Factors Affecting the Protection of Indigenous Peoples' Rights under the National Agrarian Law System (Case Study in Central Sulawesi Province)

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Abstract: This study analyzes the efforts to protect the rights of indigenous peoples in the national agrarian law system. This research uses Normative Law research type and Empirical Law. Sources of data obtained from the primary data and secondary data as a material analysis obtained from respondents and informants. The results show the form of protection in two ways, namely, First; Interior factors that serve as an indicator is the community's efforts to advocate for their rights through government agencies, private and law enforcement agencies, and Second; External factors are the support of a number of government and community institutions, which are referred to as such institutions ranging from legislative bodies (DPR / DPRD), executive and judicial institutions and some non-governmental organizations (NGOs). The research recommendation should be all legal products related to the land and have been applied as legal basis in order to fulfill the rights of indigenous peoples and as part of the national agrarian legal system.

Keywords: Protection, Indigenous Peoples, Agrarian Law

Preliminary
Tenure and Property Ownership of Indigenous People's land, by Van Vollenhoven referred to as besickingrecht. The indigenous and tribal peoples in this case serve as the watchdog for the order and security of the use of ulayat rights.¹ But in its development, the pattern of land tenure in the increasingly marginalized due to the politics of land law that does not firmly make arrangements and protection of the rights of local indigenous peoples.²

Customary law which originally became a living law and able to provide solutions in various social problems of Indonesian society, the dayIn Indonesia, the fading of its existence. Currently, in the empirical reality, there are many emerging problems faced by indigenous people of Indonesia when customary law is faced with positive law.³

This is what causes the agrarian conflict. The widespread agrarian conflict is a major sign of the need for the immediate implementation of the Agrarian Reform, since conflicts are always caused by reasons of inequality of ownership, control and management of agrarian resources or so-called imbalances of agrarian structures.⁴

Customary rights owned by traditional community in Palu City have changed its status (authority) that is to become State land based on Decree of Governor of Central Sulawesi Province Number 592.2/8158/RO.Huk/Tahun1993 About Making of Land Deed and Submission of Right of Land Ownership. The decree shifts the status of customary land into another right or is controlled by another legal subject who has no right or no legal relationship as traditional as Palu Community Traditional Law.

Transitioning the status of customary land into state-owned land can trigger or potentially lead to new legal problems (latent conflict). The legal issue relating to the transition is what is the legal basis of the Central Provincial Governor's Decision to transition from customary rights (ulayat right) to State land. The legal issue becomes very important to be studied, especially the legal basis of the transfer of customary land rights into other rights (entrepreneur right) by the Central Sulawesi Provincial Government. The transition of such rights under agrarian law (positive law) is seen as a violation of the constitution (Article 28 point 6) and violation of the principles of land law (principle of unity) that must be maintained through the regulation of land tenure and the provisions of legislation on utilization And control over customary land (ulayat truth).

Several provisions of the legislation are violated namely, Law no. 5 Year 1960 The Basic Regulation of Agrarian Mainstreaming (UUPA), especially Article 4 Juncto Article 20 which refers to the philosophy of Indonesia's legal relationship with the earth is an ulayat right not belonging to property (Sudargo Gautama, 1997:52). Further Government Regulation No.24/1997 concerning Land Registration relating to registration and
transfer of land rights, Minister of Home Affairs Regulation no.14 of 1975 concerning Registration of Land Ownership Rights and Ownership of Bangian-Building Section existing above and the issuance of certificates. Similarly Article 3 of Government Regulation Number 16 of 2004 concerning Land Acquisition and Presidential Decree No. 55/1993 concerning Revocation of Land Rights in the Public Interest. These legal provisions serve as a reference for assessing the content (substance) to the extent of the validity of the Governor's Decree as the basis for the transfer of rights or the revocation of customary land rights in Palu City and whether the philosophy of the national agrarian law system remains relevant. Therefore, the national agrarian law system incorporates custom (community) law which adheres to customary rights is still customary land owned collectively by the surrounding community. In fact, the transition of custom land into a land of right of use which is handed over by the provincial government to one of the business actors whether constitutional violation or not. The legal issue if analyzed in human rights perspective, can be categorized as human rights violation, because the right is guaranteed in NRI 1945 Constitution.

