



## Indigenous Law on Land: How Does the Government Build Constitutional Protection Against Indigenous People

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### ABSTRACT

Indonesia has a lot of cultural diversity and abundant natural resources, one of which is found in the customary law system as one of the traditional laws that has existed for a long time as one of the most influential laws for some Indonesian people. This study uses a descriptive method with a qualitative approach and data triangulation analysis, the results of the study explain that basically customary law does not only regulate the community government system, customary law also always plays a role in the ownership of customary land rights, where land rights are starting to experience many disturbances. as well as obstacles in its management and sustainability, to build a customary law that synergizes with state law, customary law begins to adapt and adapt to modern human civilization, basically the Indonesian government has recognized and guaranteed every continuity of the customary law, as contained in the Law and political law in Indonesia.

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## 1. Introduction

As we know that Indonesia is an agricultural country that is rich in all its natural resources, including in terms of land, where land is the source of all livelihoods for some Indonesian people and not a few of our people are very dependent on land as a field to find sustenance, seek business opportunities and in fact land has a very useful value with a thousand uses, this can be seen in Article 33 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia which states that the Earth, water and space and the natural resources contained in the It is controlled by the state and is intended as much as possible for the prosperity of the people.

To improve the performance of its people in advancing the national medium-term development sector, the Indonesian government will take a policy related to building a sector of suburban areas and villages where there are fishermen and farmers who are obliged to receive more education in order to increase all abilities and income to match their aspirations the nation's ideals, namely prioritizing the direction of national policies and programs, the third RPJMN is aimed at further strengthening overall development in various fields by emphasizing the achievement of competitive economic competitiveness based on the advantages of natural resources and quality human resources as well as increasing scientific and technological capabilities (Budiyanto, 2017).

The use of land as a guarantee of prosperity for all Indonesian people, has been guaranteed by law and the government, because people's lives with land are a relationship between land and its rulers, especially indigenous peoples who carry out all their activities based on the values and norms adopted. in accordance with the traditions of each applicable customary law, as well as state laws that regulate and respect the existence of indigenous peoples, this is confirmed in the State Constitution which recognizes the existence of indigenous peoples, namely in Article 18 B of the 1945 Constitution. which states that the State recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with the development of the nation, society and the principles of the Unitary State of the Republic of Indonesia.

Humans and land are two aspects that are interrelated with each other, because land is the initial capital for humans to be able to stand on this earth, with land also humans can have a variety of food wealth and land is the most important capital in economic development for people's lives so that it is possible the complexity of problems regarding land with increasing economic needs, considering that land including everything attached to it becomes part of the land, such as trees or plants attached to the land (Mebri, 2017).



The increasing human needs in supporting all their activities, the higher the role of land as a source of life and as a decent place to live, it is important for anyone to take advantage of land as a support for their welfare because by preserving and developing all the potential contained in the soil then Human relations with land become a source of livelihood that is mutually synergistic and beneficial, then develops into management related to its use, and finally develops into control over the land. Given the increasing number of human populations, their need for land is increasing on the one hand the amount of land that can be controlled by humans is very limited in number, with these conditions, it is feared that there will be a problem regarding land ownership rights, or that often referred to as land disputes, there needs to be a firmness from the government in resolving problem points regarding land ownership rights, as well as guaranteeing every legal certainty and justice for everyone and legal community units, especially for indigenous peoples.

In terms of customary law itself, the function of land is seen as a unit that can unite various living systems in it, land is the most important aspect in building understandings as well as geographical and social unity which is passed down from generation to generation, so that good land management will signify a social identity and descent inherited by their ancestors, indigenous peoples really uphold the values contained in the land, as we know land produces various benefits for humans such as water use, farming, building houses and many other benefits. can be taken from the land, even though the government has guaranteed the protection of all forms of natural resource wealth contained in the agrarian law, but in reality there are still many irregularities found and have not provided a guarantee of welfare for the wider community according to Achmad Sod iki (2018) although natural resources have been depleted, the local community has not benefited much.

