

PalArch's Journal of Archaeology of Egypt / Egyptology

LEGAL PROTECTION FOR INDIGENOUS PEOPLE'S RIGHTS IN INDONESIAN LAW

Daniel Edwin Indrajaya Gore¹, EllyneDwi Poespasari^{1}*

¹Department of Basic Law Sciences, Faculty of Law, Universitas Airlangga

**Corresponding Author: EllyneDwiPoespasari, Department of Basic Law Sciences, Faculty of Law, Universitas Airlangga, Surabaya (60286) East Java, Indonesia. Email: ellynefh.unair@gmail.com*

Daniel Edwin Indrajaya Gore, EllyneDwiPoespasari. Legal Protection For Indigenous People's Rights In Indonesian Law--Palarch's Journal Of Archaeology Of Egypt/Egyptology 17(4), 2516-2526. ISSN 1567-214x

Keywords: Customary law community unit, Legal rights, Legal protection, and customary law.

ABSTRACT:

Introduction: The Unity of the Customary Law Community (KMHA) has a very important role in its position as an entity or legal entity recognized in the Unitary State of the Republic of Indonesia (NKRI). Apart from its existence which existed even before the existence of the Republic of Indonesia was established, it is more than the Customary Law contributes to the development of the Indonesian National Law to be imbued with the souls of the people of the archipelago. **Objectives:** The purpose of this study explains the legal protection of indigenous people's rights and tribal peoples regulated in the laws and regulations and the resolution of disputes for indigenous peoples receiving legal protection. **Methods:** The study methods used were qualitative normative legal research, statute approach, conceptual approach, and historical approach. **Results:** The results of the study revealed that an example of two real violations cases of KMHA rights that occurred in Indonesia can still be seen that the legal protection of the rights of Indigenous Peoples is regulated in Indonesian laws and regulations. However, in the course of recognition of KMHA many encountered problems, especially in development policies in Indonesia, either with the government in power or the private sector which is associated with the recognition of the rights of KMHA itself. **Conclusion:** Indonesian laws and regulations are proven to regulate the customary law community. These laws and regulations relate to the existence of the Customary Law community as a legal entity of a country and the traditional rights attached together with the recognition that the protection of the community's rights Customary Law is regulated in legislation and criminal provisions must refer to the applicable criminal law provisions in Indonesia.

Keywords: Customary law community unit, Legal rights, Legal protection, and customary law.

INTRODUCTION

Customary law is a law that lives and develops within The Unity of the Customary Law Community (KMHA), because it is an inseparable part of the dynamics of KMHA. Customary law is different from customs which is called as customary law must contain certain sanctions, both in the form of physical sanctions and other fines. Van Vollenhaven in his book "Het Adatrecht van nedelandsch-indie", wrote that customary law is a "set of rules that apply to native and foreign eastern groups which on one hand have sanctions (because they are" law ") and on the other hand, they are not codified (because it is "custom")(Sudiyat, 2012). Ter Haar put forward two formulations which show a change of opinion about what is called indigenous law. In his 1930 Diestation entitled "Landraad Justice based on unwritten law", he set limits on customary law (Haar, 1999).

KMHA is a group of people who are part of the whole Indonesian nation. The founders of the nation-state of Indonesia realize from the beginning that Indonesian was formed on the basis of a pluralistic society, each of them has long had a political system, economic, legal, socio-cultural, and religious. Thus, the philosophy of Indonesian people written in "Unity in Diversity" reflects the respect and recognition of Indonesian people for the diversity. Constitution 1945 (hereinafter abbreviated as the 1945 Constitution) has given respect and recognition to the plurality of KMHA. In addition to the 1945 Constitution, the regulation on the Unity of Customary Law Communities can also be found in Act Number 5 of 1960 concerning the Basic Agrarian Law contained in Article 2 paragraph 4, Article 3, and Article 5.