The 1945 Constitution Article 18B paragraph (2) expressly states that the state recognizes and respects the unity of indigenous and tribal peoples along with their traditional rights as long as they are alive and in accordance with the development of society and the principle of the Unitary State of the Republic of Indonesia. The article becomes the constitutional basis for every person / group to respect and respect the rights of traditional society which is still in accordance with the development of its society. In that connection, if there is a transfer of ownership of customary land (ulayat) done by a person or government then the action is unconstitutional. Why? Because the constitution has established the rights of indigenous peoples as one of human rights. Human rights (human rights groups) that everyone must recognize and respect (vide Article 28 I of the 1945 Constitution of 1945) so that every person, society and government and law enforcement officials should support and not neglect it. One of the facts is the enactment of the Provincial Governor's Decree which is the basis of the conflicting transition of customary land rights in violation of the constitution or the provisions of the legislation in the field of land.

This fact has led to the pros cons in society, causing social conflicts, both horizontal and vertical. Horizontal conflicts arise of disputes among citizens about customary land rights derived from the transfer of rights whereas on the other hand the customary rights holders are unwilling to give up customary rights which have been controlled by the community for generations. Vertical conflict is the emergence of a dispute over the decision of the governor who was sued through the state administrative court. The issue raises the legal issue of whether the transition of the rights of indigenous peoples through the decision of the provincial governor of Central Sulawesi has violated the rights of the adat community as recognized by the constitution in the context of the national agrarian law system.

Research methods

This research uses the type of normative legal research and empirical law that analyzes the provisions of legislation in the field of agriculture related to the pattern of tenure and ownership of customary land in Central Sulawesi Province. Sources of data obtained from the primary data and secondary data as a material analysis obtained from respondents and informants. Qualitative data analysis techniques (deductive-inductive) using legal reasoning and legal argumentation Central Sulawesi, data source by from primer and secunder data to analyzed respondent and inform. Technic analyze qualitative data (deductive and inductive) with using logistic (legal reasoning) law argumentation.

Discussion

As the topics in this study is to examine the protection of the ulayat rights of society there, then in the results of research and discussion researchers divide into two things:

1. External Protection
2. Legislative Body

Indonesia as a state of law, in executor divide branches of state power in three namely legislative, executive and judiciary. One of the government agencies that is the driving force behind the protection of the rights of indigenous peoples of the legislature. This institution is normatively authorized in the manufacture of legal products, in this case the law derived from Article 5 paragraph 1 of the 1945 Constitution of the Republic of Indonesia. In the article, the authority to make laws is the DPR / DPRD with the President / Regional Head. This constitutional authority has been undertaken by the DPR and DPRD in producing legal products relating to the protection of the rights of indigenous peoples. The results showed that legislative law product (DPRD) increased since the stipulation of Decision of the Constitutional Court Number 35 of 2012 which was read on May 16, 2013. In the note it is shown that since the decision of the Constitutional Court No.35 has triggered national legal products (DPR) and local law products (DPRD) on the protection of...
According to Episteme's report of 2017 that:

Since the Constitutional Court's ruling, there have been 69 new regional law products on indigenous peoples, ranging from recognition of indigenous peoples, customary territories, customary forests, customary institutions and courts, and adat villages. The total area of adat is also wider than 15,199.16 hectares before The Constitutional Court decision 35 to 213,541.01 hectares. In other words there is an addition of 197,541.85 hectares in three years or 65,847.28 hectares per year. Similarly, at the national level there is also more concrete legal recognition when the Minister of Environment and Forestry issues a Decree which recognizes 9 customary forests with an area of 13,097.99 hectares which is handed over by the President at the State Palace on December 30, 2016.\textsuperscript{10}

