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Recognition and Protection of Indigenous Society in Indonesia

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***Abstract*—**Indonesia is a legal state. The consequence of this status is the recognition and protection of the existence of indigenous peoples. This paper aims to describe the dynamics of legal recognition and protection for indigenous peoples within the framework of Indonesian law. This paper is library research based on literature. The result states that although the constitution has normatively recognized the existence of indigenous peoples and their traditional rights, in reality, not all rights were recognized and protected. The protection and recognition for indigenous people need to be strengthened.

***Keywords*—**Indigenous peoples, customary law, state law, state of law.

I. Introduction

ONE of the modern state-of-law characteristics is the state's respect for human rights which is outlined in its constitution. The recognition of such human rights creates a number of political and legal consequences and responsibilities of the state to respect, to protect, and to fulfill them. Article 1 Paragraph 3 of the 1945 Constitution of the Republic of Indonesia expressly stated that Indonesia is a state of law.

In the Indonesian context, the socio-political structure of the society is very plural and heterogeneous, because there are so many groups of micro socio-political entities formed in societies whose lives and relationships are based on the law they make by themselves, apart from the state law. One example of such communities is the indigenous peoples who existed long before the State of Indonesia was founded. Article 18B, Paragraph 2 and Article 28I, Paragraph 3 of the 1945 Constitution of the Republic of Indonesia expressly recognize the existence of indigenous peoples and their traditional rights. However, the field situation is very much different from the sound of the two articles. In fact, in areas that already have local laws or regulations on the protection of indigenous peoples, conflicts that exclude their rights, on natural resources, for example, commonly happen. In other words, there is a denial of the rights of indigenous peoples, the denial of the identity and existence of them. In this case, the defining and interpreting on indigenous peoples often mean a limitation on them, even some of the violence and deprivation of indigenous peoples' rights and a number of liberal designs and projects through 'minoritization' of indigenous peoples threaten their existence, resulting in a systemic violation of human rights [1].

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Despite many laws and regulations that have been made and their implementations to give legal recognition to indigenous peoples, an important question remains unanswered, and that is: Has the model or concept of recognition in the relationship between the state and the tribal community been accommodated in the law well enough to respect, to protect, and to fulfill human rights, especially for indigenous peoples? To answer this question, this paper focuses on the dynamics of implementation of legal recognition and protection of indigenous peoples within the framework of Indonesian law.

II. The Existence and Rights of Indigenous People

In elaborating the regulation on the existence and rights of indigenous peoples in Indonesian positive law system, the easiest thing to do is to examine its regulation in the 1945 Constitution. In this constitution, there are no specific regulations on customary law but only on the existence of customary law community, namely in Article18B Paragraph 2 and Article 28I Paragraph 3, which say that:

> "The State recognizes and respects the communities of indigenous peoples and 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, as regulated by law".

While Article 28I Paragraph 3 of the 1945 Constitution says:

> "The cultural identity and rights of traditional societies are respected in harmony with the times and civilizations."

Based on the provisions of the two articles above, it is clear that there is a form of regulation that the existence of indigenous peoples and/or traditional communities is recognized only if it meets the criteria, namely: as long as they are alive, according to the development of society, not contradictory to, the Indonesian principle and are regulated by law.

The conditional recognition model is a model inherited by the colonial government. The requirements had already existed in Aglemene Bepalingen 1848, Regering Regress 1854 and Indische Staatregeling 1920 and 1929, which say that indigenous and eastern foreigners who are unwilling to submit to European civil law apply the laws of religion, institutions and customs of society, "as long as it does not contradict the generally recognized principles of justice" [2]. Such requirements are discriminatory because they are closely linked to the existence of culture. The emerging requirements orientation is the effort to subjugate customary / local law and try to direct it into a formal/positive/national law. On the other

hand it also assumes that indigenous peoples are communities that will be "eliminated" to become modern societies, who practice the pattern of production, distribution and modern economic consumption. While Hardiman stated that conditional recognition has a subject-centric, paternalistic, asymmetrical, and monologal paradigm, such as: "The state acknowledges", "The state respects", "along ... in accordance with the principle of Indonesia" which presupposes the great role of the state to define, recognize, and legitimize the existence of them, as long as indigenous peoples are conquered under the state regulation or, in other word, "tamed" [3]. This paradigm is not in accordance with the principle of equality and autonomy in democracy.

