultural, legal and utilization of one particular area from generation to generation.

Recognition of the communion of indigenous peoples and *lebensraum* is affirmed in Article 3 of the Basic Agrarian Law that the exercise of the rights of indigenous and tribal peoples insofar as they still exist should be such that in accordance with national and state interests. Thus, the authority of indigenous peoples over land known as customary rights, land rights, ancient rights or *beschikkingsrecht* is merely a mandate or delegation of authority from the state. Here there is a change in the status of communal right which is no longer as the absolute authority of indigenous peoples except when mandated by the state.

Soetandyo Wignjosoebroto stated:

“State recognition of indigenous peoples' land rights is essentially a reflection of the willingness of the bearers of state power to recognize the existence of indigenous peoples, and subsequently to recognize the rights of the indigenous peoples to the land and all natural resources mentioned above and/or therein, which are vital to ensure the physical and non-physical preservation of that society.”³

“Communal Rights” or *beschikkingsrecht* (the term is used in a technical sense) can not be found in *Burgelijk Wetboek*, also can not be equated with *recht van heerschappij* (a kind of privilege) in Western countries. But in all parts of Indonesia it is the highest right on the land. This right belongs to a tribe (*stam*), or by a combination of villages (*dorpenbond*), or usually by a village but never owned by an individual.⁴

Decentralization of regional autonomy in 2014 is constructed through the incorporation of the function of self governing community with local self government especially related to indigenous peoples as formulated explicitly in Law Number 23 Year 2014 on Regional Government as well Law of the Republic of Indonesia Number 6 Year 2014 on Village. With respect to customary rights of indigenous peoples, Law of the Republic of Indonesia Number 23 Year 2014 grants broad, real and responsible authorities to autonomous regions with autonomous emphasis on Regency/City areas including organizing land affairs, especially communal lands.

Thus, it becomes the authority of the attribution of local governments to take progressive responsive measures in the context of protecting the rights of marginalized traditional law communities in natural resource management practices so as to achieve justice values for indigenous and tribal peoples who inherit inheritance *beschikkingsrecht*. In Indonesia, especially in North Maluku province, has the potential for agrarian conflicts, forest resource management conflict, environmental damage, forest function change are examples of crises arising from development policies that place more forests and land as an economic source of increasing foreign exchange, especially Locally-Generated Revenue. Mapping results from the Aliansi Masyarakat Adat Nasional (AMAN), North Maluku Province shows a portrait of a more accommodative development policy towards investors seen in the exploitation of the tribal area of Pagu by PT. Nusa Halmahera Minerals, so does PT. Weda Bay Nickel which controls some parts area of the Sawai tribe, PT. Antam (PT Harita *sub con*) which controls the tribal area of Tobelo Dalam, PT. Oro Kni Global which controls the tribal area of Suku Sahu, PT Sanatova in area Paceda tribe, the case of Morotai Society versus the Air Force of the Republic of Indonesia, and so forth. Decision of the Constitutional Court of the Republic of Indonesia Number 35/PUU-X/2012 implies the initiative

¹ Article 2 Law of the Republic of Indonesia Number 5 Year 1960 on Basic Agrarian Law

² Nurhasan Ismail. 2012. Arah Politik Hukum Pertanahan dan Perlindungan Kepemilikan Tanah Masyarakat. *Jurnal Rechtsvinding Media Pembinaan Hukum Nasional*, 1(1): 36-37.

³ Soetandyo Wignjosoebroto. (1998). Kebijakan Negara untuk Mengakui dan Tak Mengakui Eksistensi Masyarakat Adat Berikut Hak atas Tanahnya. *Jurnal Masyarakat Adat*. 1(1): 33.

⁴ C. Van Vollenhoven. (2013). Orang Indonesia dan Tanahnya. (Translated by Soewargono). Yogyakarta: STPN Press. p. 8-9.

to mark the claim of customary forest area in forest areas including those already subject to rights. This allows for future conflict of tenure if not carefully regulated.

The above description shows that there has been a process of marginalization of the rights of indigenous peoples in the name of development in the region, including in North Maluku Province which attempted to be resolved politically by law through village law, which gives communities the option of rural governance structures into villages “*dinas*” (agency) or become a village “*adat*” (custom), where on the other hand the formulation of norms “*hak asal usul*” (rights of origin) in the context of indigenous peoples rights still creates a potential interpretive polemic of conflict latent character since the unification of national land law and the pattern of national development policy has overhauled the old customary order into a new order in accordance with state law.

Thus, the issues to be discussed in this paper are to address the issue of affirmation regarding the status and position of indigenous peoples in Indonesia, particularly in North Maluku Province and how the realization of protection for indigenous peoples following the enactment of village laws. It is expected to contribute to the analysis of the characteristics of the existence of indigenous peoples and their current communal rights as well as the progressive measures of protection of customary law communities in line with the framework of village autonomy.

II. Research Method

This research is an empirical legal research namely legal research that aims to determine the extent of the workings of law within the community that stems from the phenomenon of community law or social facts contained in customary law communities.¹ The research was conducted in several areas in North Maluku Province such as Ternate City, North Halmahera Regency, West Halmahera Regency and Central Halmahera Regency. The data collection is done by way of indepth interviews on customary figures, government figures and literature studies on the legal literature, legislation and journals of legal science.

