IMPLEMENTATION OF RESPONSIVE LAW AGAINST RECOGNITION OF INDIGENOUS PEOPLES' LAND RIGHTS IN INDONESIA

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ABSTRACT

Indigenous peoples have customary rights to land as a determinant of their survival and livelihood, the existence of customary rights is respected and recognized not only in the national dimension but also has become a global commitment. In Indonesia the recognition begins with the inclusion in Article 3 of the Basic Agrarian Law, with limitations on their existence and implementation. However, the absence of further rules on recognition and limitations and supported by an authoritarian government system during the new order became one of the factors that gave birth to a law that was still repressive towards the recognition of the customary rights of indigenous peoples. Along with the passing of the reform era, the government system leads to a more democratic system. This is a moment for indigenous peoples to claim their customary land rights so that a responsive law develops in giving recognition to the community's customary land in various regions in Indonesia, including the formal legal determination of customary community land rights and a review of various regulations that are contradictory to the recognition and protection of the customary rights of indigenous and tribal peoples, based on the aspirations that develop by involving the active participation of the community.

Keywords: Customary Law, Customary Rights, Agrarian Law

INTRODUCTION

Customary law is a reflection or incarnation of the soul of the Indonesian people from century to century. The customs that are owned by each region are different, although the basis and nature is one, namely its Indonesia. This custom always develops and always follows the development of society and is closely related to community traditions. Land in the lives of indigenous and tribal peoples has a very important position, because land is one of the natural resources that is permanent even though it has changed in circumstances and as a place of residence for a community, living in a community, livelihood, and final resting place for people who have died, and is believed as a residence for ladies in waiting and ancestors.

Every human being must maintain, manage and utilize land properly which is a basic need as mandated by Article 33 Paragraph (3) of the 1945 Constitution which is abbreviated with the 1945 Constitution that: "The earth, water and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people. " The state in this case does not have absolute power over the existing land, but only limited to being given power in regulating and controlling the implementation of agrarian resources (land) in order to realize the prosperity of the people.

Customary law (adatrecht) was first introduced by Snouck Hurgronje, a Dutch eastern literary expert in 1983 in his book De Atjehnese. At first the term adatrecht was unknown to many people, until van Vollenhoven popularized this term in his book entitled Het Adatrecht van Nederland-Indie. Cornelius van Vollenhoven first introduced the concept of indigenous and

tribal peoples, then was deepened by his students namely Ter Haar by interpreting indigenous peoples as a group of people in a regularly organized society, having their own power and wealth in the form of visible and invisible objects, so that they could it was concluded that the customary law community was a group of people living in a coherent settlement in a certain area led by the authorities and the wealth they owned could be either tangible or intangible objects.

In its development, Ter Haar Bzn defines customary law as a set of laws and regulations that arise in decisions by legal officials who have authority or influence and apply spontaneously and are implemented properly by the community. Thus, customary law is the entire legislation in the community that arises from the decisions of the customary law community authorities called legal officials. Respect and protection of the rights of indigenous and tribal peoples is not only a national commitment but also a global concern.

In the global dimension there are at least 12 international conventions that contain the protection and respect for the rights of indigenous and tribal peoples (Sumardjono, 2008), beginning with The United Nations Charter in 1945 and the Technical Review of the United Nations Draft Declaration on The Rights of Indigenous Peoples, 1994. While in the national dimension, for the first time, Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles (UUPA) has contained provisions relating to one of the most important aspects of indigenous peoples' rights relating to their living space, namely customary rights, as stated in Article 3; "Bearing in mind the provisions in Article 1 and Article 2, the exercise of customary rights and similar rights of indigenous peoples, as long as in reality there must still be such that it is in accordance with national and state interests based on national unity and may not be contrary to higher laws and regulations ".

The rolling of the reform era, the adoption of the recognition, respect and protection of customary rights in Indonesia is increasingly developing, as stated in Article 18B paragraph (2) of the 1945 Constitution, Article 9 Paragraph (1) of Law No. 23/1997 concerning Environmental Management, Article 5 Paragraph (3) and Article 6 Paragraph (1 and 2) of Law No. 39/1999 concerning Human Rights. However, up to now there has not been much formal and concrete legal recognition and protection given to customary land rights. While on the other hand land disputes or conflicts related to customary land claims by indigenous and tribal peoples cannot yet be completely resolved and continue to surface in various regions such as in Papua and West Sumatra. This condition indicates the problem of the lack of legal certainty over the existence of the recognition of customary land rights, and places the position of indigenous peoples as marginalized parties, especially when dealing with other parties outside indigenous groups who often use formal legal approaches. Therefore, this paper tries to discuss how important it is to implement responsive law in the recognition of customary land rights as a way to be able to give more concrete recognition of customary land rights of indigenous peoples, as mandated by Article 18B paragraph (2) of the 1945 Constitution (Hussain, 2021).