Based on these data it appears that the legislative institution has paid serious attention after the Constitutional Court's decision. Increasing the size of customary land is a factor driving the guarantee of legal protection against the rights of indigenous peoples in Indonesia. It is apparent that after the Constitutional Court's decision to recognize the rights of indigenous peoples is based on Article 28 I of the 1945 Constitution of 1945 and the Laws. Human rights which places the rights of indigenous peoples as a part of human rights that must be protected and strived for its existence.\textsuperscript{11}

In the historical record found that the beginning of the seriousness of the legislative body against the protection of indigenous peoples starting from the emergence of Regulation of the Minister of Agrarian Affairs / Head of National Land Agency. 5 of 1999 on the Guidance on the Settlement of Customary Communities of Customary Law. Subsequently followed into several laws namely, Law no. 41 of 1999 on Forestry, Law no. 6 Year 2014 on the Village up to Law no. 23 of 2014 about Regional Government, as well as a number of operational regulations at the ministerial regulatory level. Nevertheless, the practice of recognizing the rights of indigenous peoples through local legal products has been long, even before the birth of the Agrarian Ministerial Regulation, for example that occurred in Kerinci Regency since 1992 in the form of a Bupati decree regarding the determination of customary forests. This indicates that local governments play an important role in realizing the constitutional mandate for the recognition and promotion of indigenous peoples' rights.\textsuperscript{8} Even after that, how many regulation of head of region, such as, Decision of Head of Region, such as: 1) Permendagri No. 52 of 2014 on Guidelines for the Recognition and Protection of Indigenous and Tribal People, 2) LHK Candidate No. P.32 / Menlhk-Secretariat / 2015 on Right Forests, 3) Candy ATR 10 Year 2016 on Procedures for the Establishment of Communal Rights on Indigenous People's Land Land and Communities that are in Specified AreaOf a number of local legal products the number of customary areas and forests that have been established through the local law products is only 15,577 hectares. For example West Sumatra Regulation no. Law No. 16 Year 2008 on Ulayat Land and Utilization, in the local regulation is determined that ulayat land nagari, tribe, people and rajo can be registered as a right to land. But land registration is not the responsibility of the local government, but rather the task of the National Land Agency a vertical agency. PP no. 24 of 1997 on Land Registration does not make ulayat right as the object of registration of land rights. The emergence of some of these regulations indicates the serious support of legislatures to ensure legal protection of the rights of indigenous peoples. To know the picture of increasing the number of legal products as an indicator of increased support of legislative institutions is shown in Table 1 below:

<table>
<thead>
<tr>
<th>No.</th>
<th>Period</th>
<th>Amount of Law Product</th>
<th>Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>1979-1998</td>
<td>6</td>
<td>PascaUunO. 5 1997 year about village</td>
</tr>
<tr>
<td>2.</td>
<td>1999-2003</td>
<td>65</td>
<td>Pasca UU No 22 / 1999 about Otoda</td>
</tr>
<tr>
<td>3.</td>
<td>2004-2012</td>
<td>57</td>
<td>Pasca UU No. 32 / 2004 about regional Government</td>
</tr>
<tr>
<td>4.</td>
<td>2013-2016</td>
<td>69</td>
<td>Pasca decision of constitutional court ( followed UU No. 6 2014 year about village and UU No. 23 / 2015 regional government)</td>
</tr>
</tbody>
</table>

(Source : Secunder data 2016)
Based on Table 1 data, it appears that the tendency of local law products (DPRD) since 1979-2016 increased significantly. However, when viewed from the form of the legal product of that area, generally its nature regulates and determines as shown in Table 2 below:

Table 2  Product Form of Regional Law constitutional Court Decision No.35

<table>
<thead>
<tr>
<th>No.</th>
<th>Made rules of area institution</th>
<th>Kinds of Law Product</th>
<th>Amount of Law Product</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Areas Government</td>
<td>Setting the rule of area</td>
<td>8</td>
<td>11.59</td>
</tr>
<tr>
<td>2</td>
<td>City Of Government</td>
<td>Setting the rule of area</td>
<td>19</td>
<td>27.53</td>
</tr>
<tr>
<td>3</td>
<td>Regency of Government</td>
<td>Determination rule of area</td>
<td>9</td>
<td>13.04</td>
</tr>
<tr>
<td>4</td>
<td>Regency of Government</td>
<td>Combination Rule of Area, Setting, Determination and Form Character Law Area</td>
<td>1</td>
<td>1.45</td>
</tr>
<tr>
<td>5</td>
<td>Province Government</td>
<td>The rule of Leader Area</td>
<td>3</td>
<td>4.35</td>
</tr>
<tr>
<td>6</td>
<td>Bupati of Government</td>
<td>The Rule of Leader Area</td>
<td>4</td>
<td>5.79</td>
</tr>
<tr>
<td>7</td>
<td>Government city / regency</td>
<td>Decided letter’s leader area (Bupati / Walikota)</td>
<td>25</td>
<td>36.23</td>
</tr>
</tbody>
</table>

Totally: 69 100

(Source: Secunder data 2016)

Product Form of Regional Law After the Constitutional Court Decision Furthermore, in terms of the content of the substance of the law, it appears that generally more legal arrangements on customary institutions, customary territories and customary forests by comparing them before and after the Constitutional Court Decision No.35 as in Table 3 follows

Table 3: The Law capacity of Product area before and after Constitutional Court decision

<table>
<thead>
<tr>
<th>No.</th>
<th>Capacity Materi</th>
<th>Period</th>
<th>Inform</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Institution Custom, Justice Custom, Law Custom</td>
<td>Before</td>
<td>After</td>
</tr>
</tbody>
</table>
| 2   | Situation Custom Netizen and Custom Area | 65, 51% | 21.30%
| 3   | Custom Area and Forest Custom | 41.32% | 18.26%
| 4   | Village Custom | 13.10% | 9.13 |
| 5   | Doing Institution | 1.1% | 4.6% |

(Source: Secunder data 2016)

Data Table 3 shows that there are deficiencies in the normative reconstruction of legal substance arrangements on the protection of the rights of indigenous peoples. Nevertheless, the legal or legal basis for the recognition of indigenous peoples has received a positive response from the local legislative body (DPRD). In the following table, several local law products (regulations) that govern the protection of indigenous and tribal peoples as Table 4 follows:

Table 4: Local Legal Products (DPR / DPRD) Governing Customary Institutions, The Existence of Indigenous Peoples, and Territories and Indigenous Forests as Supporting Factors Against the Protection of Indigenous Peoples’ Rights in Indonesia.

<table>
<thead>
<tr>
<th>No</th>
<th>Name of Rule Area</th>
<th>Setting of Substance</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>UU No. 8 , 2011 year about village</td>
<td>Introducing nomenclator custom village</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>UU No. 39, 2014 year about plantation</td>
<td>Certainly about exception criminal action to custom customnetizen and prohibition using ulayat land for plantation exertion without</td>
<td>Indigenous people</td>
</tr>
</tbody>
</table>
Based on the data of table 4 it shows that all legislative institution product (DPRD) describes a legal change of legislative institution as an indicator of protection of indigenous people's rights after Decision of the Constitutional Court Number 35. Although the regulation substance has not touched on customary land yet normatively has there is a normative synchronization between the content of the constitution and the content of UUPA's legal substance which places customary law as the basic norm of arrangement of land ownership and ownership pattern in Indonesia.