Protection of indigenous peoples to maintain their constitutional rights if there are laws which impair their constitutional rights as contained in Article 51 paragraph (1) of Law No. 24 of 2003 concerning the Constitutional Court jo. Law Number 8 of 2011 concerning amendments to Law Number 24 of 2003 (hereinafter referred to as the Constitutional Court Law). Those who have legal standing. Regarding the legal protection of customary law communities, it must provide shelter to the community thus they can enjoy all the rights granted by the law or in other words legal protection is a variety of legal efforts that must be given by law enforcement officials to provide a sense of security, either mind or physical from interference and various threats from any party.

According to Setiono, legal protection is an act or effort to protect the public from arbitrary acts by the authorities and private corporations that are not in accordance with the rule of law, to realize order and peace so as to enable humans to enjoy their dignity as human beings (Setiono, 2004). In regard to the rights of indigenous and tribal peoples, there are still many customary

disputes in Indonesia, for instance the case of the resolution of indigenous and tribal peoples' disputes.

The first case, in KMHA Pandumaan Sipituhuta Humbang Hasundutan North Sumatra Province and PT Toba Pulp Lestari were in dispute by fighting for the Tukko Nisolu customary area which is now controlled by PT Toba Pulp Lestari Tbk. In such cases, violations of the legal rights of KMHA in Indonesia often occur until now. Second, the customary land dispute case of the Roughuri Rekuri Check Bocek Selesek community against West Sumbawa Regency Government and PT Newmont Nusa Tenggara which is now being changed to PT Amman Mineral Nusa Tenggara. The initial claim submitted by the Customary Law Community was the Bocek Selesek Rensuri Check to the Regional Government regarding the draft local regulation related to the recognition of status as the Customary Law Community.

It is related to the presentation of the protection of indigenous and tribal peoples based on statutory regulations, especially based on Indonesian constitution and some examples of KMHA legal disputes with corporations and the state. This study aims to explain the legal protection of indigenous people's rights and tribal peoples regulated in the laws and regulations and the resolution of disputes for indigenous peoples receiving legal protection.

LITERATURE REVIEW

Customary Law Society

The customary law community unit, especially in Indonesia, can be grouped into three groups: first, the kinship customary law alliance consisting of three forms of harmony, namely family, family, and tribal. Second, neighbourhood legal alliance consisting of three forms, namely neighbourhood, village, and district. Third, the organizational customary legal alliance which consists of three forms of harmony, namely the pillars of the group, the pillars of the organization, and the pillars of the group (Chandra, 2008.).

Therefore, it can be concluded that what is meant as the Customary Law Community is a community unit that is bound to the group that has similarities either in terms of spirituality, genealogical, territorial, or similarity of objectives (such as the tribe of Samin in Central Java) which live in an area protected by legal mechanisms created from, for, and by the community itself.

Settlement of Customary Law Community Disputes

Settlement of disputes according to Customary Law is always intended to restore the balance of society that is disrupted by disputes (Mayastuti, 2013). In resolving Customary Law disputes, deliberation and consensus are very pronounced. Besides that, this form of deliberation and consensus is usually preceded by the spirit of good faith, fairness, and wisdom from parties believed to be mediators (Wulansari, 2009) or Soepomo said were called Customary Law officers as previously mentioned. As in the field of Western Law, there are also known dispute resolution mechanisms in Customary Law

that are often used but it is still necessary to remember that this mechanism does not mean that it is procedural law.

The Concept of Legal Protection according to Philip M. Hadjon

According to (Hadjon, 1987), legal protection is the protection of dignity and dignity, as well as recognition of human rights owned by legal subjects based on the legal provisions of arbitrariness, as a collection of regulations, or rules that will protect one thing from another. He further stated that legal protection is generally in the form of a written regulation, hence it is more binding and will result in sanctions that must be imposed on those who break them. Then, he continued that it could be distinguished 2 types of means of legal protection, namely Means of Preventive Legal Protection and Facilities of Repressive Legal Protection.

METHOD

The study methods used in this study were qualitative normative legal research, statute approach, conceptual approach, and historical approach that can find truth coherence, such as the rule of law in accordance with legal norms and norms in the form of orders or prohibitions that were in accordance with legal principles as well as whether one's actions were in accordance with legal norms or legal principles or not.