Even Satjipto Rahardjo stated that four requirements in Article 18 B Paragraph 2 of the 1945 Constitution as a hegemonial state power which determines the presence or absence of indigenous peoples. The state wants to interfere, organize, define, divide, do the grouping (*indelingsbelust*) to them, by and according to the perceptions of the state power holders [4]. While Soetandyo Wignjosoebroto stated that the four requirements, both ipso facto and ipso jure would be easily interpreted as "the petitioned confession, with the burden of proof of the existence of indigenous peoples by the indigenous peoples themselves, with a policy of recognizing or not admitting unilaterally in the hands of central government power " [5].

The existence of this limited recognition concept is more visible in the regulation in the level of legislation (law), which can be started from the Basic Agrarian Law / BAL (Law No. 5 of 1960) as a law which explicitly not only regulate the existence of customary community but also customary law.

The regulation of BAL on indigenous peoples can be found in Article 2 Paragraph 4 and Article 3, while the regulation on customary law can be found in Article 5.

Article 2, Paragraph 4 of BAL states that:

> "The implementation of the state's right to control the indigenous people may be authorized to the private and customary law communities, as necessary and *in such a way that it shall not be contradictory to the national interest*, in accordance with the provisions of the Government Regulation."

Article 3 of BAL states:

> "In view of the provisions of Articles 1 and 2, the implementation of customary rights and similar rights from customary law communities, insofar as they still exist, *shall be in accordance with national and state interests, based on national unity and shall not be contrary to the higher laws and regulations.* "

While Article 5 of BAL states:

> "The agrarian law applicable to the earth, water and space is customary, *as long as it is not contradictory to the national and state interests*, based on the unity of the nation, to Indonesian socialism, and *to the regulations in this law and to other law*, all things with regard to the elements that rely on religion law."

Based on the provisions of the articles of BAL above, it is clear that the existence of indigenous people and their traditional rights is recognized only if it is not contradictory to national legislation and interest, and this national interest must be referred to Article 33 Paragraph 3 of the 1945 Constitution as stated in Article 3 of BAL, namely the interests of state control in the highest level of earth, water, space and all the natural wealth contained therein.

There is an explanation on the regulation of customary law as stated in Article 5 of the BAL. It refers to the general explanation point III number (1) which states that the term "customary law" here means customary law which has been improved and adjusted with the interest of a community in the modern state and in relation to the international world. It is adapted to Indonesian socialism that simply means a law that embodies the awareness of Indonesian society that is different from the western civil law which is no longer used. Thus, the term customary law stated in Article 5 of BAL is not a law applicable in indigenous people's environment as traditional customary law meanings, but is a "customary law that has been eclipsed and replaced by national character".

The regulation of indigenous people and their traditional rights under the concept of limited recognition which is in accordance with BAL can also be found in the Forestry Law (Law No. 41 of 1999). Several articles governing the existence of indigenous people in the Forestry Law include Article 4, Paragraph 3, and Article 67.

Article 4 Paragraph 3 of the Forestry Law states

> "State forest tenure still considers the rights of indigenous legal community, as long as they still really exists and acknowledges its existence, and does not conflict with national interests".

While Article 67 of the Law states:

(1) "Indigenous legal community, as long as they still really exist, is claimed to be entitled to:
a) collect forest products to meet the daily needs of the indigenous peoples concerned;
b) conduct forest management activities based on customary law which is not contrary to law; and
c) gain empowerment in order to improve its welfare.
(2) Inauguration and removal of customary community communities as stated in paragraph (1) shall be stipulated by Regional Regulation.
(3) Further provisions as stated in paragraphs (1) and (2) shall be regulated by the Government Regulation."

Furthermore, the explanation of Article 67 of Paragraph (1) states:

> "Indigenous legal community's existence is recognized if they are really fulfilled the following conditions:
> a) The society is still in the form of a community (rechtsgemeenschap);
> b) There is an institution in the form of its traditional ruling device;
> c) There is a real customary law area;
> d) There are institutions and legal instruments, especially customary justice, which are still adhered to; and,
> e) They still hold forest product harvesting in the surrounding forest areas for the fulfillment of daily

living needs."