METHODOLOGY

The form of this research is normative juridical research (Sri Mamudhi, 2005) because it examines juridically the implementation of responsive law for the recognition of customary land rights of indigenous peoples in Indonesia by using norms contained in statutory regulations, systematically, and consistently. The data used are secondary data not directly obtained from the research object but from literature or books (Hussain, 2021).

This research uses primary legal materials, namely legislation and secondary legal materials, namely books and scientific works contained on the internet which are the opinions of legal experts. The primary legal material used is Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles. While the data analysis method used is qualitative, which is to explore what underlies the implementation of responsive law on the recognition of customary land rights of indigenous and tribal peoples in Indonesia so that any constraints can be drawn in the implementation. Qualitative data analysis method that is exploring the meaning behind the reality or actions or data obtained and which are studied or studied are intact research objects.

The form of the report in this research is analytical descriptive which states the research objectives in writing or verbally and real behavior that provides a general description of the symptoms and analyzes them.

RESULTS

Concept of Responsive Law

Nonet & Selznick, in their book titled Law and Society in Transition, Toward Responsive Law concluded that there is a significant relationship between a country's government system and the law it adopts. In an authoritarian government system, law becomes a subordination of politics. That is, the law follows politics. In other words, the law is used only to support the politics of the authorities. In contrast, in a democratic system of government, laws are diametrically separated from politics. That is, law is not a part of politics, but law is a political reference for a nation (Philippe Nonet & Philip Selznick, 2009). Satjipto Rahardjo said that if we look at the relationship between the political subsystem and the legal subsystem, it will appear that politics has a greater concentration of energy so that the law is always in a weak position. Understanding this statement will capture a perspective that in empirical reality, politics will determine the operation of law (Rahardjo & Satjipto, 1985).

Political influence in the law, means also applies to law enforcement, the characteristics of legal products, and the manufacturing process. The above can be seen in the fact of law throughout Indonesian history, the implementation of functions and law enforcement does not always go hand in hand with the development of its structure (Hussain, 2020). This will be evident if the measure of legal development in Indonesia is the unification and codification of the law, so the development of the legal structure has been running well and stable. Because from time to time the productivity of legislation has increased. But from the other side, in terms of legal functions there has been a decline (Alkotsar, 1986). The structure of law can develop in any political configuration condition with a marked success in making the codification and unification of the law as seen in the National Legislation Program. But the implementation of functions or enforcement of legal functions tends to be weak. Even though the number of legal products produced has increased quantitatively, the substance and function of the law has not always been increased or in accordance with the aspirations of the people (Hussain, 2020). This happens asynchronous between the legal structures with the legal function as mentioned above caused by intervention or interference from political actions. The law is sometimes not able to be enforced because of the intervention of political power.

The concept of democratic political configuration and/or authoritarian concept is determined based on three indicators, namely the party system and the role of the people's representative institutions or parliament, the dominance of the executive role, and freedom of the press. Whereas the concept of responsive/autonomous law is identified based on the process of making law, granting legal functions, and the authority to interpret the law. Henceforth, the conceptual understanding is formulated as follows:

a. Democratic political configuration is a configuration that opens space for public participation to be fully involved in determining state policy. Such a political configuration places the government more in the role of an organization that must carry out the will of its people, which is formulated democratically. Therefore the people's representative bodies and political parties function proportionally and are more decisive in making state policy. The press is involved in carrying out its functions freely without the threat of banning or other criminalization.
b. An authoritarian political configuration is a political configuration that places the government in a very dominant position with an interventionist nature in determining and implementing state policies, so that the potential and aspirations of the community are not aggregated and proportionally articulated. In fact, with the very dominant role of the government, the people's representative bodies and political parties are not functioning properly and are more a tool for justification (rubber stamp) at the will of the government, while the press does not have freedom and is always under government control in the shadow of banning.

