

Traditional Rights of Indigenous People in Indonesia: Legal Recognition and Court Interpretation

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Abstract

Indigenous people living in Indonesia have enjoyed their traditional rights far before the establishment of Indonesia nation state, but their rights are often violated by issuance of government policies. In order to protect their rights, the Constitution, law and regulation recognize and respect traditional rights of indigenous people. Court also has pivotal role to interpret traditional rights of indigenous people. This paper analyzes recognition of traditional rights of indigenous people in law and regulation; and court interpretation on traditional rights of indigenous people. *Ulayat* right has been recognized since 1960, but indigenous people has not been recognized as legal subject. Meanwhile, recognition towards indigenous people by regional regulation is precondition to claim their traditional rights. Constitutional Court affirms that the nature of indigenous people recognition is declaratory. The Court emphasizes that living *ulayat* right in the jurisdiction of indigenous people shall be enjoyed hereditary; therefore it shall not be limited by permit issued by the government. Unfortunately, in civil law disputes, traditional rights of indigenous people are often neglected because the Courts only focus on formal legal proof without considering legal history of Land Certificate issuance and living or factual control of indigenous people's towards the disputed object.

Keywords: indigenous people, *ulayat* rights, traditional rights, recognition, court interpretation

A. Background

National Agrarian Reform Committee said that 1% of the richest people in Indonesia controlled 50,3% of national wealth and another 10% richest people in Indonesia control 7% of national wealth.¹ By the great number of land monopoly, agrarian conflict increases from time to time. Agrarian Reformation Consortium noted that since 2015-2017 there were 1.361 manifest conflicts; and in 2017 there were 657 agrarian conflicts in 520.491,87 hectares (Ha) land involving 652.738 families.² According to identification conducted by Coalition for Law Reform based on Society and Ecology, HuMa, during agrarian conflicts, victims are communal groups, not individual, such as indigenous peoples, local communities, and groups of farmers.³

Indigenous people and small farmers are facing land appropriation and forced eviction during agrarian conflict.⁴ Oxfam noted that local rights-holders are losing out to local elites and domestic or

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- 1 National Agrarian Reform Committee said that 71 percent of land in Indonesia are controlled by forestry corporation, 16 percent of them are under large scale plantation corporation; 7 percent are managed by conglomerate; and the rest are authorized by people. See Komite Nasional Pembaruan Agraria, "Indonesia Darurat Agraria: Luruskan Reforma Agraria dan Selesaikan Konflik-Konflik Agraria", <http://elsam.or.id/2017/09/indonesia-darurat-agraria-luruskan-reforma-agraria-dan-selesaikan-konflik-konflik-agraria/>, accessed on 25/09/2017, accessed 6 February 2019.
 - 2 Agrarian Reformation Consortium reported that agrarian conflicts are conflicts based on sector where plantation sector dominates the conflicts (32 percent, 208 conflicts), followed by property (30 percent, 199 conflicts); infrastructure (14 percent, 92 conflicts); agriculture (12 percent, 78 conflicts); forestry (5 percent, 30 conflicts); marine and fishery (4 percent, 28 conflicts); and mining (3 percent, 22 conflicts). See Konsorsium Pembaruan Agraria, "Catatan Akhir Tahun 2017: Reforma Agraria di Bawah Bayangan Investasi Gaung Besar di Pinggiran Jalan", <http://kpa.or.id/assets/uploads/files/publikasi/d5a29-catahu-2017-kpa.pdf>, accessed on 27/12/2017, accessed 6 February 2019, p. 6.
 - 3 HuMa, "Outlook Konflik Sumberdaya Alam dan Agraria 2012: Membara, Menyebarkan, dan Meluas", <https://huma.or.id/home/pusat-database-dan-informasi/outlook-konflik-sumberdaya-alam-dan-agraria-2012-3.html>, accessed on 21/03/2013, accessed 6 February 2019.
 - 4 Petr Drbohlav and Jiri Hejkrlik, "Social and Economic Impacts on Lad Concessions on Rural Communities of Cambodia: Case Study of Botum Sakor National Park, *IJAPS*, Vol. 14, No. 1, 2018, p. 166.

foreign investors because they lack the power to claim their rights effectively and to defend and advance their interest.⁵ HuMa distinguished between indigenous peoples and local communities based on claim where indigenous people bring claim based on the history of the conflicting land, while group of farmers bring claim based on contractual relation with the company.⁶

Mutolib, *et.al.* said that agrarian conflict between Melayu indigenous people and government arises from conflicting claim of forest control.⁷ State granted concession permit on forest of Melayu indigenous people because according to State Law, *Adat Forest* (indigenous forest) is defined as state forest located in indigenous people's territory.⁸ In the perspective of the people, the state has no right towards their forest because they have lived around the forest long before the establishment of Indonesia nation state. These colliding claims create conflict between Melayu indigenous people, government and investor.

Marind indigenous people resist against government policy on "Merauke Integrated Food and Energy Estate" (MIFEE) introduced by Susilo Bambang Yudhoyono in 2010. Ginting said that resistance movement against MIFEE aims not only to stall, to stop, and to rehabilitate the damages; but also to address poverty among Marind

5 Bertram Zagma, 2011, *Land and Power the Growing Scandal surrounding the New Wave of Investment in Land*, Oxfam GB for Oxfam International, Oxford, retrieved from <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/142858/bp151-land-power-rights-acquisitions-220911-en.pdf;jsessionid=F05DCBF1CDB9F1670D4FC41B2001FAFE?sequence=32>, accessed 21 March 2018, p. 3.

6 HuMa, "Outlook Konflik Sumberdaya Alam dan Agraria 2012: Membara, Menyebar, dan Meluas", <https://huma.or.id/home/pusat-database-dan-informasi/outlook-konflik-sumberdaya-alam-dan-agraria-2012-3.html>, accessed on 21/03/2013, accessed 6 February 2019.