So to observe land values as a function of life for indigenous peoples, there needs to be a continuing discussion regarding the recognition and existence of customary law which will guarantee and build a balanced modernization between a norm that was born and grew among indigenous peoples with the right legal constitution through a guarantee of access to justice which is a constitutional human right, as regulated in Law no. 39 of 1999 (TLN No. 3886) Article 6 Paragraph (1) states that customary rights which are actually still valid and upheld within the customary law community must be respected and protected in the context of protecting and enforcing human rights in the community concerned by taking into account laws and regulations.

This study aims to see how the government builds constitutional protection for indigenous peoples, previous research related to this study is from Abubakar (2013) explaining that the revitalization of customary law as a source of law in building the Indonesian legal system will contribute to some of the customary law institutions, including inheritance law, customary rights, liens, rents, profit sharing are still relevant and can be a source of inspiration for the formation of national law and a source of law in the legal discovery process. Meanwhile, Thontowi's research (2015) provides a point of view that customary law and implementation of the protection of land rights must be in accordance with human rights and prioritize the constitutional aspects of the 1945 Constitution.

From the two previous studies, this research has a novelty on the reference to customary land law which can later be used as a normative legal reference.

## **2. Research Method**

This research uses descriptive analysis research using qualitative methods. Researchers also want to examine a phenomenon that discusses the role of the government in building constitutional protection for indigenous peoples by reviewing several journals or articles related to the topic of discussion of the problem, namely the issue of customary land rights in Indonesian government regulations. There are two sources of data used in this study, where the data includes primary data and also secondary data, then the facts of the findings are described in the form of a detailed discussion and concluded more easily for interpretation.

## **3. Research Results and Discussion**

### **3.1 Recognition of the Existence of Indigenous Law Communities in Indonesia**

Land is a very central supporting factor for human life, the Indonesian state itself regulates the function of the existence of land as one of the natural resources that must be managed properly. The laws that apply in the country, as well as in the context of land rights issues within the indigenous community, as we know there are often disputes between customary law and state law regarding customary land ownership rights, of course all of this is based on the government's lack of professionalism in managing and managing land rights. regulate policies contained in customary law norms, even though strictly the existence of indigenous peoples



and their rights have a constitutional position in the Unitary State of the Republic of Indonesia. Juridically-normatively, as well as regarding traditional authorities and rights in the constitution as explicitly stated in Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia.

So as a citizen who is obedient and obedient to state law, this problem regarding customary land rights must be resolved by hoping for policies from the government to provide guarantees and recognition politically and legally because by providing an opportunity and guarantee of protection, on the traditional rights of indigenous peoples, the government's role as a liaison factor between customary law and state law has officially been realized by establishing a state law on the rights of indigenous peoples to land and other natural resources, as long as the customary law does not conflict with the law. - Act and violate the laws that have been set by the government.

Basically customary law does have differences with Indonesian constitutional law, but the birth of the existence of customary law, is not the basis for reference for customary law, it must be abolished and updated with a state law that is much more practical and modern, in the process the state does provide a The authority regarding traditional customary rights is in the RPJMN (National Medium Term Development Plan) 2004-2009 through Presidential Regulation No. 7 of 2005 Presidential Regulation No. 39 of 2005 concerning Government Work Plans (RKP) of 2006, stipulates the direction of development policies in the field of development the Indonesian legal system and politics by respecting and strengthening local wisdom and customary law to enrich the national legal system, this explanation seems to provide space for indigenous peoples to further develop various sources of wealth that exist in these customary law values. mentioned in m Article 3 of the LoGA also applies to customary rights that are practiced in the territory of indigenous peoples (Ahyar, 2015).