RESULTS

Legal Protection of the Indigenous Peoples Rights in Laws and Regulations Rights of Customary Law Communities

Customary law interpreted in this paper is customary law containing its constituent elements, such as customs as values that have been institutionalized in society through community actions, containing norms that are based on mutual agreement in writing, have an institution or organization which enforces, has sanctions, and is influenced by religion adopted by the community. Values and norms that have been obtained based on past agreements, in modern life are still referred to as local wisdom (Muazzin, 2014). According to AchmadSodiki, the concept of land tenure that applies to traditional societies, among others, is customary rights, namely a legal community's right as a unit that has outside and inside authority, and there are individual rights to land, that is, rights that are born due to exploitation which continues intensively on a piece of land (empty)(Sodiki, 1994).

The rights of the Customary Law Community can be divided into two categories, namely rights that are directly linked to universal rights called Human Rights and certain Rights that are not directly through the regulation of the Basic Law or referred to as rights constitutional rights. The most important characteristic of the rights of the Customary Law Community is its collective nature. Collective rights arise with the consideration that indigenous and tribal peoples as an anthropological community need something to maintain their existence and cultural identity as well as to develop and develop the humanitarian potential of their citizens to achieve a higher level of welfare

(Zuhraeni, 2014). The collective nature of the Customary Law Community rights is what makes indigenous peoples different from other legal entities or entities. This right will be further regulated in the legislation.

Legal Protection of Customary Law Communities in Indonesian Constitution

Related to 3 (three) Articles in the 1945 Constitution, each has a different substance and approach in viewing KMHA. The different substances and approaches lead to different legal responsibilities (Arizona, 2010) illustrate this in the Table 1. below.

Table 1. Construction of the arrangements for the existence and rights of KMHA in Constitution 1945

Role	Approach	Substation	Responsibility
Article 18B Paragraph (2)	Government	-Unity Indigenous Law Society -Traditional rights Requirements: -as long as still alive -as same as the society development -as same as the principle of Republic of Indonesia -regulated in Constitution	State recognize and respect. Then regulated in constitution.
Article 28I Paragraph (3)	Human Rights	-Cultural identity -The Rights of Indigenous people “by the requirement that in line with the development era”	State is respected
Article 32 Paragraph (1) and Paragraph (2)	Cultural	- <i>Right to develop cultural values</i> - <i>cultural language</i>	State is respected and guarantee the freedom of society

Regarding the State of Indonesia, although it has not yet ratified the ILO Convention 169, the principles of recognition, and protection of the rights of indigenous as well as tribal peoples to natural resources governed by the convention were already regulated in the Constitution of the Republic of Indonesia. Important recognition of customary law communities and customary rights is found in the Basic Law (1945 Constitution) as a result of the second amendment. Article 18 B paragraph (1) and paragraph (2) of the 1945 Constitution.

Legal Protection of Customary Law Communities in Law Number 5 of 1960

Arrangements regarding Customary Law Community Unity can also be found in Article 2 paragraph 4, Article 3, and Article 5 of Law Number 5 of 1960 Concerning Basic Agrarian Law governing Customary Rights of Customary

Law Community Unity. The customary rights themselves according to BoediHarsono are a series of authority and obligations of the Customary Law community which are related to the land located within their territory. Customary rights are rights obtained by a legal community in the land and what is contained therein within the boundaries of the legal community (Dijk, 1971).

Customary rights are recognized when there is still a certain group of indigenous peoples concerned in reality. If it still exists, the implementation must be in accordance with national and state interests and does not conflict with statutory regulations. Law No.5 of 1960 concerning UUPA Article 3 and 5 recognizes and respects the customary law community and land rights with some restrictions.

Legal Protection of Customary Law Communities in the Constitutional Court Decision Number 35 / PUU-X / 2012 against Law Number 41 Year 1999

The legal implication before the Constitutional Court Decision number 35 / PUU-X / 2012 is in article 1 number 6 of Law Number 41 of 1999 concerning forestry. It is stated that customary forests are still included in state forests. Even though, they are within the territory of the customary law community. Prior to the petition for testing, even though Article 4 paragraph (3) of Law No. 41/1999 regulates that "Forest control by the State still takes into account the rights of indigenous and tribal peoples, as long as it still exists and is recognized and does not conflict with national interests in reality," however in practice, this article is felt to cause a lot of problems. Especially those aimed at first weakening and eliminated the country's traditional culture (Mazhitova, 2016). After the decision of the Constitutional Court and the abolition of the word "state" in the definition of customary forest, making control of customary forest fully constitutes the right of the Customary Law Community.