7 Abdul Mutolib, *et. al.*, "Konflik Agraria dan Pelepasan Tanah Ulayat (Studi Kasus pada Masyarakat Suku Melayu di Kesatuan Pemangkuan Hutan Dharmasraya, Sumatera Barat)", *Jurnal Penelitian Sosial dan Ekonomi Kehutanan*, Vol. 12, No. 3, 2015, p. 223.

8 See Article 1 (f) Law Number 41 of 1999 regarding Forestry before Constitutional Court Decision Number 35/PUU-X/2012 dated 26 March 2013.

indigenous people and to obtain recognition as indigenous people.⁹ MIFEE acquired 2.5 of 4 million hectares land in Merauke Regency where the community lives.¹⁰ This project is an economic politic scheme to serve global agribusiness industry under the claim of food and energy crisis. Unfortunately, it neglects traditional right of Marind indigenous people towards their land, territory, and natural resources; and their citizen right to enjoy a living that is decent for humanity.¹¹

Converting common pool resources into private property is the initial cause of coastal and marine resources conflict in Tomini Bay between Bajo indigenous people, government and private sector.¹² Bajo indigenous people who live on the sea are forced to resettle on land because their way of live are perceived as underdeveloped, traditional, and primitive.¹³ Indigenous people's way of life is often perceived as symbol of backwardness and obstacles to moderniza-

9 Wiranta Yudha Ginting and Cristina Espinosa, "Indigenous Resistance to Land Grabbing in Merauke, Indonesia: the Importance and Limits of Identity Politics and the Global-Local Coalitions", *International Journal of Social Science and Business*, Vol. 1, No. 3, 2016, p. 7.

10 Tim Inkuiri Nasional Komnas HAM, 2016, Inkuiri Nasional Komisi Nasional Hak Asasi Manusia Hak Masyarakat Hukum Adat atas Wilayahnya di Kawasan Hutan, Komisi Nasional Hak Asasi Manusia Republik Indonesia, Jakarta Pusat, retrieved from [https://www.komnasham.go.id/files/20160530-inkuiri-nasional-komisi-nasional-\\$N60YN.pdf](https://www.komnasham.go.id/files/20160530-inkuiri-nasional-komisi-nasional-$N60YN.pdf), p. 68. See Article 18B (2) and Article 27 (2) the 1945 Constitution Republic of Indonesia.

11 Eko Cahyono and YL. Franky, "Demi dan atas Nama MIFFE Suku Malind Dikorbankan" in Eko Cahyono, et. al. (Ed.), 2016, *Konflik Agraria Masyarakat Hukum Adat atas Wilayahnya di Kawasan Hutan*, Komisi Nasional Hak Asasi Manusia Republik Indonesia, Jakarta Pusat, retrieved from <http://www.aman.or.id/wp-content/uploads/2016/03/BUKU-3-KONFLIK-AGRARIA-MASYARAKAT-HUKUM-ADAT-ATAS-WILAYAHNYA-DI-KAWASAN-HUTAN-.pdf>, p. 937. See Article 18B (2) and Article 27 (2) the 1945 Constitution Republic of Indonesia.

12 Muhammad Obie, 2015, "Perampasan Hak Ulayat Pesisir dan Laut Komunitas Suku Bajo (Kasus Pengelolaan Sumber Daya Pesisir dan Laut di Teluk Tomini)", *Dissertation*, Sekolah Pascasarjana Institut Pertanian Bogor, Bogor, retrieved from <https://repository.ipb.ac.id/handle/123456789/75186>, p. 5.

13 Muhammad Obie, et. al., "Sejarah Penguasaan Sumber Daya Pesisir dan Laut di Teluk Tomini, *Paramita*, Vol. 21, No. 1, 2015, p. 82.

tion.¹⁴ They lose their traditional right towards their water and mangrove area because their access is limited by conservation policy and concession permit. Not only Bajo indigenous people, but also Roma indigenous community also lose their traditional right towards their water and territory through government policy. Gold exploration mining permit issued by the government to PT Gemala Borneo Utama, subsidiary company of PT Robust Resource Ltd. has destroyed their livelihood and created horizontal conflict between the people.¹⁵

Rights of indigenous people in Indonesia have guaranteed by the 1945 Republic of Indonesia Constitution (the Constitution). Indigenous people which translated as *Adat Law Community* has conditional traditional right. Their traditional right is conditional because it shall exist; in accordance with the development of society and the principle of Unitary State Republic of Indonesia; and in harmony with the development of the age and civilization. At this current situation, traditional right of indigenous people is not regulated in distinct law. Traditional right of indigenous people are regulated in various laws and regulations. This paper will describe how law and regulation recognize traditional rights of indigenous people.

When traditional right of indigenous people conflicts with other interest, court has pivotal role to settle it. Since 2001, the 1945 Republic of Indonesia Constitution has recognized new branch of judiciary power, Constitutional Court. Constitutional Court has authority to review laws against the Constitution at the first and final instance where the judgement is final. By the development, Constitutional Court has important role in enforcing traditional right of indigenous people. This paper will analyze how does the court interprets traditional right of indigenous people.

14 John Mamba, "Recognition "In Kind": Indonesian Indigenous Peoples and State Legislation", in Christian Erni (Ed.), 2008, *The Concept of Indigenous Peoples in Asia A Resource Book*, International Work Group for Indigenous People/Asia Indigenous People Pact Foundation, Copenhagen/Chiang Mai, p. 267.

15 Tim Aman Maluku, "Lewati Nyawa Kami, Jika Mau Rampas Tanah Roma, in Eko Cahyono, *et. al.* (Ed.), *Op. Cit.*, p. 675—691.