III. Results and Discussion

A. The Concept of Recognition and Protection of Indigenous Peoples

Terminologically, “*pengakuan*” (recognize/*erkenning*) means processes, acts of confessing or acknowledging. While the word “*mengakui*” (recognition) means declare “*berhak*” (have a right).² According to Husen Alting that: the recognition of the rights of indigenous peoples is not only limited in the form of recognition in state law, but because in fact the people of Indonesia are plural, the recognition can be obtained through the living law in the society.³ Pengakuan hak atas tanah baik yang diatur dalam hukum negara⁴ as well as the laws that live in society, have meaning if the provision is followed by the protection measures of the state. While “*perlindungan*” (protection) composed of a basic word of protection which means shelter or things (deeds). The meaningful protection of the guarantee of something as a consequence of the protector. In connection with the legal protection carried out by the government, where Philipus M. Hadjon differentiates into two kinds of preventive law protection and repressive law protection.⁵

According to Achmad Sodiki, protection against the recognition of customary law can be done with several options, as follows:

- a. If the customary law is considered parallel to the law, it means returning to the position before independence that is the enactment of customary law which is intended for the class of *Bumi Putera* (local people) so that there are equal degree with the Civil Code which is intended for the European and East Foreigners Class, Tionghoa. Thus, land law follows customary law and western civil law.

¹ Bahder Johan Nasution. (2008). Metode Penelitian Ilmu Hukum. Bandung: Mandar Maju. p. 123-124.

² Departemen Pendidikan Nasional. (2001). Kamus Besar Bahasa Indonesia. Jakarta: Balai Pustaka. p. 24.

³ Husen Alting. (2010). Dinamika Hukum dalam Pengakuan dan Perlindungan Hak Masyarakat Hukum Adat Atas Tanah. Yogyakarta: LaksBang PRESSindo. p. 67

⁴ According to Hans Kelsen that recognition in relation to the existence of a state is interpreted as an act in an acknowledgment of political action and legal action. Political acts recognize a state (by the authors called ‘the existence of indigenous peoples’) means that the state acknowledges the will to establish political relations and other relations with the community it claims to be. While legal action is a procedure established by international law (by the authors called ‘national law’) to establish state facts (by the authors called ‘indigenous peoples’) in a concrete case. In Husen Alting. (2011). Penguasaan Tanah Masyarakat Hukum Adat (Kajian Terhadap Masyarakat Hukum Adat Ternate). *Jurnal Dinamika Hukum*, 11(1): 89-90.

⁵ Protection of preventive law, people are given an opportunity to file an objection (*inspraak*) or his opinion before a government decision is formulated in a defensible form. Preventive legal protection aims to prevent the occurrence of disputes. While the protection of repressive law is a protection effort which is done through judicial body, both general court and state administration court. While repressive law protection is aimed at resolving disputes. In Philipus M. Hadjon. (1987). *Perlindungan Hukum Bagi Rakyat Indonesia*. Surabaya: Bina Ilmu. p. 2-3.

- b. If the recognition of customary law under the provisions of the law, then the existence of customary law depends very much on the mercy of the law.
- c. If customary law is not parallel to the law, then the situation will occur as it is today due to the direct implications of the implementation of the right of state control.
- d. If customary law is above the law of the State, then this can happen if the customary law is taken part which is the legal morality. However the customary law of life is a reflection of the legal morality of Indonesian society.¹

The principle recognizes and respects the unity of indigenous peoples and their traditional rights² has been affirmed in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. Furthermore, according to Birgitte Feiring said that the traditional rights indigenous people as well as the International Covenant on Civil and Political Rights (ICCPR), The International Covenant on Economic, Social and Cultural Rights (ICESCR), The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and The International Labour Organization (ILO) Convention Number 169 that: “Indigenous peoples land rights comprise both individual and collective aspects. Whereas most indigenous peoples have customary ways of recognising land and resource rights of individual members or households, the collective aspects of their rights to lands, territories, and resources are intrinsically linked to their collective rights to self-determination, nondiscrimination, cultural integrity, and development as distinct peoples. Indigenous peoples have rights to the lands, territories, and resources that they have traditionally occupied, owned, or used, meaning that it is “the traditional occupation and use which is the basis for establishing indigenous peoples’ land rights, and not the eventual official recognition or registration of that ownership”.³

B. Understanding and Nature of Indigenous Peoples in Indonesia

There is a fundamental difference between understanding “*masyarakat*” (society) with “*Masyarakat Adat*” (indigenous peoples). Society is a social system that produces culture. Society is the association of human life (the collection of people living together in a place with certain bonds) The community is a group of people who have their own identity, which distinguishes the other groups and lives and dwells in a certain region or region individually. This group, whether narrowly or broadly, has a feeling of unity among group members and considers the group to be different from other groups. They have norms, rules that are obeyed as a bond. The tools or institutions are used as guidelines to meet the needs of the group in a broad sense.⁴

While *masyarakat adat* are the translation of the word *Indigenous peoples*. Many people distinguish his understanding with the term *masyarakat hukum adat* (customary law community) which is a translation of the Dutch term *Rechtsgemeenschap*.⁵ The use of the term indigenous peoples will be more meaningful when compared to customary law community. The term indigenous peoples is believed to have a broad dimension of meaning from just legal aspects, whereas in indigenous peoples are closely related to cultural dimensions, religion and so forth, but as a supporter of rights and obligations, it would be more appropriate that community entities are established on customary law community.⁶

Kusumadi Pudjosewojo as quoted by I Gede A.B. Wiranata distinguishes between the legal community and customary law community. According to him, customary law community is a society that establishes, is bound, and is subject to its own law. Indigenous and tribal peoples are societies that arise spontaneously in certain areas

¹ Achmad Sodiki. (1999). Politik Hukum Agraria: Unifikasi atau Pluralisme Hukum. Arena Hukum, 8 (July), p. 101.