Legal Protection of Customary Law Communities in Law Number 39 Year 1999 Concerning Human Rights

Arrangements for protection of indigenous peoples based on Law No. 12 of 2005 concerning Ratification of the International Covenant on Civil and Political Rights. The law which contains the ratification of the International Covenant on Civil and Political Rights expressly recognizes the right not to be discriminated against by everyone as regulated in Article 2 paragraph (1) and Article 3, the right to enjoy all rights, (including rights to land and resources nature) regulated in Article 26, the right to enjoy a unique way of life related to the use of land and natural resources is regulated in Article 27, and the right to participate is regulated in Article 25. Generally, the arrangements in this Law are in line with UNDRIP as stated in the previous section. Customary or customary land law in Indonesian society today has encouraged broad local aspirations for recognition and recognition of customary land rights and affirmation of indigenous peoples' claims to resources and land (Mcwilliam, 2006).

DISCUSSION

Legal Protection of Customary Law Community Dispute Resolution

The dispute that occurred over the last thirty years was caused by the problem of land grabbing and customary forest which was performed by one of the KMHA in Tapanuli, namely Pandumaan and Sipituhuta (Harahap, 2016). Following are the aspects of violation of the law and the seizure of the rights of Pandumaan Sipituhuta Customary Community by PT Toba Pulp Lestari.

PT Toba Pulp Lestari's Chainsaw Confiscation Event

One day on June 22, 2009, when a wedding party was taking place in a traditional village, Pandumaan, talks began and it was agreed that it should immediately stop logging by PT Toba Pulp Lestari by prohibiting PT Toba Pulp Lestari workers from logging incense due to the area belongs to the Customary Law Community. On the next day, June 23, 2009, when it was very early in the morning two residents of the village, numbering hundreds of people, left spontaneously to Tombak Haminjon and found several workers at PT Toba Pulp Lestari doing logging on the land. One member of the Customary Law Society (Harahap, 2016).

The members of the Customary Law Community put together chainsaw totalling 14 units and took the initiative to make a letter on a piece of paper, a kind of receipt proof for the chainsaw taking. Subsequently, residents asked PT Toba Pulp Lestari workers and public relations officials to sign the receipt (Harahap, 2016). Residents reasoned that the confiscation of chainsaw prevented the increasing damage and the optimization of the Pandumaan and Sipituhuta customary lands and forests. The seizure of chainsaws found in the homes of residents and arrested 3 members of the Customary Law Community. Then the residents came to the office of the Humbang Hasundutan District Representative Council in an effort to find a middle ground and to clean up their members who were arrested by the police.

Determination of 8 suspects and entered in DPO

Humbahas Regional Police responded by expressing a call that if the weapons were not returned or surrendered that night, all the houses would be searched. However, if the weapons are returned, the village will be safe, is considered to have no problems, and guaranteed. There will be no arrests of residents. On the guarantee of the Village Head, finally that night, around 23:00 WIB, Deputy Chief of the Resort Police, Chief of the Resort District Police of Pollung, and Head of the Intel Unit came to the village to pick up the weapon safely. However, after the weapons were taken, Humbahas Police Chief determined 8 Pandumaan and Sipituhuta residents to be suspects and DPO status (Harahap, 2016).

Thirty-one Farmers of Kemenyan Arrested

TPL worker who was released together with the police (Brimob) complete with long-barrelled weapons turned around and immediately attacked and

pelted residents with stones. The sound of gunfire was heard many times. Residents panicked and frightened, each running away to save himself. In that incident, 16 residents were captured and forcibly put into a truck. Not accepting with the treatment, residents came to Mapolres to free the 16 residents who were arrested earlier. Had a riot with officers, 15 more members of the Customary Law Community were arrested following 16 people before although several days later all prisoners were released (Harahap, 2016).