B. Recognition towards Traditional Rights of Indigenous People in Law and Regulation

Traditional right of indigenous people towards land and territory has been acknowledged by Indonesian law since 1960. Basic Agrarian Law¹⁶ recognizes *ulayat* right, indigenous people's right to control land and territory. According to this law, indigenous people can exercise their existing conditional *ulayat* right and any right similar to it. In *adat* law (customary law) literature, *ulayat* right was known as *beschikkingrecht* or ancient (*purba*) right. According to Bosco, scope of *ulayat* right embraces land, water, and natural resources contained therein.¹⁷

Beschikkingrecht was term introduced by Van Vollenhoven. It is further explained by Ter Haar as right of a group of people to internally regulate how the members collect resources from their land and restrict outsider to take unlawful benefit from their land.¹⁸ Ter Haar said that right to *bechikken* is absolute, including right to transfer land title, but according to Van Vollenhoven one of *beschikkingrecht* distinct character is prohibition to transfer the land.¹⁹ At this current situation, *ulayat* right is right to control land, but it restricts land transfer.

The term ancient right is introduced by M. M. Djodjodigoeno. The smallest indigenous community structure, village, has ancient right towards their territory. According to Iman Sudiyat, ancient right is right to control land in indigenous people territory.²⁰ This right co exists with individual right of the community's member. M. M. Djodjodigoeno says that relation between ancient right and individual

16 Law Number 5 of 1960 regarding Basic Agrarian.

17 Rafael Edy Bosko, "Reconsidering the Inalienability of Communal Ulayat Rights: Theoretical Review", article presented at the 19th ALIN Expert Forum Land Rights on Asian Countries conducted at Faculty of Law, Universitas Gadjah Mada, Yogyakarta on 12 June 2014, p. 17.

18 Ter Haar, 2013, *Asas-Asas dan Susunan Hukum Adat*, Translated by Soebakti Poesponoto, Balai Pustaka, East Jakarta, p. 49—50.

19 *Ibid.*

20 Iman Sudiyat, 1981, *Hukum Adat Sketsa Asas*, Liberty, Yogyakarta, p. 2.

right is flexible (*mulur mungkret*).²¹ Their relation is fluid because they adapt to each other. When ancient right towards land is strong, individual right is weak; and vice versa.

Legally speaking, the application of *ulayat* right shall limit the implementation of state right to control in the territory of indigenous people. If indigenous community practices their *ulayat* right in their territory; state shall restrict itself to control it. The application of *ulayat right* according to Basic Agrarian Law is limited. *Ulayat* right shall be applied only if it is in accordance with national and state interest; nation unity; Indonesia socialism; law and regulation, including religious law. The practice of *ulayat* right is restricted by law and regulation issued by the state. Later, indigenous people find that it is troublesome to exercise *ulayat* right because they are not recognized as legal subject.

Ulayat right has tight relation with customary law and indigenous people. *Ulayat* right can not be separated from the existence of indigenous people because *ulayat* right is practiced through the customary law within the jurisdiction of indigenous people's territory.²² If indigenous community is not recognized, then their *ulayat* right is not respected. The absent of recognition toward indigenous people as legal subject and indifference toward *ulayat* right can be seen in Forestry Law.

Forestry Law recognized indigenous forest, but it was defined as state forest located in the territory of indigenous people. This definition neglect indigenous people as legal subject who has right to control forest in their territory.²³ Recognition of indigenous people as legal subject to access their right is prominent. It is proven by requirement as mentioned in Forestry Law where right of indigenous people is considered only if they exist, recognized by regional regulation,

21 M. M. Djojodigono, 1961, *Asas-Asas Hukum Adat Kuliah Tahun 1960-1961 Djilid 1*, Jajasan Badan Penerbit Gadjah Mada, Jogjakarta, p. 97-98.

22 Darwin Ginting, 2012, "Politik Hukum Agraria terhadap Hak Ulayat Masyarakat Hukum Adat di Indonesia", *Jurnal Hukum dan Pembangunan*, Vol. 42, No. 1, p. 40.

23 Later, this provision is dismissed by the Constitutional Court Number 35 / PUU-X/2012 dated 26 March 2013.

and in line with national interest. Moreover, Forestry Law regulates that existing and recognized indigenous people have right to collect forest product for daily life; to manage forest according to customary land and not in contrary to state law; and to be empowered.

Theoretically speaking legal, the nature of recognition towards indigenous people is declaratory. Recognition through state legal instrument, such as regional regulation, is a declaration to confirm the existence of indigenous people.²⁴ State legal instrument does not justify the existence of indigenous community. The community themselves shall justify their existence. The state only administer the existence of indigenous community through state legal instrument. Though legal recognition through state law is only a declaration of existence, state often neglect existing indigenous people's right if they are not legally recognized. Failure to identify indigenous peoples as such incurs the imminent risk of violating the collective aspects of their human rights.²⁵ Considering the urgency of indigenous people recognition in order to access their right, Minister of Home Affair Republic of Indonesia issues regulation to administer indigenous people recognition.

In 2014, Minister of Home Affair Republic of Indonesia issues procedure to recognize indigenous people.²⁶ Indigenous people are defined as Indonesian citizen which has distinct character; lives in group harmoniously according to their customary law; has ancestral bonding and/or similar residence; has strong relationship with land and environment and has value system which hereditary determines their economic, politic, social, culture, law and utilization of territory.²⁷ Recognition and protection towards indigenous people shall be

24 Maria S.W. Sumardjono, 2018, *Regulasi Pertanahan dan Semangat Keadilan Agraria*, STPN Press, Yogyakarta, p. 44.

25 Birgitte Feiring, 2013, *Indigenous People's Rights to Lands, Territories, and Resources*, International Land Coalition, Rome, p. 14.