Based on the above explanation, according to the Forestry Law, the existence of indigenous people is recognized to exist only if its existence has been established by a law which bases itself on the criteria as described in the explanation of Article 67 paragraph 1 above, and above all, the most important thing is that the recognition of the existence of such indigenous people shall not be contradictory to the national interest as stated in Article 4, Paragraph 3. Indeed there are many other laws and their derivative technical regulations governing the existence of indigenous people, but of the many legislations there is one similarity, i.e.: the concept of recognition of the existence of indigenous people is a limited recognition concept that the existence of indigenous people are recognized as long as it is not contradictory to the interests of the state and is not in conflict with the provisions of law.

According to history, the recognition of the existence and limited rights of indigenous people is inseparable from the context of the regime's political control since the colonial period in the Dutch East Indies, and then, such submission is perpetuated in the present legal situation. In the McCarthy study, for example, the colonial government adopted an appropriate strategy to exercise control over natural resources in the archipelago through the appointment of customary structures as representative of colonial administration [6].

The elimination of the existence of indigenous people as a whole, especially in their complex relations with agrarian and natural resources continues in the concept of establishing the nation-state of Indonesia [5]. The modern state undermines old communities such as indigenous people, which are subsequently thought to be merged into the state as envisioned as a united nation, forced to become a common imagination among the thinkers and politicians in Jakarta with a free community in the interior of Papua, Sulawesi, Kalimantan, and Sumatra. Next, under this shadow a common political institution is formed, namely: a state [7].

In his study, Steny concluded that the discourse on indigenous people from colonial to postcolonial, presents a lame pattern of relationships because of dominant power structures on one hand (modern state and society) and oppressed as well as controlled groups on the other (traditional-customary community) [8].

III. Discussion

The consequence of a limited recognition concept of the existence of indigenous people and their rights and interests which are (supposed to be) contradictory with the interests of the state (national interest) is that if there is a rule of customary law, which is considered to be contradictory with the rule of the state positive law, the existence of indigenous people along with their traditional interests and rights regulated in customary law can be ignored. This then often leads to social conflicts that generally involve indigenous people on the one hand and the state or companies on the other hand which are interested in investing in and "developing" areas where the indigenous people live. This conflict is rooted in the contradictions of interests between the parties, each based on the normative order of the legal system completely different from each other, that is between customary law (which is used by indigenous people as a basis for thinking and acting) and the state positive law (which is used by the state and companies as a basis for thinking and acting).

The customary law system is a legal system which is totally different from the western legal system and all its follow-up concepts, including the concept of the existence of the state. While the state legal system is fully based on the existence of a state with historical roots in ancient Greece, the customary law system stands on the historical roots of indigenous people that existed long before the concept of the law of the nations was transplanted by the Europeans through colonialism in the eastern and southern states, including the archipelago. This seems to be in line with the basic concept of customary law, which is firstly expressed by Van Vollenhoven, who stated that customary law is a law (for indigenous Indonesians) which is not based on the regulations made by the Dutch East Indies government [9].

Customary law is a distinctive legal system and therefore different from other legal systems, including the western legal system as part of the concept of the State of Law. Thus, it can be said that customary law is a legal system that is not concurrent with the concept of the State of Law. This dissonance can, more or less, be seen from some quite contrasting differences between the characteristics of customary law and the common elements in the concept of the State of Law. These differences include the following:

Firstly, the concept of the State of Law, the supremacy is the law of the state, whereas customary law is not an artificial law of the state but a law formulated from the daily habits of society.

Secondly, the concept of the State of Law, the principle of legality that the law must be clear, definite, and measurable and unchangeable is the absolute prerequisite, whereas in customary law it is not written and flexible and dynamic, and every problem that emerges is precisely settled according to existing circumstances (tends to be arbitrary).

Thirdly, in its substantive category, one of the elements of the vital Law State concept is the protection of individual rights and freedoms. This indicates that in the concept of the State of Law, the rights of individuals are fundamental rights, as a consequence of liberalism in European culture as the womb of the birth of this concept. At the same time, the purpose of the State of Law is to protect (the life and private property) of every citizen of an arbitrary act by either the state or by a fellow citizen. This is in contrast to the customary law in which the ultimate right is not the right of the individual, but the right of the fellowship. Under customary law, an individual's right may be disregarded if he or she is against the right of the fellowship.

A real example of the contrast between indigenous people's structures and their customary law systems and state structures with the concept of the State of Justice in the Indonesian context can be seen in the frequent emergence of agrarian conflicts involving indigenous people on the one hand and the state or companies on the other. This is initialed by a

considerable difference in legal conception (legal gap) about land between the customary law and Indonesian positive law.