Settlement Efforts from Various Parties Related to this Case

Citizen response after the Constitutional Court decision 35 / PUU-X / 2012; Recommendation from the directorate general of forestry business development at the ministry of forestry; Komnas HAM findings and recommendations; National forestry council recommendations; The forestry ministry option is based on the recommendation of the national forestry council; and Recommendations for the district DPRD special committee were donated.

Violation of Law against the Customary Law Community Cek BocekSelesekRensuri West Sumbawa

Initial Description of Community Legal Disputes BocekSelesekRensuri West Sumbawa

The legal dispute that took place between the indigenous law community of Cek BocekSelesekRensuri against the West Sumbawa Government and PT Newmont Nusa Tenggara which has now been changed to PT Amman Mineral Nusa Tenggara. Problems faced by Bocek Community related to the rights to the KMHA region. BocekSelesekRensuri area is located in the central part to the south of the Sumbawa Regency with an area corresponding to the mapping results from the participatory KMHA of 28,975.74 Ha or around 3.46% of the Sumbawa Regency area 837,403.18 Ha, which has lived since the 1980s which is forests that are part of traditional identity and socio-economic activities and religious rituals, has been claimed as a State Forest and granted Mining Concession Rights to PT. Newmont Nusa Tenggara (Anindita, 2016).

Local Government of Sumbawa Does Not Recognize the Existence of the Customary Law Community, Cek BocekSelesekRensuri

Recognition of the Customary Law Community for Cek BocekSelesekRensuri is very important because it is related to the status of the Customary Legal Territory that is being disputed with PT Newmont Nusa Tenggara. However, it seems that the efforts conducted by the Indigenous Peoples Customary Law Community Association of BocekSelesekRensuri asked the local government to be given protection and legal guarantees related to their control of their customary land in the Sumbawa Government. Independently, regulating land ownership is a milestone in post-colonial Indonesian autonomy (Sukaryanto, 2017). The Regional Government of Sumbawa does not recognize the existence of the RensuriSelekekRensuri customary legal community and its customary land, even the Sumbawa Regent Jamaluddin Malik openly on every

occasion stated that Cek BocekSelekekRekuri legal community is illegal or does not exist (Muhammad Imran, 2015).

Mining Exploration Activities Breaking Indigenous Graves

PT Newmont Nusa Tenggara which resumed mining exploration activities after disregarding warnings from the Customary Law Community, Cek BocekSelesekRensuri, armed with the protection of two Brimobplatoones of the West Nusa Tenggara Regional Police, after learning of the high gold content in the area (Anindita, 2016).

Legal Protection can be performed against PandumaanSipitaanSipitaan Community Customary Law Dispute and PandumaanSipitaanSipat Customary Law Community

It is found 2 major categories of legal protection for dispute resolution as previously mentioned, namely: Preventive legal protection. Legal protection aimed at preventing the occurrence of these disputes can be found in several relevant laws and regulations in Indonesia. Legal protection in a repressive aspect of civil law. Dispute resolution can be performed with 2 alternative dispute resolution. First, as mentioned in the previous section that the parties in dispute with customary law communities can settle customary law disputes that are applicable in the disputed customary law territory, both those that carry out private dispute resolution, involving the Head of Custom / Relatives, and or uses the highest level, involving the village head. Second, because it is related to disputes in customary law areas which are still in the form of forests, then based on Article 74 of Law Number 41 Year 1999 paragraph (1) and (2).

Criminal Legal Aspects

Criminal law aspect in the dispute between PandumaanSipituhuta Customary Law Community in HumbangHasundutan Regency against PT Toba Pulp Lestari and the second one about the dispute of the Customary Law Community Checks for Cek BocekSelesekRekuri against PT Newmont Nusa Tenggara and the West Sumbawa Government, if it is related to forestry issues use criminal provisions in Chapter XIV of Law Number 41 Year 1999 concerning Forestry.