26 Minister of Home Affair Regulation Number 52 of 2014 regarding guideline to Guideline to Recognize and to Protect Indigenous Community.

27 Different from Minister of Home Affair, Minister of Forestry and Environment defines *Adat Law Community* as a group of hereditary community who lives in particular geographical territory based on genealogical bonding, livelihood bonding, and value system which determines their econom-

conducted by governor or regent/mayor (chief of region). Chief of region's authority to recognize the existence of indigenous people is not only regulated in Minister of Home Affairs Regulation, but also in Regional Government Law²⁸. According to this law, regional government of province and regency/municipality, has authority to recognize and to protect indigenous community's right.

Minister of Home Affairs regulates steps to recognize indigenous people. It is started from identification, verification to stipulation. By involving indigenous people, regent/mayor shall identify the history; territory; law; wealth and/or property; and organization system/institution of the community. This identification will be verified and validated by regency/municipality indigenous people committee²⁹. Then it will be published to the community within a month.

If there is objection from the community, the committee shall re-verify and re-validate the identification. Verification and validation result is the basic of the committee to deliver recommendation to the regent/mayor. Based on the recommendation, regent/mayor recognizes indigenous people through chief of region decision. If the community lives in two or more regencies/municipalities, recognition shall be stipulated by head of region joint decision.

Recognition of indigenous people through regent/mayor decision is prominent since it is the precondition to claim their rights. Theoretically speaking there is different between regional regulation and decision issued by chief of region. Regional regulation is a product of legal consensus between regional house of representative and chief of region. While chief of region decision is decision issued solely by the chief without any consensus with regional house of representative. From above explanation, there is inconsistency between recognition of indigenous people regulatory in Forestry Law

ic, political, social, and law structure.

28 Law Number 23 of 2014 regarding Regional Government.

29 *Adat Law Community Committee* is committee established by regent/mayor and consists of Head of Region Secretary as the head; head of unit of government on people empowerment; head of legal department of regency/municipality; head of district; and head of government unit related to the characteristic of *Adat Law Community*.

and Minister of Home Affair Regulation.

Forestry Law orders to recognize indigenous people through regional regulation, but Minister of Home Affair instructs to acknowledge indigenous people by chief of region decision. In order to mitigate the disharmony, Minister of Forestry and Environment issues regulation regarding Forest with Title³⁰. This regulation broaden instrument to recognize indigenous community. Recognition towards indigenous community can be conducted through regional law product. Regional law product is legal instrument which expected to accommodate either regional regulation, chief of region decision, or chief of region joint decision.

At this current situation, there are three Drafts of Law regarding indigenous people proposed by House of Representative, Regional Representative Council, and Indonesia Indigenous Community Alliance (AMAN). According to Sumardjono recognition of indigenous people's existence shall identify legal subject; existence of territory as legal object; and existence of authority to conduct legal action.³¹ In general, these drafts are similar. They try to recognize indigenous people's right towards territory, natural resources, development, spiritual and culture, and environment. The different is how the procedure to recognize indigenous community whether indigenous community as subject or the object under the control of the community which shall be recognized first.

Right of indigenous people towards natural resources are scattered in natural resources law. Not only Basic Agrarian Law, but also Plantation Law³² recognizes *ulayat* right of indigenous people. It is defined as authority of indigenous people to collectively regulate the utilization of land, territory and natural resources because resources in their territory are their source of life and livelihood. Plantation permit on indigenous people's territory can only be issued if there is

30 Minister of Forestry and Environment Regulation Number 32 of 2015 regarding Forest with Title.

31 Maria S.W. Sumardjono, 2009, *Kebijakan Pertanahan antara Regulasi dan Implementasi*, Kompas, Jakarta, p. 57.

32 Law Number 39 of 2014 regarding Plantation.

consensus between the community and Plantation Company.

As mention before, recognized indigenous people have right to manage forest. According to Prevention and Eradication of Forest Destruction Law³³, indigenous people who has permit to manage forest shall also prevent forest destruction. To prevent and to eradicate forest destruction, the community has right to search and to receive information and to obtain service in searching, receiving, and giving information on allegation of forest destruction and misuse of permit. They also have rights to search and to obtain information on forest management permit issued by regional government; to deliver recommendation and opinion to legal enforcer; and to obtain legal protection in exercising rights and in investigation, inquiry, and court proceeding as informant, witness, or expert.

According to Law regarding Coastal Area and Small Islands Management³⁴, utilization of coastal area and small islands, including business on sea surface and water column to bottom of the sea surface, is granted in the form of Right of Coastal Water. Later, Right of Coastal Water is revoked by Constitutional Court. Then, Right of Coastal Water is replaced by Location Permit. Location Permit is permit granted to utilize space of partial coastal water including sea surface and column water to bottom of sea surface in certain area and/or to utilize part of small islands. Persons who utilize space and part of coastal water; and utilize permanent small islands shall have Location Permit as the basic of Management Permit, except indigenous people. Recognized indigenous people is excluded from obligation to have Location Permit in order to utilize their space and resource in coastal area and small islands in their territory.³⁵

33 Law Number 18 of 2013 regarding Prevention and Eradication of Forest Destruction.

34 Law Number 27 of 2007 regarding Management of Coastal Area and Small Islands. This Law is amended by Law Number 1 of 2014 regarding Amendment of Law Number 27 of 2007 regarding Management of Coastal Area and Small Islands.

35 See Article 17 and 22 Law Number 1 of 2014 regarding Amendment of Law Number 27 of 2007 regarding Management of Coastal Area and Small Islands..

Indigenous people in Papua is distinctly recognized by Law regarding Papua Province Distinct Autonomy³⁶. They are defined as native Papua people who born and live in particular area, bound and obey customary law, and have high solidarity between the members. The community has *ulayat* right and each member has individual right. *Ulayat* right is communal right of indigenous community towards particular territory as members' livelihood including right to utilize land, forest, water and therein according to law and regulation.