c. Responsive or autonomous legal products are the character of legal products that reflect the fulfilment of the aspirations of the community, both individuals and various social groups, so that they are relatively better able to reflect a sense of justice in society. The normative process invites public participation and aspirations. Judicial institutions and legal regulations function as implementing instruments for the will of the community, while the formulations are usually sufficiently detailed so that they are not too open to be interpreted and interpreted based on the will and vision of the authorities/government arbitrarily.
d. Conservative or orthodox legal products are the character of legal products that reflect the political vision of the holder of a very dominant state power, so that in the process of making it is not accommodating to the participation and aspirations of the people seriously. The manufacturing procedure is usually only a formality. In such legal products, law usually operates with an instrumentalist positivist nature or merely becomes a justification tool for the implementation of government ideology and programs. The formulation of legal material is usually of the main points so that the state authorities can interpret according to their own vision and will with various implementing regulations.

When related to the theory above, it is clearly seen that there is indeed a significant relationship between a country's government system and the law it adopts. The new-order centralized government system at the center, where all officials at that time culted an individual, so that the famous phrase spoken from the officials was "beg for your guidance." Indirectly, the government at that time was in the grasp of one person. The New Order Government system is basically not much different from the Old Order government system with its Guided Democracy. Seeing the above theory, Indonesia at that time had an authoritarian political configuration. This is because Indonesia places the government in a very dominant position with interventionist nature in determining and implementing state policies, so that the potential and aspirations of the people are not aggregated and proportionally articulated. In fact, with the very dominant role of the government, the people's representative bodies and political parties are not functioning properly and are more a tool for justification (rubber stamp) at the will of the government, while the press does not have freedom and is always under government control in the shadow of banning for example, the Tempo newspaper and the Bintang Indonesia Tabloid, which had been breached by the Soeharto era government.

Thus it is clearly seen that state law which is now enforced in Indonesia is actually closer to the type of autonomous law, according to Nonet and Selznick, where in the type of autonomous law the government system is run based on the rule of law and the interpretation of the apparatus towards law enforcement is carried out in accordance with what is written in those legal regulations. But there are times when Indonesian law is also close to repressive types of law where the role of those in power politically can influence the law in accordance with what they want. Lawmaking, which is narrowed in legislation, is in no way separate from political influence. As a result, besides not fulfilling a sense of community justice, the existence of the law also poses a threat to the community.

Philippe Nonet and Philip Selznick, explained that there are three basic classifications of law in society, as follows:

1. Law as a servant of repressive power (repressive law);
2. Law as a separate institution capable of taming repression and protecting its integrity (autonomous law); and
3. Law as a facilitator of various responses to social needs and aspirations (responsive law).3

Among the three types of law, Nonet and Selznick argued that only responsive law promises an orderly and stable institutional order. Nonet through its responsive legal type rejects legal autonomy which is final and cannot be contested. Responsive legal theory is a legal theory that contains a critical view. This theory holds that law is a means to an end. Responsiveness can be interpreted as serving the needs and social interests experienced and discovered, not by officials but by the people. Responsiveness implies a commitment to "law in the consumer's perspective". Two prominent features of the concept of responsive law are: a. shifting emphasis from rules to principles and goals; b. the importance of democracy as both a legal objective and a way to achieve it. Responsive law is results-oriented, that is, objectives that will be achieved

outside the law. In responsive law, the legal order is negotiated, not won through subordination or forced. The hallmark of responsive law is to look for the implied values contained in regulations and policies. In this responsive legal model, they express disapproval of the doctrine which they consider to be a standard and inflexible interpretation.

The type of responsive law, based on the nature of responsiveness which can be interpreted as serving the needs and social interests experienced and found not by other officials by the people. The type of responsive law is defined as serving the needs and law enforcement cannot be done half-way. Implementing the law does not only implement the law, but must have social sensitivity. The law is not only rules (logic & rules), but there are also other logics. That applying jurisprudence is not enough, but law enforcement must be enriched with social sciences. The type of responsive law distinguishes itself from autonomous law in its emphasis on the role of purpose in law. Lawmaking and application of law are no longer their own goals, but their importance is the result of the greater social goals they serve (Fadjar, 2013).

Customary Law Community Land Rights: Recognition and Dilemma

The existence of customary community's customary rights over land in Indonesia would be undeniable, because it has existed since before Indonesia's independence, although the existence of its existence in various regions varies greatly (Boedi, 1999). Therefore, the LoGA as a national land law since its birth in 1960 has given recognition of these customary rights. Recognition of customary rights listed in Article 3 of the Loga is limited to two requirements, namely 1). These rights exist (exist), and 2). The exercise of these remaining rights must be in accordance with national and state interests and must not conflict with statutory provisions.