Based on the provisions of Indonesia's positive law, the 1945 Constitution, Article 33 Paragraph 3, together with all its derivative legislation, it can be noted that earth, water, space, with all things contained therein is viewed as a mere material object ("wealth") that can be utilized to encourage creation, increasing the standard of living economically in society as a whole ("... for the greatest prosperity of the people"). Due to the existence of the state as a macro-socio-political entity that has exclusive power at the highest level of all people within its territory (as an inherent part of the concept of the State of Law), the land as a material wealth is, at the highest level, controlled by the state. On the other hand, according to customary law, the land is not a material thing but it rather has a supernatural meaning (as a form of religious-magical pattern). It is the motherland or mother who gives birth to everything that exists on earth including human beings and other living things. Consequently, there is a close relationship between indigenous people and the inseparable land like a relationship between a child and his mother [10]. Based on this magical-philosophical concept, for indigenous people, the land is a collective property belonging exclusively to its community of customary law just as a mother to her children. This is called the *ulayat* right, which is the right of the community of customary law in which the land is considered as a manifestation of the power of the communion of customary law, namely the power of the land, and thus, all the existing natural resources belong to the customary community law. In addition, Koesnoe explained that the existence of *ulayat* right on land brings legal consequences internally and externally [10]. In the former, the *ulayat* right provides capacity exclusively to the fellowship of the customary law to deal with administer, utilize, and care for the land and its natural resources, and in the later, it assigns the responsibility to safeguard its land and natural resources from the control of foreign parties and all things that endanger the existence of land and natural resources. This is clearly a reflection of the reciprocal relationship between mother and child, the child (the customary community) is sustained by his mother (the land), and on the contrary, the child is obliged to protect and protect the mother. That is why the land in the perspective of indigenous and customary people can only be controlled by the customary law community in which the land is located and it is prohibited for foreign parties outside the fellowship, including the state.

IV. Conclusion

The regulations on indigenous people are inadequate. Limited recognition on indigenous peoples is based on excessive suspicion on them. On the one hand, the state wants to recognize them. On the other hand, it suspects these customary rights may disrupt the so-called "national interest" which is sometimes interpreted as the grand opening of plantations and forests. The national interest should be interpreted as the interest of citizens to empower to manage their own resources. Therefore, the national interest must be translated as the vision and mission of the government to develop the country beginning with the periphery, the community that had been marginalized.

Based on the statement above, the constitution requires a change. Such change can be done through formal amendment, through formal interpretation by the judicial interpretation, as well as through the implementation of legal construction in the operational and policy regulations. Formal amendments have the advantage of being able to directly change the text of the constitution, thus avoiding the often highly biased meanings of the legal texts available today. But this is not easy, considering the great procedures and political impulse to change the constitution. The amendments are necessary to, generally, provide the protection and the fulfillment of human rights and, specifically, regulate on the existence and rights of indigenous peoples on the land and natural resources in a cluster of arrangements with the state control over them. In addition, restrictive regulations on the existence and rights of indigenous people need to be reviewed because they have been “used” to discriminate and neglect the rights of indigenous people. A number of requirements existing today justify the provisions of the law to limit the existence and rights of indigenous people. Furthermore in the level of legislation, an integrated arrangement on the existence and rights of indigenous people is required. So far, the existence and rights of indigenous people have spread in various laws. Within these various laws, there are unlawful arrangements on terms, definitions, criteria, rights of indigenous people, administration on existence, lack of clarity of mechanisms or recognition of pluralism, resolution of the right mechanism, affirmation of the concept of indigenous people’s rights, and paradigms and perspectives in treating indigenous peoples as part of Indonesian citizens. Such uncertainty or inconsistency leads to the weakening or even elimination of indigenous people’s rights, along with the common law that accompanies them. These integrated regulations can be done by providing a law on the recognition and protection of indigenous people. This is in line with the mandate of Article 18B Paragraph 2 of the 1945 Constitution of the Republic of Indonesia which requires that further regulation of the existence and rights of indigenous people be regulated in the law. The two main issues underlying the need for a special law on indigenous people, namely: to overcome the problems encountered by the community in the field (social aspect) and to overcome the problem of complicated rules on the legal customary (legal aspect) which all this time has caused uncertainty about who indigenous people are and what their rights over livelihood resources are.

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