Ulayat right shall be conducted by head of the community according to their customary law by respecting authorization of *ex ulayat* land which has legally transferred to other party. Procurement of *ulayat* land or individual land of the community shall be conducted through deliberation to achieve consensus on land transfer and compensation. Government shall actively, fairly, and wisely mediate dispute resolution of *ulayat* land and *ex* individual land to achieve satisfying consensus between parties.

Minister of Agrarian and Spatial Planning aware that land right of indigenous people who live in forest or plantation is often disputed; therefore it shall be protected. In 2016, Minister of Agrarian and Spatial Planning issues procedure to stipulate Communal Land Right of indigenous people and community in particular area³⁷. Communal right is collective land ownership of indigenous people or collective land ownership granted to community living in forest or plantation. In order to obtain Communal Land Right, indigenous community shall be *paguyuban* community³⁸; have indigenous government insti-

36 Law Number 21 of 2001 regarding Distinct Autonomy for Papua Province.

37 Minister of Agrarian and Spatial Planning/ Head of National Land Agency Regulation Number 10 of 2016 regarding Procedure to Stipulate Land Communal Right of *Adat* Law Community and Community in Particular Area.

38 Sasmitha says that *paguyuban* refers to *rechtgemeenschappen*. *Adat* Law Community as *rechtgemeenschappen* is community which has permanent and eternal structure; created by destiny; a unity of communal living; unity of belief; has distinct material and immaterial wealth; has administrator; has no authoritarian organization character; and the member has no desire

tution; have clear territory boundaries; and have customary law and structure. Community living in forest or plantation shall authorize the land physically at least 10 (ten) years or more consecutively; collect natural product or utilize land directly in forestry or plantation and its surrounding to fulfil daily need; consider forest or plantation as their main source of life and livelihood; and have social and economic activity integrated with forest or plantation.

Procedure to obtain Communal Land Right is started from indigenous community request to regent/mayor or governor. Based on the request, regent/mayor or governor shall establish Inventory Team of Control, Ownership, Use, and Utilization over Land (IP4T Team) to identify the existence of indigenous people and their land. IP4T Team will check, identify and verify the document on applicant's land history and authorization. When it is complete, IP4T Team conduct field observation. Based on collected data, IP4T Team shall verify whether there is authorization of land by indigenous people.

If there is land authorization by indigenous people, the team shall analyze under what title the authorized land is. Title of land authorization will determine where to address the report. If the land is under forest area, the report shall be submitted not only to chief of region, but also to Minister of Forestry, *cq.* Director General on Planology Forestry. Then, Minister of Forestry shall release the forest area and revise utilization and function of forest.

If the land in under Right to Cultivate, the report shall be sent to the head of region and the right holder or any related party regarding the authorization of the land. The right holder is requested to release

to dissolve. See Sasmitha, Tody, 2016, "Masyarakat Hukum Adat: Persekutuan Hukum (Rechtsgemeenschappen) atau Subyek Hukum". Article delivered in Simposium Nasional Masyarakat Adat II in Universitas Pancasila conducted by cooperation between Epistema Institute, Aliansi Masyarakat Adat Nusantara, Perkumpulan HuMa, Pusat Kajian Hukum Adat Djojodigono Universitas Gadjah Mada, Komisi Nasional Hak Asasi Manusia, Fakultas Hukum Universitas Pancasila, Jaringan Kerja Pemetaan Partisipatif, and Badan Registrasi Wilayah Adat on 16-17 May. It is part of research funded by Unit Penelitian dan Pengabdian kepada Masyarakat Faculty of Law, Universitas Gadjah Mada, p. 4-5 & 9.

partial land title which has been authorized by the indigenous people and return it to the state. If the right holder is unwilling to release or to return the land, Head of Regional Land Agency requests cancellation of partial land title to Minister of Agrarian and Spatial Planning. If it is granted, Minister of Agrarian and Spatial Planning issues Decision regarding Cancellation of Right to Cultivate. The land becomes state land and later granted to the community. If it is rejected, Minister of Agrarian and Spatial Planning will return back the document to Head of Regional Land Agency and recommend the right holder to well utilize, use, and maintain the land; and not to create conflict.

Use and utilization of registered Communal Right of indigenous people can be cooperated with third party based on consensus and law. Transfer of indigenous people's Communal Right shall be conducted according to customary law. Susilaning Sih differentiates between communal right and *ulayat* right because *ulayat* right has wider scope than communal right.³⁹ Sumardjono explains that *ulayat* right has broader scope than communal right because *ulayat* right has public and private character, while communal land right only has private character.⁴⁰ Public character of *ulayat* right authorizes indigenous community to regulate land utilization and to manage relation between the community and the land; while private character of *ulayat* right is *ulayat* right as manifestation of collective ownership.⁴¹ By considering this difference, recognizing Communal Right of indigenous people restrict the nature of *ulayat* right which has public and private character because it only recognized private character of *ulayat* right, collective ownership.

As mentioned above, *ulayat* right is traditional right of indigenous people. Recognizing *ulayat* right of indigenous people is different from granting communal right to community in forest and plantation. The nature of *ulayat* right recognition is declaratory, while the

39 Tri Susilaning Sih, 2018, "Juridical Studies on the Communal Rights of Land according to Agrarian Law in Indonesia", *Journal of Law, Policy, and Globalization*, Vol. 71, p. 168.