However, the Agrarian Basic Law does not provide further provisions and clarification regarding the criteria for the existence of customary rights and about the limitations of "national and state interests". Harsono said that the reason for the formation of the Loga did not regulate customary rights because the regulation of customary rights, both in determining criteria and registration, would preserve the existence of customary rights, while naturally there was a tendency for weakening customary rights.

With regard to boundaries it must be in accordance with national and state interests, Maria SW. Sumardjono stated that the thoughts underlying the draft law on UUPA were motivated by empirical experience in the form of obstacles when the Government needed land owned by indigenous and tribal peoples for agricultural projects in South Sumatra by 1960, which among other things led to the main ideas that the interests of indigenous and tribal peoples should submit to national interests and that customary rights are not exclusive (Sumardjono, 2001).

UUPA also does not provide an understanding of customary rights, except that what is meant by customary rights is what in the customary law library is called "beschikkingsrecht" (explanation of Article 3 of the LoGA). Harsono (1999) states that the customary rights are a series of authority and obligations of an adat law community, which is related to land located within its territory. Customary rights are the main supporter of the livelihood and life of the community concerned for all time. Customary rights are the names given by jurists to legal institutions and concrete legal relations between customary law communities and their territorial lands, which are called ulayat lands. The legal relationship between the customary law community (the subject of rights) and certain lands/territories (the object of rights) contains authority, to: 1. Regulate and administer land use and preserve land 2. Regulate the contents of the customary rights authority stating that the relationship between the customary law community with land/territory is a master relationship, not a property relationship. This is the same as the concept of the relationship between the state and land, according to Article 33 paragraph 3 of the 1945 Constitution.

Referring to the above definition, According to Maria Sumardjono, it can be said, that the determining criteria still exist or whether there is customary rights, must be seen in three things, namely:

1. The existence of customary law communities who fulfill certain characteristics as subject to customary rights.
2. The existence of land/territory with certain boundaries as lebensraum which is the object of customary rights.
3. The authority of indigenous and tribal peoples to take certain actions.

Cumulatively fulfilling these three requirements, it is quite objective as a determining criterion whether or not there are ulayat rights, so for example, even though there is a legal community and there is land or territory, but if the legal community does not have the authority to carry out these three actions, then the customary rights can be said to no longer exist. On the other hand, if customary rights are deemed to still exist, recognition of these rights must be given along with the imposition of obligations by the state. Recognition of that right appears, for example, if ulayat land is given for development, the party requiring the land must ask permission from the legal community. And if necessary, it also provides a restoration of any balance that is beneficial to the legal community and surrounding communities.

However, in reality, the absence of the criteria for the existence of customary rights and the absence of clear boundaries regarding national and state interests are one of the factors that marginalize customary rights of indigenous peoples which cause conflicts between indigenous and tribal peoples and businessmen and authorities related to the granting of HGU or HPH. Without objective criteria, those who deal with indigenous and tribal peoples, authorities and entrepreneurs tend to deny the rights of indigenous and tribal peoples who are objectively weaker than indigenous entrepreneurs compared to entrepreneurs and authorities who have stronger economic, social and political positions. Coupled with a pro-growth policy orientation during the New Order era, various impacts have arisen, including the increasing pressure on the rights of indigenous peoples to natural resources which become their living space (lebensraum), both because they were formally taken over by other parties (with or without adequate compensation) or because they do not recognize (directly or indirectly) the rights of indigenous peoples to land resources by the state.

The various cases described by Afrizal (Afrizal, 2006) show the urgency of community land rights over land along with the swift investment and government/private development projects have led to various protests from indigenous communities that triggered conflicts with companies and the government. The demands of the indigenous people are often responded by repressive programs by the security forces so that the indigenous people prefer not to continue their demands. However, after the reformation era, the protests of the indigenous people again raised up demanding what they called their customary land that had been taken or exploited by outsiders for so long without regard to the customary community's rights. Their demands vary from the demand for compensation for the use of customary land to the return of customary land.