² As Bagir Manan states that: “the unity of indigenous peoples is entitled to all treatments and given the opportunity to develop as a subsystem of the Unitary State of the Republic of Indonesia is advanced, prosperous and modern. Existing traditional rights are recognized and upheld including customary rights, benefits or enjoyment rights from land and water or forest products, etc. Such recognition and respect does not mean to be rights that can not be touched or regulated, but such arrangements must be truly for the greatest prosperity together without harming the interests of the people who are related to those traditional rights”. Husen Alting. Op.Cit. p. 37-38.

³ Birgitte Feiring. (2013). Indigenous Peoples’ Rights to Lands, Territories, and Resources, Rome: International Land Coalition. p. 17-18.

⁴ W.J.S. Poerwadarminta. (1982). Kamus Besar Bahasa Indonesia. Jakarta: Balai Pustaka. p. 636.

⁵ Term “*rechtsgemeenschap*” which translates into a rather problematic legal society because some are interpreted as *paguyuban hukum* (law community) or *persekutuan hukum* (legal partnership).

⁶ The definition of customary law community according to Ter Haar is a group of people who regularly, settled in a certain region, have their own power, and have their own wealth either in the form of visible objects or objects that are not visible which members of each unity experience life in society as natural according to the nature and no one among the members has the thought or tendency to dissolve the growing bond or leave it in the sense of breaking away from that bond forever. In Husen Alting. Op.Cit., p. 30-31.

whose establishment is not established or commanded by the higher authorities or other rulers with a great sense of solidarity among their members, who view non-members as outsiders and use their territory as a source of wealth that can only be fully utilized by its members.¹

Hazairin in Soekanto states that customary law community are: "... unity of society which has the equipments to stand alone, that is to have unity of law, unity of authority and unity of environment based on collective right of land and water for all its member. All members are equal in rights and obligations".²

At the Congress of Masyarakat Adat Nusantara I it was agreed that indigenous peoples are groups of people who have ancestral origins in certain geographical areas, and have their own values, ideological, economic, political, cultural, social and territorial systems. Next F.D. Hollemann in Otje Salman³ construct four general characteristics of indigenous peoples ie: (1) Religious Magis (*Magisch-Religieus*);⁴ (2) Communal (*Commuun*);⁵ (3) Concrete (*Concret*);⁶ dan (4) Directly (*Kontante Handeling*).⁷ Ter Haar, as quoted by Bushar Muhammad, made the characteristics of customary law community (law community), as follows: "...1) unity of man; 2) settling in a certain area; 3) having rulers; 4) have tangible or intangible wealth, where members of each unity live life in society as a natural thing according to nature and none of them has any thought or tendency to dissolve a bond that has grown or abandoned it in the sense of escape from that bond forever".⁸

The forms of indigenous and tribal peoples are determined by three different factors from one region to another, ie:⁹

1. Territorial Factors: the formation of legal communities caused by the sense of attachment of people in a certain area so as to form a legal society. Such legal societies have three forms: the hamlet community (*de Dorpsgemeenschap*); regional society (*de Streekgemeenschap*) and federations or joint villages (*de Dorpenbond*).
2. Genealogical Factors: The formation of a legal community based on the blood relation or pattern of withdrawal of lineage.¹⁰
3. Mixed Factor: mixed factors defined as a combination of territorial and genealogical factors that form a legal society.

According to Soepomo,¹¹ customary law communities in Indonesia can be divided into two groups namely according to the basic structure that is related to the offspring (*genealogis*), based on the environment (*teritorial*) and a mixture of heredity and the environment. From the standpoint of customary law community there is a stand-alone, a part of a higher customary law community or includes some lower customary law communities, as well as an union of some customary law communities that are equal.

¹ I Gede A.B. Wiranata. (2005). Hukum Adat Indonesia, Perkembangannya dari Masa ke Masa. Bandung: Citra Aditya Bakti. p. 111.

² Soerdjono Soekanto & Soleman B. Taneko. (1981). Hukum Adat Indonesia. Jakarta: Rajawali Press. p. 108.

³ H.R. Otje Salman Soemadiningrat. (2015). Rekonseptualisasi Hukum Adat Kontemporer. Bandung: Alumni. p. 29-33.

⁴ This nature is defined as a mindset based on religiosity, namely the belief of the community about the existence of something sacred. Before customary law community come into contact with the religious legal system, this religiosity is manifested in a prelogical, animistic and belief in the supernatural nature that inhabits an object. There is also an opinion that the religious magic of animist society is not much different from that of the people who have known the unity of the religious legal system in which the religious feeling is manifested in the belief in God over the belief that any deed of any kind will always be rewarded punishment according to the degree of deeds.

⁵ The customary law community has the assumption that every individual, member of society is an integral part of society as a whole. It is also believed that every individual interest is appropriately tailored to the interests of society because no individual is detached from his community.

⁶ This property is defined as a very clear or real style, indicating that any legal relationship that occurs in society is not done in secret or abstract. Transactions that occur are a real act.

⁷ This nature contains a direct meaning, especially in terms of achievement, where every fulfillment of achievement is always accompanied by counter-achievement that is given immediately (instantly).

⁸ Bushar Muhammad. (1994). Asas-Asas Hukum Adat; Suatu Pengantar. Jakarta: Pradnya Paramita. p. 22.

⁹ Ter Haar. (1983). Asas-Asas dan Susunan Hukum Adat. Jakarta: Pradnya Paramita. p. 19-22.