40 Maria S.W. Sumardjono, 2018, *Op. Cit.*, p. 37.

41 *Ibid.*, p. 37-38.

nature of granting communal right to community in forest and plantation is constitutive. Recognition of *ulayat* right is to confirm what already exists, while granting communal right to the community is creating new right which does not exist before. By considering the nature of *ulayat* rights, Sumardjono says that the government shall only grant communal land right of community living in forest and plantation in order to create new title for their existing land authorization.⁴² Traditional rights of indigenous people shall not be given, but it shall be recognized by considering the fact that their rights exist hereditary and traditionally.

C. Court Interpretation on Traditional Right of Indigenous People

Constitutional Court has jurisdiction to review law against the Constitution. Article 18B (2) of the Constitution is often brought by the claimant as legal basis to review natural resources law which allegedly violates traditional right of indigenous people. This article guarantees recognition and protection towards traditional right of indigenous people. Article 18B (2) of the Constitution is brought to challenge Forestry Law.

Forestry Law recognizes traditional indigenous people's property, indigenous forest. According to this law, indigenous forest is state forest located in indigenous people's territory.⁴³ Constitutional Court Decision Number 35/PUU-X/2012 dated 26 March 2013 decides that defining indigenous forest as state forest contradicts to the Constitution. It is against the Constitution because it neglects traditional rights of indigenous people.

Indigenous forest is located within the jurisdiction of indigenous people's *ulayat* right. Within *ulayat* right, there is individual right. As explained before, relation between *ulayat* right and individual right is fluid. When individual right is strong, it will limit the application of *ulayat* right. Since *ulayat* right is applicable on indigenous forest,

⁴² *Ibid.*, p. 44. Tri Susilaningsih, *ibid.*

⁴³ See Article 1 (f) Law Number 41 of 1999 regarding Forestry.

Constitutional Court says that state only has indirect control towards indigenous forest.⁴⁴ State has indirect authorization towards indigenous forest because state right to control is limited by *ulayat* right. Through *ulayat* right, indigenous people directly control their territory.

Article 18B (2) of the Constitution is also used as legal basic to challenge Right to Cultivate Coastal Water in Law regarding Coastal Area and Small Island Management. According to Constitutional Court, Right to Cultivate Coastal Water threatens the existence of indigenous people's traditional right.⁴⁵ Right to Cultivate Coastal Water will deprive hereditary right of indigenous people to utilize coastal water and small islands. Even if they receive compensation when Right to Cultivate Coastal Water in their territory is given to private company, it still hampers their traditional right.

According to Constitutional Court, either utilizing their territory based on Right to Cultivate Coastal Water for 20 years which extendable or receiving compensation is against the concept of *ulayat* right.⁴⁶ *Ulayat* right is limitless traditional right because it is enjoyed hereditary. Replacing *ulayat* right with 20 years permit will confine the application of *ulayat* right into particular period on time.

Compensation to replace indigenous people's traditional right will deprive hereditary enjoyment of *ulayat* right. *Ulayat* right is inherited from the ancestor to be taken care of by current generation and later will be enjoyed by future generation. Each generation has right to live on the planet in no worse condition than did the past generation, to inherit comparable diversity in the cultural and natural resources, and to have just access to the use and advantage of the legacy.⁴⁷

44 Constitutional Court Decision Number 35/PUU-X/2012 dated 26 March 2013, p. 172.

45 Constitutional Court Decision Number 3/PUU-VIII/2010 dated 9 June 2011, p. 162.

46 Constitutional Court Decision Number 3/PUU-VIII/2010 dated 9 June 2011, p. 163.

47 Edith Brown Weiss, 1990, Our Rights and Obligations towards Future Generations for the Environment, *The American Journal of International Law*,

Compensation is received only by the community at the time it is given. When compensation is received, future generation loses their chance to enjoy *ulayat* right. This contradicts to the principle of *ulayat* right as traditional right which shall be enjoyed hereditary. Considering those reasons, Constitutional Court Decision Number 3/PUU-VIII/2010 dated 9 June 2011 revokes Right to Cultivate Coastal Water regulated in Law regarding Coastal Area and Small Islands Management.

Water Resources Law respects living *ulayat* right of indigenous people towards water resource which has been recognized by regional regulation.⁴⁸ Constitutional Court emphasizes that the nature of indigenous people recognition through regional regulation is not constitutive, but declarative.⁴⁹ It is not constitutive recognition because it does not constitute new rights. Declarative recognition is recognition towards fact of existence.⁵⁰ The fact that indigenous people exist is recognized by the state through regional regulation. Regional regulation declares recognition towards the existence of indigenous people and their traditional rights. Recognition is to recognize being which exist, not to grant existence.⁵¹

Right of indigenous community towards land and territory is not only contested in Constitutional Court, but also in District Court, High Court, and Supreme Court. *Langgam* Indigenous Community and *Luhak* Indigenous Community are indigenous communities living in West Sumatra. Utilization of indigenous people's *ulayat* land in West Sumatra by private entity has been practiced before either right of indigenous people is recognized by the Constitution in 2000

Vol. 4, No. 2, p. 202.

48 See Article 6 (2) Law Number 7 of 2004 regarding Water Resources (Water Resources Law). This Law is revoked by Constitutional Decision Number 85/PUU-XI/2013 dated 17 September 2014.

49 Constitutional Decision Number 85/PUU-XI/2013 dated 17 September 2014, p. 142. See, Constitutional Court Decision Number 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005 dated 19 July 2005, p. 503.

50 Sukirno, 2016, "Tindak Lanjut Pengakuan Hutan Adat Setelah Putusan Mahkamah Konstitusi No. 35/PUU-X/2012", *Masalah-Masalah Hukum*, Vol. 45, No. 4, p. 261.

51 *Ibid.*

or *ulayat* land and its utilization are recognized by regional regulation in 2008.