Afrizal further explained that state policies were the main cause of the protests of indigenous peoples. First, national agrarian law, in this case the Basic Agrarian Law shown in the articles of the conversion made customary land surrendered to companies in the Dutch era claimed as state land by the government and companies. Indigenous peoples of customary land tenure reject this unilateral claim of the state because in the Dutch era their customary leaders did not sell the land to companies, but instead gave us the usufructuary rights, and customarily after being no longer controlled by a Dutch company the land returned to the community's customary rights, such as claims of communal land by the Nagari Kapalo Hilalang community over the former erfacht verp land. No. 163,190,164 and 199 in Kab. Padang Pariaman and Nagari River, Kumayang District, on the former land of erfacht verponding No. 202 in Kab. 50 City of West Sumatra. Second, government regulations made by relevant ministries without regard to the rights of indigenous peoples to take over land or give concessions to companies, such as granting HGU to PT. TSG without regard to customary mechanisms and provide a comprehensive explanation to indigenous peoples that the transfer of customary land to the company and then issued by the HGU to the company, caused after the HGU ended up being directly controlled by the state in accordance with Government Regulation No. 40 of 1996

concerning HGU, HGB and HP, has led to protests and conflicts of indigenous peoples with companies and or the government, because for the community the transfer of customary land to outsiders followed by payment is not in the sense of compensation or buying and selling, but is a form of "siliah" jariah "(hard work to maintain/ \work on the land) or" adat money "as a result of the surrender of the use of land to outsiders, and after the land is no longer used in accordance with the original designation it is returned to the customary authority not to become state land. The two policies that make/transfer the status of customary land to state land are very contradictory to customary law which is actually practiced in indigenous communities in West Sumatra. In recent years, disputes regarding land claims for customary land rights are also seen in the following Table 1.

Table 1
LAND DISPUTE BY THE CUSTOMARY LAW COMMUNITIES IN PAPUA AND WEST SUMATRA

No.	The Parties	Main Problem
1	Moi Tribe and Government in Sorong City, Papua	Based on erfacht's Rights No. 1 Year 1951 land of 3,120 hectares was erfacht rights in the name of NNGPM. However, based on a letter from the Moi tribe they claimed that the erfacht rights that had been abandoned by the rights holders were claimed as their customary rights.
2	Nagari Silaut with PT. Sapta Sentosa Jaya in the Regency. South Coa	Land controlled by PT. Sapta Sentosa Jaya with HGU of ± 2,250 Ha, claimed by the indigenous people of the Nagari Silaut, is in the ulayat Nagari Land of Silaut, which has never been handed over to any party including PT. Sapta Sentosa Jaya.
3	Nagari Kapalo Hilalang with the government in Kab. Padang Pariaman	The land claimed by the Nagari Kapalo Hilalang Community as its customary land was previously leased to the Belanda NV. Java Rubber Corp Company, after Indonesian independence was granted by the state by HGU to the national private sector (PT. Tandikat Baru Corp) then it was changed to PT. Purna Karya, and when the HGU was declared to have ended by the Government with the Decree of the Head of BPN No.24/HGU/BPN/92 dated October 5, 1992, the land was declared to be land that was directly controlled by the state. Furthermore, based on the Regent's Decree Number 372/KEP/BPP/2016, it is stipulated to use it for various public interests such as for campuses, stadiums, hospitals, government offices. On the other hand, the land is claimed to be its traditional land by the Nagari Kapalo Hilalang community.

Sumber: Regional Office of BPN Prov. Papua in Maria S.W Sumardjono, Land, and the Government Bureau of the Regional Secretariat of Prov. West Sumatra in 2016.

After more than three decades since the Basic Agrarian Law (UUPA) was enacted, then the government then issued a further regulation of the form of affirmation of recognition of the customary rights of indigenous peoples as stated in Article 3 of the Basic Agrarian Law (UUPA), through the Regulation of the Minister of Agrarian Affairs/Head of BPN No. 5 of 1999 concerning Guidelines for the Settlement of Indigenous Peoples' Customary Rights Issues. This Ministerial Regulation explicitly states the criteria for the continuation of customary community rights based on the existence of indigenous peoples, territories, and customary legal arrangements. Further regulations regarding the recognition of customary rights depend on local government initiatives to conduct research as a basis for determining the existence of customary rights in the area concerned.

However, this ministerial regulation, apparently still has not fully resolved the issue of customary land rights of indigenous peoples, can instead disappear the customary land rights of indigenous peoples who have switched (either with/become state land. This can be seen in Article 3 which states that the implementation of community customary rights Customary law as

referred to in Article 2 can no longer be applied to parcels of land when the Regional Regulation is stipulated as referred to in Article 6:

1. Already owned by an individual or legal entity with a right to land according to the Basic Agrarian Law;
2. It constitutes parcels of land that have been acquired or acquired by Government agencies, legal entities or individuals in accordance with applicable provisions and procedures.