¹⁰ By blood relation or pattern of withdrawal lineage which in Indonesia is divided into four categories, namely: patrilineal system (*patrilineal/agnatic descent*) namely the system of lineage drawing/kinship relationship through the lineage of the men (father); matrilineal system (*matrilineal descent*) namely the system of withdrawal of lineage or kinship relationship only from woman/mother side; parental or liberal systems (*parental/bilateral descent*) namely the system of withdrawal of lineage or kinship relationship of men and women side; and *alternerend* system namely the system / pattern of withdrawal lineage done from the side of men (father) or from the mother in turn depending on the form of marriage done.

¹¹ Husen Alting. Op.Cit., p. 48-49.

Whereas Law of the Republic of Indonesia Number 6 Year 2016 on Village formulating the characteristics of indigenous peoples includes (1) having the territory at least meet one or a combination of elements of existence; (2) communities whose citizens share a shared sense of belonging; (3) customary government institutions; (4) customary property and/or objects; and/or (5) the device of customary law norms. Customary law communities according to the Regulation of the Minister of Home Affairs of the Republic of Indonesia Number 52 Year 2014 are Indonesian citizens who have distinctive characteristics, live in harmonious groups according to their customary law, have ties to ancestral origins and/or residence similarity, there is a strong relationship with the land and the environment, and the value system that determines the economic, political, social, cultural, legal and utilization of one particular area from generation to generation.

Looking at the various criteria of the customary law community that is formulated, the Village Law has a different nature than other regulations. If the Basic Agrarian Law, the Forestry Law, the Plantation Law, the Environmental Protection Law see the criteria as an accumulation that must be applied in a customary law community, The village law actually implements an alternative nature¹ of the existing criteria to become a customary village. The main criterion of community village according to the Village Law is only the availability of the territory, while other criteria are limited to the support of custom village formation, this condition that causes the conflict of norms in custom village setting.

Thus, the historical reality convinces us of the existence of indigenous peoples in the history of the establishment of the state as well as the legitimate citizens who existed long before the sovereignty of the state was formally formed. Indigenous peoples are part of diversity in the history of civilization of the nation that has a pattern of social interaction between community members and physical environment institutionalized in such a way that the bewujud a social unit, independent/autonomous with varying rules of procedure including a system of value systems, division of labor, and legal rules that go on through the socialization of values and traditions from generation to generation.

C. Position of Customary Law Community and Customary Land in North Maluku Province

The tribes inhabiting the province of North Maluku come from the Melanesian and Polynesian nations, composed of 28 tribes with 28 different languages including the tribe of Madole, the tribe of Pagu, the tribe of Ternate, the tribe of Western Makian, the tribe of Kao, the tribe of Tidore, the tribe of Buli, the Patani tribe, the Maba tribe, the Sawai tribe, the Weda tribe, the Gane tribe, the East Makian tribe, the Kayoa tribe, the Bacan tribe, the Sula tribe, the Ange tribe, the Siboyo tribe, the Kadai tribe, the Galela tribe, the Tobelo tribe, the Loloda tribe, Tobaru, the Sahu tribe, the Arab tribe, and the Tagutil tribe. This shows the diversity of cultures, customs and habits that deserve to be appreciated and become the strength of glue in the association and brotherhood in community life. Based on the history of North Maluku, there are four the empire known as *Moloku Kie Raha* ie Ternate, Tidore, Jailolo and Bacan which uphold the system *Adat Se Atorang*² under the philosophy "*Marimoi Ngone Futuru*" (united to us firmly) within the framework of the Unitary State of the Republic of Indonesia.

The existence of Ternate society is divided into the traditional structure, although the classification is not as sharp as the division of castes, but there is a classification based on descendants. The division or stratification of the people of Ternate is not functional which consists of *Jou* groups³, *Dano/Danu*⁴, the people, and the slave class (in the past) and the division of society by clan-based kinship groups (*Soa*) which is a pure kinship of the people of Ternate. This group consists of 4 tribes ie: Soa Sio, Sangaji, Heku and Cim with 41 kinds of tribes/*soa*. Likewise with Tidore indigenous peoples from Tidore Island and inhabiting Tidore Island, the western Halmahera coast, Mare Island, Moti and Maitara islands are spread over the Gamrange region⁵, *Nyili Seba-Seba* to Raja Ampat (*Papua Gam Sio*) under the leadership of the Sultan as head of state assisted by the Wajir Council which consists of four *Pehak* or better known as "*Kolano Se'i Bobato Pehak Raha*". According to M. Amin Farok,⁶ the structure of *Bobato Shari'a* is the highest structure in which the power is in the hands of the Sultan, while the structure of *Bobato Hakikat* is held by *Sowohi*.⁷ Meanwhile in West Halmahera area before the

¹ Article 97 paragraph (2) stipulates that the unity of customary law society as well as their traditional right to survive as referred to in paragraph (1) letters shall have territory and at least meet one or a combination of elements of existence: a. communities whose citizens share a shared sense of belonging; b. customary government institutions; c. property and/or customary objects; and/or d. device of customary law norms.

² Behave according to the customs of Ternate.

³ Groups of Sultan and Family up to third generation

⁴ The grandchildren of the Sultan and the children who were born of the sultan's daughter with people from outside the palace family

⁵ This term means three countries

⁶ M. Amin Faaroek, Tullamo Empire of Tidore, interview on September 21, 2017.