Observing customary rights that have been officially issued by the government in guaranteeing and recognizing customary law as one of the most developed laws in Indonesia, the existence of customary law itself is born from norms and grows from generation to generation among indigenous peoples from various regions in Indonesia. , the application of customary law is also one of the proofs that the development of modernization of a society will not change a law that applies in the area, but what we often find in reality are legal restrictions based on the interests of an organization or the interests of the state that cause rights The customary law has decreased in quality in the eyes of the legal assembly, of course this is a very worrying portrait and the need for a re-examination of natural resource management based on the principles of decentralization and legal systems and politics in Indonesia.

In line with the issuance of the rights of indigenous peoples to get more legal recognition from the government, access to customary land law has also been awarded which is based on the results of the ILO (International Labor Organization) convention No. The independent state which entered into force on September 5, 1991, stipulates that the government is obliged to respect the culture and spiritual values of indigenous peoples who are upheld in their relationship with the land (land) they occupy or use. Of course this is a very high appreciation in order to improve the quality of customary law and empower more than the government in providing convenience to regulate the customary land rights system so that it is in line with the laws and laws of the Indonesian state. A number of laws regulate its existence further (Syafa'at, 2008).

In other provisions, the Indonesian Constitutional Court in its decision Number 31/PUU/2007 sets benchmarks or basic principles for assessing the existence of customary law that can still be recognized by the state, including the law is still alive or is still being implemented today, then the existence of a society that lives in groups and upholds the values of unity and integrity, the third point is the existence of a sovereign government institution and regulates the culture of customary law, then there is still a wealth and inheritance in the form of traditional objects, of course if a customary law still exists and survives until now in it there must be norms that are still being studied and form a customary law and are territorial in nature within certain areas. When viewed in terms of its development, customary law itself has been recognized and guaranteed by the applicable law because the development of values contained in a customary law is general or sectoral, such as agrarian, forestry, fisheries, and others. as well as in local regulations.

Basically customary law is still developing today in various regions in Indonesia, the existence of this customary law system can provide an example of its inherent diversity in culture and government, so if the existence of a customary law is in accordance with the basic principles of the Republic of Indonesia, then The state is obliged to provide guarantees and traditional rights, as long as the customary law does not threaten the sovereignty and integrity of the nation and the substance and norms of customary law do not conflict with the nation's ideology, according to Ter HaarBzn (2009) that customary law is born from and is maintained by decisions - decisions of the citizens or the community, especially the authoritative decisions of the heads of the people who assist the implementation of legal actions, or in conflict with the interests of the area where the customary law applies.

### 3.2 Customary Land Rights in Indonesia According to the 1945 Constitution

There are various ways to use customary land as a cultural heritage that must always be guarded and preserved, in some areas in Indonesia we often encounter customary land that is highly guarded and made as a livelihood for some indigenous people who are there even today. This is all for the sake of progress and benefit so that customary lands can be managed and developed into a source of life as a guarantee of welfare for the people who really adhere to the traditional values of the customary lands, in fact the biggest challenge in efforts to maintain these customary lands comes from some irregularities committed by government officials or businessmen who really want to seize and eliminate the rights to the customary land, even though it is clear that the state and its laws have issued a decision regarding the protection of these customary land rights, in the Minister of Agrarian Decree/head BPN No. 5 of 1999, Article ( 1) explicitly stipulates that, ulayat rights are the authority which according to customary law is owned by certain customary law communities over the area which is the living environment of its citizens to take advantage of natural resources, including land in the area for their survival and livelihood, arising from from external relationships.

Several provisions that guarantee the rights to customary land provide a hope for the continuity of all indigenous peoples in preserving various customary laws as one of the laws that can be recognized by the Indonesian state, in the end with the issuance of these customary rights, it must be accompanied by ownership of legal rights to customary land, and capable of providing benefits to improve the economic system in accordance with the expectations of the indigenous peoples, ulayat land itself has the meaning as a land on which there are ulayat rights and has a very close relationship between ulayat land and indigenous peoples who inhabit the area, while the customary law community itself has the meaning as an association of a group of people or humans who are closely bound by traditional values with these indigenous peoples.