That was then, this ministerial regulation received a lot of rejection in West Sumatra and other regions having similar customary laws. Because the existence of Article 3 makes a lot of customary land rights of indigenous peoples in West Sumatra, which have been granted HGU, HGB, or HP to private or state companies, either with or without adequate compensation or because they are not recognized (directly or indirectly) the rights of indigenous peoples, presenting is no longer recognized or returned to the customary land of indigenous peoples. Article 3 of the Agrarian Regulation seems to be in line with Article 17 paragraph 2, Article 36 paragraph 1 and Article 56 paragraph 1 Government Regulation Number 40 of 1996 concerning HGU, HGB and HP stating that when the HGU, HGB or HP was ended and not extended or deleted, the land becomes state land. This means that the customary land of the adat community will eventually run out or become state land when it has been converted to HGU, HGB, HP. In fact, on the other hand the existence of ulayat land is a determinant of existence and as an adhesive of kinship within the indigenous community itself. So it is not surprising that the indigenous people will continue to fight for their customary land because it involves the existence of the indigenous peoples concerned.

From the description above, it can be understood that the land law, especially concerning the recognition of the customary rights of indigenous peoples in the New Order era, has shown a repressive type of law. It was seen that there was no willingness from the government to regulate further the customary rights of indigenous peoples recognized in the LoGA as national land law. In the meantime, on the other hand unilaterally the dominant role of the government is to determine whether or not there are customary rights to customary land, without objective criteria. Protests from indigenous people over the use of their customary land rights that are not in accordance with customary provisions are actually faced by violent means through the legal apparatus. In addition, it was also marked by the birth of legal products that lacked a sense of justice in accordance with the local customary law, such as granting HGU, HGB or HP to the company, on the customary land of indigenous peoples through the relinquishment of rights. In accordance with PP No. 40 of 1996 concerning HGU, HGB and HP, after the HGU, HGB or HP ended resulting in the conversion of communal land that had been handed over to the company to state l and it is also in line with what Philippe Nonet said that in an authoritarian political configuration that places the government in a very dominant position with an interventionist nature in determining and implementing state policies, so that the potential and aspirations of the people are not aggregated and proportionally articulated.

Legal Products Responsive to Recognition of Customary Land Rights of Indigenous Peoples

Responsive legal development strategies have implications for the character of their legal products, namely legal products that are responsive to the demands of various social groups and individuals in their communities (Abdul Hakim Garuda Nusantara, 1988). Responsive/populistic legal products are legal products that reflect a sense of justice and meet the expectations of the community. In the process of making it provides a large role and full participation of social groups or individuals in society. The results are responsive to the demands of social groups or individuals in society. Legal products that are responsive, the process of making it participatory, which contains as much as possible community participation through social groups and individuals in society. Judging from its function, law which is responsive in character is aspirative meaning it contains materials that are generally in accordance with the aspirations or

desires of the people it serves, so that the legal product can be seen as the crystallization and will of the community. Whereas in terms of interpretation, legal products that are responsive/populistic in character usually provide little opportunity for the government to make its own disclaimers through a variety of enforcement regulations and the narrow opportunities for that apply only to matters of a technical nature.

The demand to present a responsive type of law for the recognition of customary communal land has recently found momentum, especially with the birth of Law No. 23 of 2014 concerning Regional Government, specifically Article 354 which emphasizes the obligations of regional governments in encouraging community participation. Likewise in Article 96 of Law No. 12 of 2012, opening the space for community participation in the formation of regional regulations has become more open where the existing government system has opened space for public participation to be fully involved in determining public policy. Emphasized by Mulyana (Rodiyah, 2012), community participation in law making is expected to be an agent of social control and a balancing force between the interests of the government and the community. In situations where there is responsive law, opportunities to participate in law formation are more open.

With regard to community participation in effective law formation, stated by WJ Witteven in "evenwicht van Machten" that in its ideal and important effect the formation of law is to facilitate public debate, where lawmakers encourage people to listen to and talk with one another, thus ignoring the role of the community, especially in developing countries will fail to make the law a transformation program because the people are not well facilitated and not heard in the process of establishing law (Witteveen, 2010).