⁷ Meaning the Minister/Protocol of the Empire is assigned to certain affairs.

existence of Jailolo Empire, the indigenous tribes were identified among others: Sahu, Wayoli, Tobaru, Gorap, Loloda and Gamkonora.¹ Jailolo tribe spread in the village of Gufasa, Gam Ici, Gam Lamo, Tuada; Wayoli tribe, Gorap tribe spread in the Bobaneigo area; Tobaru tribe inhabit Loloda District, Sahu District and Ibu District namely inhabiting several villages including the village of Akeara, Domato, Gamlamo, Bukumatiti, and Todowonge; while Sahu tribe spread over Sahu District. In the structure of indigenous peoples in West Halmahera led by *Fomanyira* (village leader) who has the highest position and is in charge of regulating the life and welfare of the people.² The main tribe inhabiting Central Halmahera is the Sawai tribe, which settles in the North Weda District, spread in several villages, among others: Lelilef Woi Bulan, Sagea, Gemaf, Lelilef Sawai, Kobe, Kobe Peplis, Sidanga, Weda, Fritu, Wale, Messa, Woejarana, Lukulamo and Dote.

As the character of the indigenous people put forward Ter Haar namely inhabiting a particular territorial as a living space and possessing both tangible and intangible wealth in indigenous peoples' communications practices with living space is still identified although diminished due to unification of land law through conversion. This transportation is characterized by the still identifiable areas of *pertuanan* as area "*hutan sagu*" (sago forest), "*hutan damar*" (damar forest), "*hutan rotan*" (rattan forest) as a common area that can be penetrated by members of the indigenous community alliance. Typology of control over this *pertuanan* area in Ternate tribe gave birth to the right of land: *aha kolano*, *aha soa*, *aha cocatu* as the basic right to land and the right to work on the land as *safa* rights, *asal-usul* rights, *teto* rights, *tolagumi* rights, *jurame* rights and *rubabanga* rights as the right to work the land. Land rights under the customary law of Ternate also apply to the area of North Halmahera and West Halmahera. while the control of land in Tidore gave birth to the right of land *hale kolano*, *hale soa*, *hale cocatu*, *hale bilang*, *hale eto sedaerah* and other land rights.

Land tenure in customary law places the Sultan as the holder of the highest rights either in the region or in the conquered areas, but the occupation and ownership of the land by the Sultan is not absolute but merely regulates the use, designation and utilization. According to H. Ridwan Do Taher³ that "*Hale Kolano*" is divided into two ownership status ie "*Hale Due*" namely lands which have been cultivated by the clan and/or the community but at the highest level are occupied by the Sultan as the holder of the administrative ownership rights over the land and "*Hale Furu*" is land that has not been managed or has not been granted the status of the land rights to the clan/community, so absolute ownership of the Sultan.

The reality of land tenure identified in some areas of North Maluku Province is, according to the authors, the existence of indigenous peoples despite the existence of their communal right of weakening in line with the unification of national land law and the centralization of government in line with the legislation on the village. The position of indigenous peoples as legal subjects has been recognized as Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, and sectoral laws⁴ until the Decision of the Constitutional Court of the Republic of Indonesia Number 35/PUU-X/2012.

To obtain state protection, in *de jure*, customary law community must obtain recognition through the Decree of the Regional Head as defined in the Regulation of the Minister of Home Affairs Number of the Republic of Indonesia 52 Year 2014⁵ after identification by Head of District, verification and validation by Regency/City Customary Law Community Committee. The legal norms of material recognition of customary law community in this regulation formulate cumulative indicators that are: the history of customary law community, customary territories, customary law, property and/or customary objects, and customary government institutions/systems that are somewhat distorted by political laws in Indonesia are fluid.

In North Maluku province, the commitment of local government recognition of indigenous peoples was identified through Ternate City Local Regulation Number 13 Year 2009 on the Protection of Customary Rights and Indigenous Peoples' Cultural Rights of Ternate Empire, and Decree of the Regent of Halmahera Utara Number 189/133/HU/2015 on Recognition and Protection of Customary Law Community of Hibualamo as a unit of customary law community of North Halmahera Regency.

The recognition shows that the protection of customary law community in North Maluku province is known as "*Moloku Kie Raha*" depending on the political will of the local government in recognizing the existence of customary law community through the determination of the Decree of the Regional Head, whereas it is the duty of the government to give recognition to the customary law community and its traditional rights as the basic legal norm (Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia).

¹ Awat Lolori, Tulilamo Jailolo Empire, interview September 20, 2017.

² Abner Koyano, Focus Group Discussion about Tobaru Tribe, September 25, 2017.

³ H. Ridwan do Taher, *Joujau* (Prime Minister) Tidore Empire, interview September 23, 2017.

⁴ See Law of the Republic of Indonesia Number 6 Year 2014, Law of the Republic of Indonesia Number 30 Year 2009, Law of the Republic of Indonesia Number 27 Year 2007, Law of the Republic of Indonesia Number 12 Year 2005, and Law of the Republic of Indonesia Number 41 Year 1999

⁵ Article 5 and Article 6, the Regulation of the Minister of Home Affairs Number of the Republic of Indonesia 52 Year 2014 on Guidelines for Recognition and Protection of Indigenous People.