Since 2008, *ulayat* land and its utilization in West Sumatra is recognized through regional regulation.⁵² According to this regulation, *ulayat* land in West Sumatra consists of *Nagari Ulayat* Land controlled by *Ninik Mamak Kerapatan Adat Nagari*; *Tribe Ulayat* Land owned by head of tribe representing its members; *Kaum Ulayat* Land owned by *Mamak Kepala Waris* representing *jurai/paruik* of its *kaum*; and *Rajo Ulayat* Land which owned by eldest man heir of *rajo* representing members of *kaum* from matrilineal lineage. According to the regulation, *ulayat* land of indigenous people can be utilized for private interest. Utilization of *ulayat* land for private entity's/individual's interest shall be conducted based on Utilization and Cultivation Agreement between the owner/holder/controller of *ulayat* land and private entity/individual regarding duration of time and profit sharing.

Langgam Indigenous People and *Luhak* Indigenous People are neighbors. On 1st May 1985, they sign agreement of land boundaries between *Langgam* and *Luhak* according to *Kinali* Customary Law. On 24th May 1989, *Langgam* Indigenous People, according to *Bakinali* Customary Law and witnessed by head of Indigenous People, gives 7.000 Ha *ulayat* land located in *Langgam* Village and *Katiangan* Village to PT Tri Sangga Guna to be utilized as palm oil plantation. On 20th November 1991, Land Registrar Office issues Right to Cultivate Certificate on 7.000 Ha *ulayat* land located in *Langgam* Village and *Katiangan* Village to PT Tri Sangga Guna to be utilized as palm oil plantation.

In 2007, *Luhak* Indigenous People files lawsuit against PT Tri Sangga Guna and PT Laras Internusa. *Luhak* Indigenous People sues PT Tri Sangga Guna and PT Laras Internusa under act against law because the company does not clear land for palm oil plantation according to Right to Cultivate Certificate. The company unlawfully clear land of *Luhak* Indigenous People's territory located in *Sidodadi* Village and gradually expand their palm oil plantation up to ±11.050

⁵² West Sumatera Province Local Regulation Number 6 of 2008 regarding *Ulayat* Law and Its Utilization.

Ha. West Pasaman District Court rejects *Luhak* Indigenous People's claim by reasoning that 7.000 Ha of land disputed object under Right to Cultivate title is lawfully authorized by PT Laras Internusa through auction; therefore *Luhak* Indigenous People has no legitimate right over the disputed land.⁵³

The Court does answer claim brought by *Luhak* Indigenous People which contesting authorization of PT Laras Internusa on *Luhak* Indigenous People's land in Sidodadi Village, not authorization of PT Laras Internusa under Right to Cultivate title in *Langgam* Village and *Katiangan* Village. Moreover, according to research conducted by West Pasaman Regent to settle dispute between PT Laras Internusa dan *Luhak* Indigenous People, it is found that (1) land authorized by PT Laras Internusa for palm oil plantation is located in Sidodadi Village within *ulayat* land of *Luhak* Indigenous People, while location of land registered under Right to Cultivate title is within *ulayat* land of *Langgam* Indigenous People; (2) PT Laras Internusa shall give plasma garden to *Luhak* Indigenous People; (3) since land authorization of PT Laras Internusa has not fulfilled *Bakinali* Customary Law; therefore PT Laras Internusa shall pay *silih jarih* as compensation of land authorization to *Luhak* Indigenous People.

Unfortunately, there is no follow-up action towards the research finding and on 9th May 2008, West Pasaman Regent issues new Plantation Permit to PT Laras Internusa. Not satisfied with West Pasaman District Court Decision, *Luhak* Indigenous People files appeal to High Court. Padang High Court strengthens West Pasaman District Court Decision. Then, *Luhak* Indigenous People submit second appeal to Supreme Court, but it is rejected.⁵⁴

In 2012, *Luhak* Indigenous People files another law suit against PT Tri Sangga Guna, PT Laras Internusa, and West Pasaman Regent. They argue that the defendants have unlawfully authorized ±11.050

53 See West Pasaman District Court Decision Number 17/PDT.G/2007/PN/PSB, dated 29th July 2008.

54 See Padang High Court Decision Number 42/PDT/2009/PT.PDG, dated 22nd June 2009 and Supreme Court Decision Number 1112K/PDT/2010, dated 15th November 2010.

Ha land for palm oil plantation within *ulayat* land of *Luhak* Indigenous People. West Pasaman District Court decides not to receive the claim since the claim is *nebis in idem* to West Pasaman District Court Decision Number 17/PDT.G/2007/PN/PSB *jo*. Padang High Court Decision Number 42/PDT/2009/PT.PDG *jo*. Supreme Court Decision Number 1112K/PDT/2010.⁵⁵

Right of Indigenous Community towards land and territory is not only recognized in West Sumatra, but also in Papua. Indigenous Community in Papua is recognized and protected by Law regarding Distinct Autonomy.⁵⁶ Indigenous people shall be involved in the deliberation of *ulayat* land procurement to achieve consensus regarding land transfer and compensation. If there is dispute on *ulayat* land procurement, provincial and regency/ municipality government shall actively mediate to settle dispute fairly and wisely.