CONCLUSION

Laws and regulations in Indonesia are proven to regulate Customary Law Communities as a legal entity in a country and traditional rights attached together with the recognition. Although the recognition of traditional rights of the customary law community is often still hampered by provisions such as "not in conflict with national interests", "respected in accordance with the times and civilization", "based on national unity", "in accordance with statutory provisions". However, it can still be seen that the protection of the rights of the Customary Law Community is regulated in legislation and criminal provisions must refer to the provisions of criminal law in force in Indonesia.

REFERENCES

- Anindita, F. (2016). *Konflik Agraria Masyarakat Hukum Adat Atas Wilayahnya di Kawasan Hutan*. Jakarta: Komisi Nasional Hak Asasi Manusia Republik Indonesia.
- Arizona, Y. (2010). *Satu Dekade Legislasi KMHA: Trend Legislasi Nasional Tentang Keberadaan Dan Hak-Hak KMHA Atas Sumber Daya Alam Di Indonesia (1999-2009), dalam Yance Arizona (Eds.), Antara teks dan konteks: Dinamika pengakuan hukum terhadap hakKMHA atas sumber daya alam*. Jakarta: Huma.
- Chandra, A. I. (2008.). *Dekonstruksi Kesatuan Masyarakat Hukum Adat Dalam Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*. Malang: Disertasi, Program Doktor Ilmu Hukum Universitas Brawijaya.
- Dijk, V. (1971). *Pengantar Hukum Adat Indonesia*. Bandung: Terjemahan, A. Soehardi, Sumur.
- Haar, T. (1999). *Asas-Asas Dan Susunan Hukum Adat, terjemahan K.Ng.Suebakti Poesponoto*. Jakarta: Pradnya Paramita.
- Hadjon, P. (1987). *Perlindungan Hukum bagi Rakyat Indonesia*. Surabaya: Bina Ilmu.
- Harahap, S. S. (2016). *Konflik Agraria Masyarakat Hukum Adat Atas Wilayahnya di Kawasan Hutan*. Jakarta: Komisi Nasional Hak Asasi Manusia Republik Indonesia.
- Mayastuti, A. (2013). *Pola Mediasai Dalam Persektif Hukum Adat*. Solo: Jurnal Hukum Universitas Sebelas Maret.
- Mazhitova, A. A. (2016). *The Institute of Biys in The Imperial Russia and Early Soviet Period: From Reforms to Abolishment*.
- Mcwilliam. (2006). *Historical Reflections on Customary land Rights in Indonesia*.
- Muazzin. (2014). *Hak KMHA (Indigenous Peoples) atas Sumber Daya Alam Perspektif Hukum Internasional*. Sumedang: Padjadjaran Jurnal Ilmu Hukum.
- Muhammad Imran, I. P. (2015). *Perlindungan Hukum Terhadap Eksistensi Penguasaan Hak Atas Tanah UlParagraph oleh Komunitas Adat Cek Bocek Salesek Reen Suuri (Suku Berco) Studi di Kabupaten Sumbaw*. Malang: Program Studi Magister Kenotariatan Fakultas Hukum Universitas Brawijaya.
- Setiono. (2004). *Rule of Law (Supremasi Hukum)*. Surakarta: Magister Ilmu Hukum Program Pascasarjana Universitas Sebelas Maret.
- Sodiki, A. (1994). *Penataan Kepemilikan Hak atas Tanah di Daerah Perkebunan Kabupaten Malang (Studi tentang Dinamika Hukum)*. Surabaya: Disertasi, Program Pascasarjana Universitas Airlangga.
- Sudiyat, I. (2012). *Hukum Adat Sketsa AsasLiberty*. Yogyakarta: Cetakan Ketujuh.
- Sukaryanto. (2017). *Conflict Over Landownership in The Postcolonial Era: The Case of Eigendom land in Surabaya*.
- Wulansari, D. (2009). *Hukum Adat Indonesia Suatu Pengantar*. Bandung: Refika Aditama.

Zuhriani. (2014). *Kesatuan Masyarakat Hukum Adat Dalam Dinamika Politik Hukum Indonesia*. Bandar Lampung: Harakindo Publishing.