The same thing was put forward by Brigitta Hauser: “Indigenous peoples or rather customary law communities are to be granted a special status and corresponding rights and entitlements.⁶ The international conventions, especially those from the UN Permanent Forum on Indigenous Issues, emphasise that self-identification is the major factor of determining which community is “indigenous” or not. In the Draft Law on the Recognition and the Protection of the Indigenous Peoples (RUU PPHMHA) in Indonesia, self-identification is a key criterion for the communities’ self-determination. However, this is only a first, though significant, step in the process of full official recognition and acceptance”.¹

D. Responsiveness of Village Laws to Customary Law Community

Village according to H.A.W. Widjaja is as a legal community unity which has original structure based on special origin rights. The foundations of thinking on village governance are diversity, participation, indigenous autonomy, democratization and community empowerment.² The village law enacted in Indonesia classifies that the village is a village and a customary village or called by another name, hereinafter referred to as a Village, where a legal community unity has a territorial boundary that is authorized to regulate and administer government affairs, the interests of local communities based on community initiatives, origins, and/or traditional rights recognized and respected within the system of government of the Unitary State of the Republic of Indonesia.

Customary villages are the oldest legal entities and legal entities in which their authenticity is measured by their autonomy and governance authorities which are governed and managed on the basis of the right of origin and local custom recognized by the Constitution. The transformation of the concept of village autonomy following the enactment of village law has implications for the protection of indigenous and tribal peoples through the recognition of the right of origin in village governance including customary villages as a special characteristic government that philosophically states only "recognizes" the existence of a village, but not "share" the power of government to the village. Recognition of the village only as a legal community unity based on the origin and custom (self governing community), not prepared as an autonomous entity namely local self government.

In connection with the transformation of the concept of village autonomy according to Soetardjo Kartohadikoesoemo as quoted Rifqi Phahlevy that: “the transformation that occurred systemically in the village, very influence towards the birth of autonomy village government concept. autonomy as a consequence of the vertical distribution power of the state, not recognized on construction of the village governance at first, given the village is a self governing community who are not on any government hierarchy structure”.³

Empirically, the political implications of village governance law eliminate the social, political, economic and cultural order of indigenous peoples such as social institutions, leadership patterns, customary institutions, knowledge and local wisdom that are currently trying to re-organize. The transformation of the concept of village autonomy places the village as an entity constructed as a merger of the function of self-governing community with local self-government, so that the unity of indigenous and tribal peoples who are part of the village area can exercise the origin right which mainly concerns the social preservation of Customary Villages, setting and maintaining customary territories, indigenous peace meetings, maintaining tranquility and order for customary law community, and governance arrangements based on the original.

The right of origin as a form of recognition of existing rights with indigenous and tribal peoples is not merely a symbol but relates to the values, institutions, and other local wisdom. this right shows the fundamental features of community life as individuals and alliances. Hazairin in Otje Salman states that: “customary law societies are civic units which have the means to stand alone, that is to have unity of law, unity of authority and unity of the environment based on the common right of land and water for all its members equal in rights and its obligations”.⁴

Law of the Republic of Indonesia Number 6 Year 2014 on Villages strengthens the decentralization of power and delegation of authority through the principle of recognition. This means that the recognition of all authority including the right of origin has consequences for political support of the government, law and finance in order to achieve village independence. Legalization of recognition by the government is manifested through the establishment of customary villages with authority, as follows:

- a. governance and execution of governance based on the original arrangement;

¹ Tyson. (2014). Review of ‘Adat and Indigeneity in Indonesia: Culture and Entitles between Heteronomy and Self-Ascription’ edited by Brigitta Hauser-Schaublin, Universitätsverlag Göttingen. *Journal of Social Issues in Southeast Asia*, 29(3): 10.

² H.A.W. Widjaja. (2003). *Pemerintahan Desa/Marga*, Jakarta: Raja Grafindo. p. 3.

³ Rifqi Ridlo Phahlevy. (2016). The Concept of Village Autonomy in Indonesia (Indonesian Constitution Perspective), *Rechtsidee Journale*, 3(1): 28.

⁴ H.R. Otje Salman Soemadinigrat. Op.Cit., p. 139.

- b. customary lands and territory management and arrangement;
- c. preservation of socio-cultural values of *Desa Adat* (customary village);
- d. the settlement of customary dispute based on customary law which is applicable in Customary Village in areas that are in harmony with the principle of human rights by prioritizing the settlement by deliberation;
- e. the implementation of an customary village peace trial in accordance with the provisions of legislation;
- f. maintaining the tranquility and order of the people of Customary Village based on customary law applicable in Customary Village; and
- g. development of customary law life in accordance with socio-cultural conditions of Customary Villages.¹

The legal norms of Article 103 in the village law provide confirmation of the governance and governance based on the original arrangement as in the area of North Maluku Province (Sultan/Kolano, Bobato, Sangaji, Gimalaha, Fomanyira); customary territorial arrangements and communal rights including the management of land rights (*aha kolano/hale kolano, aha soa/hale soa, aha cocatu/hale cocatu, hale eto se daera, hale bilang, Tolagumi, safa, ruba banga, jurame*)²; preservation of socio-cultural values in philosophy *Jou se ngofangare*,³ *Goheba dopolo rommidi*⁴ which is known as *se atorang* customary, in Tidore's customary philosophy *Ge Mauri Syara, Syara Mauri Kitabullah se Sunatul Rasul*⁵; the implementation of order, security and justice contained in the regulations *Kie se Kolano* (1868 M) for Tidore Empire which adheres to the principles of the rule of law such as power sharing, deliberation, enforcement and protection of human rights, accountability, peace and people's obedience.