In 2015, Demianus M. Afaar, heir of Afaar Tribe, files lawsuit against Republic of Indonesia Government *cq.* Minister of Home Affairs *cq.* Papua Governor. Claimant argues that disputed object is *ulayat* land of *Nonomiweci* Indigenous Community located in STIE street Kotaraja, VIM Kotaraja Village, Abepura District, Jayapura Municipality. This land is hereditary owned by Afaar Indigenous Community. In 1974, Cigombong Kotaraja Government built Local Government of Cigombong Kotaraja housing on disputed land without any release from Indigenous Community and compensation according to law and regulation. Plaintiff sues defendant to return back disputed object or to pay compensation. Jayapura District Court is in favor of the claimant and order defendant to return back the disputed object to claimant or to pay compensation.⁵⁷

Defendant submits appeal to Jayapura High Court. Jayapura High Court revokes decision of Jayapura District Court because High Court argues that plaintiff can not prove that disputed object

55 See West Pasaman District Court Decision Number 05/PDT.G/2012/PN.PSB, dated 26th February 2013.

56 Law Number 21 of 2001 regarding Distinct Autonomy for Papua Province.

57 See Jayapura District Court Decision Number 85/Pdt.G/2013/PN.Jpr, dated 7 April 2014.

belongs to Afaar Indigenous Community.⁵⁸ According to defendant, disputed land belongs to Papua Local Government proven by Right to Use Certificate⁵⁹ issued by Land Registrar Office. Defendant argues that this certificate is lawfully obtained based on Letter of Land Title Release from Petrus Hamadi, head of Indigenous Community, dated 5th July 1973.

Regarding Letter of Land Title Release from Petrus Hamadi, it has been proven in Jayapura District Court that Petrus Hamadi did not sign or handled over Letter of Land Title Release to Papua Local Government. Indigenous Community also has not received compensation; therefore issuance of Right to Use Certificate as legal basic to build Local Government of Cigombong Kotaraja housing has no legitimate basis.

In Jayapura District Court, defendant does not object the proof that plaintiff has lawfully hereditary owned disputed object either based on customary law or national law. Moreover, according to law and regulation, issuance of Certificate of Land Title which initially owned by Indigenous Community shall be based on Letter of Land Title Release witnessed by authorized officers and contains land identity and compensation.⁶⁰

Not satisfied with Jayapura High Court Decision, claimant files second appeal to Supreme Court. Unfortunately, it is rejected by reasoning that there is no proof which strengthens claim of plaintiff that disputed land is owned by *Afaar* Indigenous Community.⁶¹ Both High Court and Supreme Court neglect District Court's proof that *Afaar* Indigenous Community is proven as legal owner of the disputed land; the tribe has not released the land; and there is no compensation received by the tribe.

Conceptually speaking, judge in codification system of law and

58 See Jayapura High Court Decision Number 53/PDT/2014/PTJAP, dated 29 October 2014.

59 Right to Use Certificate Number 870 of 1982 holds by Irian Jaya (Papua) Local Government.

60 At that time, land release is regulate under Minister of Home Affair Regulation Number 15 of 1975 regarding Procedure to Release Land.

61 See Supreme Court Decision Number 864K/Pdt/2015, dated 27 July 2015.

customary law has similarity and differences. Either in codification system of law or customary of law, judge decides based on past legal principle; society's condition; and case individuality.⁶² The different is that judge in codification legal system shall implement legal principle and norms in codified law, while judge in customary law has more flexibility to include or exclude legal principle in customary law based on situation suitable for each case.⁶³ Koesno mentions that in customary law, judge made law according to harmony, propriety, and peaceful legal principles in order to settle the dispute and restore the wellness.⁶⁴

Above decisions are judge made law according to codified law. Theoretically, judge in codified law shall apply past legal principle in the specific case by considering the society's condition. Constitutional Court has appropriately reviewed law by referring to legal principle to recognize and respect traditional right of indigenous people. *Ulayat* right is traditional right of indigenous people towards their territory, including land, water, and natural resources therein. Constitutional Court has confirmed that *ulayat* right is traditional right which shall be enjoyed hereditary; therefore it can not be limited for example by Right to Cultivate Coastal Water for 20 years. *Ulayat* right is applicable in the jurisdiction of Indigenous People, therefore recognition towards indigenous people as legal subject is prominent. Constitutional Court has confirmed that the nature of recognition towards indigenous people through regional regulation is declaratory.

Unfortunately, District Court, High Court and Supreme Court often did not decide the case by referring to the legal principle to recognize and respect indigenous people in regional regulation and Law. The Courts neglect direct or living control of indigenous people

62 M.M. Djojodigono, 1960, *Harapan Hukum Adat Indonesia*, Badan Penerbit Gadjah Mada, Jogjakarta, p. 29.

63 Sulastriyono and Sartika Intaning Pradhani, 2018, "Pemikiran Hukum Adat Djojodigono dan Relevansinya Kini", *Mimbar Hukum*, Vol. 30, No. 5, p. 456.

64 Moh. Koesno, 1979, *Catatan-Catatan terhadap Hukum Adat Dewasa Ini*, Airlangga University Press, Surabaya, p. 61.

towards their land and only focus on formal legal certainty according to Land Certificate. Though right of indigenous people is legally recognized and protected by regional regulation and Law, there is still another challenge to prove their factual control before the Court.

D. Conclusion

Traditional land right of indigenous people, *ulayat* right, has been recognized since 1960 through Basic Agrarian Law. Unfortunately, recognition of *ulayat* right is not automatically recognition of indigenous people as legal subject. Failure to recognize indigenous people as legal subject neglects their right to access natural resources because laws, such as Forestry Law, Plantation Law, Prevention and Eradication of Forest Destruction Law, and Coastal Area and Small Islands Management Law, require recognition of indigenous people as basic precondition to access their right.

Court has crucial role to interpret traditional rights of indigenous people in specific case by considering society's condition. According to Constitutional Court, living *ulayat* right in the jurisdiction of indigenous people shall be enjoyed hereditary. It shall not be limited by permit issued by the government. In order to respect traditional right of indigenous people, indigenous people shall be recognized as legal subject through regional law product. The nature of indigenous people recognition is declaratory because it is necessary to confirm their existing rights. Unfortunately, in civil law disputes, District Court, High Court and Supreme Court often neglect traditional rights of indigenous people because the Courts only focus on formal legal proof, Land Certificate, without considering legal history of Land Certificate issuance and living or factual control of indigenous people's towards the disputed object.

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