Jazim Hamidi, et al., (Hamidi, 2008) put forward several concepts of participation, namely: first, participation as a policy, which views participation as a procedure of consultation of policy makers to the community as the subject of regional regulations. Second, participation as a strategy, which sees participation as one of the strategies to gain public support for the credibility of the policies issued by the government. Third, participation as a communication tool, which sees participation as a communication tool for the government (as a public servant) to find out the people's wishes. Fourth, participation as a tool for resolving disputes and tolerance for distrust and confusion in the community.

Nevertheless, dealing with concrete legal events is certainly not easy and simple. The main difficulty is removing the habit of immediately applying formal rules with a legalistic approach. Because with this approach can result in denial of the law that lives in the community concerned. Because of that there needs to be awareness, that dealing with customary rights, means having to open up involving indigenous peoples and understanding the legal awareness of a community that is manifested in real day-to-day actions departing from the perspective and mindset of the community concerned. For this reason, a full understanding of the existence of community customary rights is needed, an understanding of social structures, including patterns of power in the legal community, which will provide clarity about "who" (the figure given public trust) is authorized to determine "matters" what matters "(legal relations and legal actions regarding the land of his territory), and" what forum "decisions regarding the exercise of authority are made. Thus it can be avoided mistakes to deal with other parties who are not competent to decide something. In connection with the determination of community land area as the object of customary rights, it is not always easy to do because the boundaries of the territory are often in the form of nature. However, presumably the customary leaders/elders as living witnesses and the customary law community in general can show their boundaries.

To be able to create responsive law as a concrete form of recognition of customary land rights of the customary community, as mandated by Article 18H paragraph (2) of the 1945 Law, then there are at least two things that can be done by the government and/or regional government, namely:

a. Determination of Indigenous Peoples' Land Rights

Law No. 23 of 2014 concerning Regional Government, has provided clear boundaries regarding the division of concurrent governmental affairs between the government, the provincial government and the district/city government, as stated in the attachment. One of the government's affairs in the field of land which is the authority of the regional government is in the determination of the customary community's customary land. In the case of customary land in one regency/city area the authority of the regency/city government, and for those that are cross regency/city, is the authority of the provincial government. Technical implementation instructions have also been spelled out in the Minister of Agrarian Regulation and Spatial Planning/Head of BPN No. 10 of 2016 concerning Procedures for Determination of Communal Rights in Land of Customary Law Communities and Communities Located in Certain Areas. With the issuance of this Ministerial Regulation, the effectiveness of the determination of customary/communal land rights of the customary law community depends on the initiative/follow-up of the regional government, which begins with the application submitted by the customary law community (Article 5). Based on the request, the Regional Government can form a TIM to conduct research, which consists of elements from the government, academics, NGOs, and representatives of indigenous and tribal peoples. The basis of the Team's research results is then the basis for determining/determining whether or not the customary community's land rights exist or not in the regional legal products. The active participation of the community in conducting research and drafting of legal products on the determination of customary land rights is important to pay attention to so that the legal products for the determination of ulayat land that are born are truly responsive, that fulfills a sense of justice, and are based on a complete understanding of the reality in the customary law community.

Therefore, in order to recognize indigenous peoples' customary rights over land in their living environment, it is time to determine the customary land in the form of regional legal products. The birth of this legal product became a concrete form of recognition of customary rights from the government to the customary rights of customary communities, which are expected to achieve legal certainty both for the indigenous peoples concerned and for the parties concerned with the said customary land.

However, one thing is still confusing and shows that there are still out of sync provisions related to the determination of customary land right now are about the form of legal products. Bearing in mind that the Agrarian Ministerial Decree is sufficient in the form of a Regional Head Decree. While in Law No. 2 of 2012 concerning Land Procurement for Development in the Public Interest it is stated that customary law communities as subjects in the acquisition of land for their customary land can be compensated in the form of replacement land or resettlement, etc., if it is proven that there is a form of stipulation in the acquisition of customary land.

Local regulation: For this reason, it is necessary to synchronize the technical designation of the customary communal land intended, namely:

Settlement of Disputes Related to Land of Customary Rights

Considering that research on the existence of customary land requires a large amount of time and cost, research efforts on whether or not the customary land rights of a customary community can be prioritized can also be prioritized on the disputed land due to the claims of indigenous peoples over their customary land, as a form of local government response in ensuring the existence or non-existence of the indigenous peoples' customary rights.