The implementation of Customary Village is carried out in accordance with the right of origin which is a living legacy and village initiative or village community initiative in accordance with the development of community life, such as the system of indigenous peoples organizations, institutions, institutions and customary law, village cash lands in village life. Furthermore, the Indonesian government imposes restrictions on the authority of origin rights through the Ministry of Village of the Republic of Indonesia Regulation Number 1 Year 2015 namely: (1) structuring the system of organization and institutional of indigenous peoples; (2) customary law institutions; (3) the ownership of traditional rights; (4) customary village cash management; (5) communal land management; (6) agreement in the customary village community life; (7) filling the position of customary village chief and village customary apparatus; (8) the tenure of the customary village head.

It shows that authority based on the right of origin can be applied after the arrangement and determination of traditional village through local regulations. The authority of the right of origin is stipulated by the Regulation of the Head of the Region to be used as the basis for the preparation of the Village Regulation. In connection with institutional arrangement, filling position and tenure of Head of Customary Village based on customary law according to Article 109 of Village Law determined by Provincial Regulation. The formulation of this norm according to the author is ambiguous and overlapping the arrangement where the determination of customary law community association in the form of customary village becomes the authority of the Regional Government of Regency/City, but in the case of filling the position becomes the authority of the Provincial Government. This is counter productive with the provision of Article 111 paragraph (2) of village law stating that the provisions on the village also apply to Customary Village as long as it is not regulated in the specific provisions on Customary Village which refer to the legal norms of election procedure, the appointment and dismissal of the Head Village and Village Device in accordance with the legislation and spirit of democracy. On the other hand, the preparation of legal norms related to the institutional arrangement, filling of office and tenure of Head of Customary Village based on customary law should be regulated by District Regulation at Regency/City level, where indigenous territories come from, customary law itself with original structure, institutionalization of different origins and/or traditional rights.

¹ Article 103 of Law of the Republic of Indonesia Number 6 Year 2014 on Village

² The type of institutionalization of land rights under Ternate and Tidore customary law.

³ philosophically believe in the truth of Allah SWT in the teachings of Kitabullah and sunnah of the Prophet as a guide of life. See Mudafar Syah. (2005). *Sejarah Hukum Adat dan Lingkungan Hidup Adat Ternate*. In Sukardi Syamsuddin & Basir Awal. (Eds.), *Maluku Kie Raha dalam Perspektif Budaya dan Sejarah Masuknya Islam*. Ternate: HPMT Press. p. 19.

⁴ The symbol of a two-headed bird that means the belief of human existence on earth as a creation of Allah SWT in human relationships with humanity must be united.

⁵ Customary based on Shari'a (religious teachings) and the Shari'a based on the book of Allah SWT (Al-Qur'an) and the sunnah of the Prophet.

Thus, the authors hold that the protection of customary law community after the existence of Law of the Republic of Indonesia Number 6 Year 2014 on Villages can not be studied only by using these legal instruments, but in relation to the traditional right of origin and/or rights to the living spaces of customary law community review sectoral legislation that translates the philosophy of basic norms formulation of Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which puts the power of the state as an organization of power of all people. This formula shows how the state thinks (*denken*), wills (*willen*) and do and act (*handeling*) with the argument of authority over the earth, water, natural resources contained therein. Further described in Law of the Republic of Indonesia Number 5 Year 1960 concerning the Basic Agrarian Law, Law of the Republic of Indonesia Number 41 Year 1999 on Forestry is still within the scope of the arrangement that places the state in the highest position of control of agrarian resources (in the broad sense), while other entities including customary law community are bound to the recognition conditional.

The clause of this requirement shows that there is a substitution of customary law against state law by Jhon Griffiths as weak law pluralism because customary law can only apply if its existence is recognized by state law. Recognition of indigenous and tribal peoples also has implications for legal certainty including state recognition of customary justice institutions dealing with customary law community' problems under "recognized customary law".¹ On the other hand, the arrangement of villages into customary villages is directed at the independence of villages to realize the welfare of society as welfare state concept. In line with the terminology of state control over the formulation of the legal norm of Article 33 of the 1945 Constitution of the Republic of Indonesia according to Mohammad Hatta as quoted by Yance Arizona as controlled by the state which does not mean that the state itself becomes entrepreneur, businessman or *ordernemer*. It is more appropriate to say that the power of the state lies in the making of rules for the smoothness of economic roads, a rule that prohibits the exploitation of the weak by the capital.²

Customary law as living law is conceptualized as a legal system formed and derived from the empirical experience of past societies, considered fair or proper and has gained legitimacy from the customary ruler so binding or compulsory (normative). Thus, the state should devote itself to accommodating the rights of customary law communities as Jawahir Thontowi views that: "for the foreseeable future, recognition and respect for community autonomy (village) is intended to answer the future especially in response to the globalization process, which is characterized by the liberalization process (information, economy, technology, culture, etc.) and the emergence of economic players in global scale. The impact of globalization and exploitation by global capitalists is unlikely to be faced by locality, albeit with adequate autonomy. This challenge requires a stronger institution (in this case the country) to deal with it".³

Thus, Law of the Republic of Indonesia Number 6 Year 2014 on Villages should be implemented as a form of appreciation of actual relations between indigenous and tribal peoples as the traditional *lebensraum* that is accepted as customary law of indigenous communities that need to be supported by the state for the development of the capacity of customary law community in achieving their welfare.