1.2 Executive Board Support

One of the branches of power that the constitution says is the executive body. This institution is constitutionally given the authority to produce regulations of law (law, regulation of local government and regency / municipality) as a provision of Article 5 paragraph 2 of the 1945 Constitution of the Republic of Indonesia. The executive institution exercises the power of legislation product legislation as well as legislative institution (Act ). In addition, the executive authority has the authority to enact some legal rules concerning the translation of the law. In relation to legal protection of the rights of indigenous peoples some executive regulations have been established in the form of Governor / Regent / Mayor Regulations as shown in the following table.

Table 5 : Local Law Products (executives) Governing Customary Institutions, Indigenous Peoples, and Customary Areas and Forests

<table>
<thead>
<tr>
<th>No</th>
<th>Regulatory Name</th>
<th>Substance Settings</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Permendagri No. 52 of 2014 Year</td>
<td>Guidelines for Recognition and Protection of Indigenous and Tribal Peoples</td>
<td>Indigenous people</td>
</tr>
<tr>
<td>2</td>
<td>PermenATR No. 9 of 2015 Yearreplaced byPermenATR No. 10 of 2016 Year</td>
<td>The Procedure for the Establishment of Communal Rights on Land of Indigenous and Peoples Law Communities within the Indigenous Species of Indigenous Peoples</td>
<td>Indigenous people</td>
</tr>
</tbody>
</table>
Based on the data of table 5 shows the political picture of government law (executive) in order to provide legal protection for the rights of indigenous peoples. The number of regulations is a supporting indicator of the strengthening of the attachment of the legal protection of the rights of indigenous peoples in the framework of national agrarian law. It is just to be further noted that within the framework of developing a national agrarian legal system, several progressive and sustainable steps are needed to support the compilation of all laws and regulations relating to the legal substance of indigenous and tribal peoples in order to be fully responsive to operational technical matters and matters. This becomes the main program of the legislative program in the future.

The legal arrangement or reform of the national legal system of the current legal position of the legal community (at least after the Constitutional Court's Decree 35 of 2013) the position of customary law communities has been restored as one of the main components in the reform of the national agrarian legal system. Observe the various provisions of national legislation and regional legislation that strengthen the position of indigenous peoples so that all the potential that has been achieved not only to the strength factor formulation of the law alone. There are concerns from some researchers and include the analysis of this study, and also agree with the assumption building of the 2017 outlook Episteme that there are challenges that threaten many legislative products in this case DPR and DPRD (table 24) and the executive in this case the Central Government and Local Government Table 25) which the Episteme Institute 2017 outlook team poses as an opportunity and challenge for the position of indigenous peoples:
Firstly, the House of Representatives has incorporated RUUPKakuan and Protection of Indigenous Peoples Rights in the 2017 National Legislation Program priorities. This means that the bill will be discussed again after it was not successfully approved by the House of Representatives in 2014. In line with the preparation of the Bill, the experience of legal recognition in Regional and national levels should be a reference to establish an accessible, equitable and equitable legal system for the recognition and protection of indigenous peoples' rights. One of the keys to the success of the RUU Acknowledgment and Protection of Indigenous Peoples' Rights depends largely on the extent to which lessons learned from past experiences can be used to build the legal system forward. Secondly, the current legal system in Indonesia still requires the formation of local regulations and SK declarations for the recognition of the existence of indigenous peoples. As long as it has not changed, it is necessary to continue to make efforts to expand the presence of local legal products on indigenous peoples. The results in the last three years are significant but have not yet reached all indigenous communities in Indonesia. The exchange of inter-regional experience becomes an important medium of expanding the presence of local legal products on indigenous peoples, coupled with the support of NGOs and experts on indigenous peoples. Third, the system of administration of the existence and rights of indigenous peoples has begun to establish linking regional legal products with institutions at the national level. But the procedure is still complicated and takes a long time. The experience of recognition of 9 customary forests is stronger in their political nuances. This is evidenced by the submission made by the President of the Republic of Indonesia, not merely the administrative process of the citizens. In the future customary forest recognition procedures need to be pushed more simply by emphasizing the livelihoods of government agencies to serve the basic rights of indigenous communities in Indonesia. The exchange of inter-regional experience becomes an important medium of expanding the presence of local legal products on indigenous peoples, coupled with the support of NGOs and experts on indigenous peoples. Fourth, customary forest 9 is a pilot to see how the effectiveness of customary forest recognition for environmental sustainability and community welfare improvement. Based on LHK Candidate No. P.32 / Menlhk-Secretariat / 2015 on Right Forests, the government is obliged to provide incentives that can support the improvement of customary forest management. The realization of incentives in the form of a development program becomes an important aspect to show that the government is truly present, not only limited to recognition on paper, in support of customary forest management by indigenous peoples. Fifth, indigenous communities are the first and decisive factor for the presence of legal products for the recognition and protection of rights. Therefore, consolidation at the community level is very important to accomplish the birth of local legal products and their implementation. The development of customary values of participation and justice should continue to inspire every beat of indigenous rights struggles. This is so that the rights of indigenous peoples can directly contribute to the realization of social justice, not a tool to create social inequality within the community.