Understanding customary law as part of law that is recognized by the government, makes customary law factually formulated into a state legal framework, so that all aspects related to customary rights are integrated into a conceptual state law, but the question is, whether the indigenous peoples will be involved in the formulation of the constitutional law or only become an object of study, of course this is a serious problem between the very traditional customary law order balancing a conceptual state law, for that these differences need to be clarified and compromised through harmonization and mutual openness for the parties to accept their respective conditions so that everything can be conceptualized properly, without discriminating against customary rights and state rights, because if we refer to the development of Indonesian society, indigenous peoples have existed since the colonial period and form a According to SujoroWignjodipuro (2006), the customary law community before independence had lived side by side with the Dutch East Indies, at that time the Dutch East Indies government recognized and regulated customary law communities in its regional autonomy government.

The existence of customary land as one of the cultural heritages and has been maintained until now until it has received legal recognition either through the decision of the Supreme Court or through a State Law, it can be interpreted that customary law along with its traditions have received guarantees and entered into a legal system. positive law of Indonesia, then if customary land law has been recognized, automatically the customary land law has a very sacred sovereignty in the eyes of applicable law, according to Austin (2000) positive law Recognition through state law (positive law, according to Austin is defined as made by a person or institution that has sovereignty, and the recognition is applied to members of an independent political society. Members of the community recognize the sovereignty or supremacy of the person or law-making institutions concerned. , the habit according to him will only be shall be valid as law if the law requires or expressly states the application of the customary law habit.

Actually, there are two forms of customary law that exist in Indonesia, where these laws also regulate the rights to customary lands that are spread in various regions in Indonesia, first, customary rights, in fact this concept is a term used by the Indonesian government both Juridically as well as in general, ulayat rights themselves are communal and govern part of the object of the customary land rights, but basically ulayat rights are very different from use rights where the definition of use rights itself is to allow someone to use a piece of land for his interests, usually against rice fields and fields that have been opened and worked continuously for a long time. These differences illustrate how important the position of customary law is for some indigenous peoples who still rely on customary law as one of the most ideal laws in determining customary land rights in Indonesia.

Customary law in Indonesia is a very complex law against norms originating from the sovereignty of its people, customary law has actually developed a lot together with human civilization itself, some customary law is indeed unwritten and is still traditional law for some regions in Indonesia, However, customary law plays a very important role in the formation of sovereignty that is capable of being obeyed and respected. In terms of law through the decision of the Supreme Court, in its development the Indonesian nation has also



accepted customary rights as one of the laws governing the rights of indigenous peoples, forming a cultural identity, customary law is also in line with the development of today's human era although in reality the legal development process is As stated in Article 6 of Law Number 39 of 1999 as follows, in the context of upholding human rights, differences and needs in customary law communities must be considered and protected by law. and the government, the cultural identity of the customary law community, including the rights to ulayat land, is protected in line with the times and the current law.

#### 4. Conclusions

Based on the research that the researchers conducted on the discussion of how, the role of the government in building constitutional protection for indigenous peoples, the researchers can conclude several main points that can be concluded, the results of various observations that researchers found in the field, namely, the existence of indigenous peoples along with their traditional laws. or better known as customary law is one of the laws originating from several regions in Indonesia, where in the process this customary law has a system that is very different from the state procedural system, customary law also regulates customary land ownership rights which still hold a lot of variety. heritage and culture that are still preserved to this day, customary law actually existed even before the independence of the Indonesian state, customary law has grown and developed into a traditional law that regulates many provisions and policies in the territory of these indigenous peoples, customary law It is also recognized as one of the valid laws according to the 1945 Constitution and according to the Constitutional Court, as stated in Article 18B Paragraph (2) of the 1945 Constitution. If you look at the constitution, where it is stated that the State recognizes and respects customary law community units. along with their traditional rights (Article 18B Paragraph (2) of the 1945 Constitution).

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