IV. Conclusion

Indonesia as a country where its constitutionality has given recognition to the entity of customary law community which is part of the citizen that should be equally also paying homage to the identity of customary law community as legal subjects of equal right to prosper as well as the goals of national development. Recognition of customary law community is more declarative so that the government recognition ideally gives the influence of confidence in managing the existing natural resources so as to achieve the ideals of welfare state. In the province of North Maluku, the rights of customary law community have been identified through their rights of origin, among others, governance, *pertuanan* territory and other culture as a form of weak law pluralism. Law of the Republic of Indonesia Number 6 of 2014 on Villages as the legal basis for the implementation of rural development still formulate the ambiguous norms that have the potential for conflict, where the protection of customary law community is only limited through the Customary Village which is established through the local regulation.

References

- Achmad Sodiki. (1999). Politik Hukum Agraria: Unifikasi atau Pluralisme Hukum. Arena Hukum, 8 (July).
Bahder Johan Nasution. (2008). Metode Penelitian Ilmu Hukum. Bandung: Mandar Maju.

¹ Jhon Griffiths. (2005). Memahami Pluralisme Hukum, Sebuah Deskripsi Konseptual dalam Pluralisme Hukum, Jakarta: HUMA. p. 77-78.

² Yance Arizona. (2011). Perkembangan Konstitusionalitas Penguasaan Negara atas Sumber Daya Alam dalam Putusan Mahkamah Konstitusi, *Jurnal Konstitusi*, 8(3): 260.

³ Jawahir Thontowi. (2013). Perlindungan dan Pengakuan Masyarakat Adat dan Tantangannya dalam Hukum Indonesia. *Ius Quia Iustum*. 1(20): 21-36.

- Birgitte Feiring. (2013). *Indigenous Peoples' Rights to Lands, Territories, and Resources*, Rome: International Land Coalition.
- Bushar Muhammad. (1994). *Asas-Asas Hukum Adat; Suatu Pengantar*. Jakarta: Pradnya Paramita.
- C. Van Vollenhoven. (2013). *Orang Indonesia dan Tanahnya*. (Diterjemahkan Soewargono). Yogyakarta: STPN Press.
- Departemen Pendidikan Nasional. (2001). *Kamus Besar Bahasa Indonesia*. Jakarta: Balai Pustaka.
- H.A.W. Widjaja. (2003). *Pemerintahan Desa/Marga*, Jakarta: Raja Grafindo.
- H.R. Otje Salman Soemadiningrat. (2015). *Rekonseptualisasi Hukum Adat Kontemporer*. Bandung: Alumni.
- Husen Alting. (2010). *Dinamika Hukum dalam Pengakuan dan Perlindungan Hak Masyarakat Hukum Adat Atas Tanah*. Yogyakarta: LaksBang PRESSindo.
- Husen Alting. (2011). *Penguasaan Tanah Masyarakat Hukum Adat (Kajian Terhadap Masyarakat Hukum Adat Ternate)*. *Jurnal Dinamika Hukum*, 11(1).
- I Nyoman Nurjaya. (2008). *Pengelolaan Sumber Daya Alam dalam Perspektif Antropologi Hukum*. Jakarta: Prestasi Pustaka.
- I Gede A.B. Wiranata. (2005). *Hukum Adat Indonesia, Perkembangannya dari Masa ke Masa*. Bandung: Citra Aditya Bakti.
- Jawahir Thontowi. (2013). *Perlindungan dan Pengakuan Masyarakat Adat dan Tantangannya dalam Hukum Indonesia*. *Ius Quia Iustum*. 1(20).
- Jhon Griffiths. (2005). *Memahami Pluralisme Hukum, Sebuah Deskripsi Konseptual dalam Pluralisme Hukum*, Jakarta: HUMA.
- Mudafar Syah. (2005). *Sejarah Hukum Adat dan Lingkungan Hidup Adat Ternate*. In Sukardi Syamsuddin & Basir Awal. (Eds.), *Maluku Kie Raha dalam Perspektif Budaya dan Sejarah Masuknya Islam*. Ternate: HPMT Press.
- Nurhasan Ismail. 2012. *Arah Politik Hukum Pertanahan dan Perlindungan Kepemilikan Tanah Masyarakat*. *Jurnal Rechtsvinding Media Pembinaan Hukum Nasional*, 1(1).
- Philipus M. Hadjon. (1987). *Perlindungan Hukum Bagi Rakyat Indonesia*. Surabaya: Bina Ilmu. p. 2-3.
- Rifqi Ridlo Phahlevy. (2016). *The Concept of Village Autonomy in Indonesia (Indonesian Constitution Perspective)*, *Rechtsidee Journale*, 3(1).
- Soerdjono Soekanto & Soleman B. Taneko. (1981). *Hukum Adat Indonesia*. Jakarta: Rajawali Press.
- Soetandyo Wignjosoebroto. (1998). *Kebijakan Negara untuk Mengakui dan Tak Mengakui Eksistensi Masyarakat Adat Berikut Hak atas Tanahnya*. *Jurnal Masyarakat Adat*. 1(1).
- Ter Haar. (1983). *Asas-Asas dan Susunan Hukum Adat*. Jakarta: Pradnya Paramita.
- Tyson. (2014). *Review of 'Adat and Indigeneity in Indonesia: Culture and Entitles between Heteronomy and Self-Ascription'* edited by Brigitta Hauser-Schaublin, *UniversitätsverlagGöttingen. Journal of Social Issues in Southeast Asia*, 29(3).
- W.J.S. Poerwadarminta. (1982). *Kamus Besar Bahasa Indonesia*. Jakarta: Balai Pustaka.
- Yance Arizona. (2011). *Perkembangan Konstitusionalitas Penguasaan Negara atas Sumber Daya Alam dalam Putusan Mahkamah Konstitusi*, *Jurnal Konstitusi*, 8(3).