Based on these concerns is the outcome information of the Episteme Institute 2017 outlook team that monitored the development of the enforcement of indigenous peoples' rights during 1979 to 2016. Observations and research on the development of the enforcement of indigenous rights in Indonesia (including Central Sulawesi) should also be integrated In the framework of reforming the national agrarian legal system based on customary law norms as the main source of the formulation and enforcement of national agrarian law system. This is important, because until now, in this case before the Decision of the Constitutional Court Number 35 of 2012 impressed slowly so that the emergence of some national and regional legislation products become the driving factor and become the locomotive of acceleration of agrarian reform in Indonesia.

Based on the results of the research, there are research findings that since the era of the Constitutional Court's decision Number 35 the legislation product on the protection of indigenous and tribal peoples increased rapidly. Improvement of local law products shows the orientation of strengthening of customary law position. Many local law products governing the protection of indigenous peoples show a strong shift to return to customary law as the main lex (superior lexter) as at the beginning of UPA 1960 and subsequent constitutional mandate of the 1945 Constitution of the Republic of Indonesia after the amendment. The change of orientation is not accidental but becomes a legal requirement of society in the framework of renewal of national agrarian law system. The theoretical basis of reference is the theory of the validity of the rule of law (SatjiptoRahardjo and J.I.H. Bruggink) and the theory of legal system (L.M. Fridman) and the theory of law enforcement (SoerjonoSoekanto). Some of these theories become applied theory of the grand theory of legal protection in order to achieve the research objective of the legal protection of the rights of indigenous peoples land in the national agrarian law system.

Customary law as the norm for guiding the behavior of its citizens has shown its performances for three ages, however, after the independence era (after 1960) as the beginning of the end of the dualism of agrarian law in Indonesia, the position
of adat law reinforced, but after the era of BAL into
effect Verdict MK No. 35 customary law positions
decline (shift in meaning / interpretation) because
some UUPA derivative laws issued by the state
have shifted the position of customary law as the
lex superior or different application as understood
and practiced in the previous two ages. One of the
issues of shifting is the enactment of several laws
and regulations that provide "mandate" to the
government on behalf of the state to master the
pattern of land ownership and ownership by issuing
several laws and regulations which are the basis of
the government to control the land in Indonesia,
Customary land.

In its development, and based on
legislation made by the government, among others,
Law No. 41 of 1999 on Forestry and Regulation
of the Governor of Central Sulawesi Province no.
592/2/8158/1993 (appendix)xi as the finding
(novelty) that some customary land is used as state
land by reason of self-government and non-
preserved land into state land. Such land
acquisitions are still applied to indigenous lands to
date so that the position of customary land is
converted into state (domain) land or other rights
(HGU, HGB, private rights). In the context of
national agrarian law, especially in interpreting
Article 28 I (3) of the 1945 Constitution of 1945,
the constitution of the 1945 Constitution of the
Republic of Indonesia and UUPAon "Basic
Agrarian Law that "the identity and rights of
traditional society are respected in harmony with the
times and civilizations so that customary lands
are still recognized Of indigenous peoples' lands as
long as they exist".