To find a solution to the dispute cannot be separated from efforts to understand the various root causes of land problems that are so complex in their dimensions. The root causes of land disputes in outline according to Christopher W. Moore (Sumardjono, 2008) can be caused by the following: First, Conflicts of Interest, which are caused by competing interests that are related to substantial interests (for example: the right to resources agrarian including land), procedural and psychological interests. Second, structural conflicts, caused among others due to destructive behavior patterns or interactions, unequal control of ownership or distribution of

resources, unequal power and authority, as well as geographical, physical or environmental factors that hinder cooperation, Third, Value Conflicts, caused by differences in the criteria used to evaluate ideas or behavior, differences in lifestyle, ideology or religion/belief, Fourth, Conflict Relationships, which are caused due to excessive emotions, wrong perceptions, bad or wrong communication, repetition of negative behavior. Fifth, Data Conflict, which is caused due to incomplete information, erroneous, different interpretations of data, and differences in assessment procedures.

Understanding of the various root causes can be used as a starting point in efforts to resolve land disputes related to customary land that arises. If the results of research involving the active participation of these communities will prove that there are no more customary rights of the customary community, then it is probable that the customary law communities concerned can receive and no longer claim their customary rights. However, if it is indeed proven that the customary rights of indigenous peoples still exist, then a win-win solution step to meet and protect the interests of the parties to the said customary land needs to be done, both for the indigenous peoples concerned and outside parties who have obtained land rights in accordance with applicable legislation, facilitated by local government.

Reviewing and revising laws and regulations that contradict the recognition of customary land rights of indigenous peoples

The availability of legal instruments that meet the standards in terms of the quantity and quality of legal products, in supporting the recognition of customary land rights of indigenous peoples is something that cannot be ignored, as has been recognized and respected in Article 18H paragraph 2 of the 1945 Constitution and Article 3 of the Basic Agrarian Law (UUPA). Besides that, in terms of land law, the basic framework of legal development must still be put in an effort to realize the ideals of law in Article 33 paragraph (3) of the 1945 Constitution which is the basis for the formation of national agrarian law, which is aimed at achieving social justice for all levels of society including indigenous and tribal peoples.

The norms of the legal relationship between people and the land occupied in customary law/customary law communities known as ulayat rights, which have not been or are not accommodated in national law, are certainly philosophically and sociologically the laws and regulations will not be meaningful, and not responsive because it certainly only shows the dominance of government thought alone. Adjustment of laws and regulations in recognition of customary rights can be done through responsive legal development strategies, by involving active participation of all elements of society, including indigenous and tribal peoples.

One legal norm that needs to be considered for revision is the legal norm in PP No. 40 of 1996 concerning HGU, HGB and HP, which emphasized that the HGU, HGBU, HP originated from state land, and if it ended its rights would return to state land. In the future, because the customary rights themselves are the same as the relationship between the right to control the state in Article 33 paragraph 3 of the 1945 Constitution, it is necessary to consider the emergence of a HGU, HGB or HP on the customary land rights of indigenous peoples, and after the HGU, HGB and HP end up returning to land customary communities' customary rights if in reality they still exist, not state land, so that the interests of indigenous peoples to maintain the existence of customary land rights of indigenous peoples can still be guaranteed and the interests of other parties to obtain legal certainty over the land they use can also be fulfilled.

CONCLUSION

Recognition of customary community's customary rights over land is still in the form of recognition in the declaration or articles of law alone, but has not given much concrete recognition of the customary community's customary land. The repressive type of law presented by the government during the New Order era has become one of the marginal factors that have led to the customary rights of indigenous peoples, leading to conflicts and conflicts over

indigenous peoples with the private sector and/or the government. In the era of dispute/conflict reforms, it seems that they exist and cannot be completely resolved. For this reason, the implementation of responsive law towards the recognition of customary land rights for customary communities can be an entry point for the resolution of customary land rights over customary land so far.

The momentum to produce responsive legal products has been opened with various changes in laws and regulations and the promulgation of regional autonomy which provides flexibility for regional governments in making regional policies, one of which is in determining the customary land of indigenous peoples in their regions. With the determination of customary land in the form of legal products, it is certainly not only able to increase legal certainty and sense of justice, but also then facilitate the resolution of customary land issues. In addition, a review of contradictory laws and regulations with the recognition of customary rights becomes necessary, including Government Regulation No. 40 of 1996 concerning HUG, HBG and HP, in the direction of better protecting the existence of customary rights of customary communities.

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