That why in the Constitutional Court
Decision No.35/PUU-2012 on judicial review
against Law Number. 41 of 1999 year on Forestry
that providesAuthority to state (government) to
regulate customary law is canceled. The decision of
the Constitutional Court relating to the authority of
the state which regulates the land and the
indigenous peoples or in accordance with the 1945
Constitution of the Republic of Indonesia, namely:
first, the word-state] in article 1 the number 6 the
act of number 41 1999 about forestry contrary to
the constitution of the republic of indonesia of
1945;Secondly, the word-state] In article 1 the
number 6 the law number 41 years 1999 about
forestry has no binding legal force , so article 1 the
number 6 the law number 41 years 1999 about
forestry referred to become customary “forest is the
forest who are in community territory adat law”.
Thirdly, Article 4 Paragraph (3) of Law Number
41 Year 1999 concerning Forestry is in conformity
with the Law of the Republic of Indonesia of the
Republic of Indonesia Year 1945 as long as it is not
understood that "forest tenure by the state shall
keep the rights of customary law community as
long as it is alive and in accordance with the
development of society and the principle of the
Unitary State of the Republic of Indonesia
regulated in the legislation"; Fourthly, Article 4
Paragraph (3) of Law Number 41 Year 1999
concerning Chancery does not have a binding legal
force as long as it is not interpreted as "forestry by
the state regardless of the rights of customary law
community, as long as the life is alive and equal to
the development of society and the principle of the
Unitary State of the Republic of Indonesia
regulated in the Laws"; Fifth, Article 5 Paragraph
(1) of Law No. 41/1999 on Forestry in conjunction
with the Statute of the Republic of the Republic of
Indonesia Year 1945 as long as it is not interpreted
as “forested country as referred to in paragraph (1)
letter a , not including forest customary”Sixth,
Article 5 Paragraph (1) of Law Number 41 Year
1999 concerning Forest does not possess the
power of law binding as long as it is not interpreted "State
forests are not meant in (1) lettera, not including
forests"; Seventh, Elucidation of Article 5
paragraph (1) of Law Number 41 Year 1999 on
Forestry is contradictory to the Constitution of the
Republic of Indonesia Year 1945; Eighth,
Elucidation of Article 5ayat (1) of Law Number 41
Year 1999 “binding punishment powerlevies legal
power binding”. Ninth, Article 5 Paragraph (2) of
Law Number 41 Year 1999 regarding Forestry is in
conformity with the Law of the Republic of
Indonesia in 1945, Tenth, Article 5 Paragraph (2)
of Law No. 41 of 1999 on Forests does not have
binding powers; Eleventh, Phrase “and Paragraph
(2)” in Article5 Paragraph (3) of Law Number 41
of 1999 concerning Forestry is against the
Constitution of the Republic of Indonesia Year
1945; AndTwelfthPhrase “and Paragraph
2"Article 5 paragraph (3) of Law Number 41 Year
1999 concerning Forestry shall be referred to as
"the Government establishes the status of forest
resources referred to in Article 5 paragraph (3) of
Law No. 41 of 1999 on Forestry. “Customary
forests are stipulated insofar as the reconciliation
of the indigenous peoples concerned is still in my
presence” xii

Based on several dictums of the
Constitutional Court decision it is clear and clear
that the Constitutional Court as a “guardian of
constitution" institution has canceled the authority
of the state (government) on the land and the
custodial law community which it regulated in
Law no. 41 of 1999 on Forestry.This shows the
meaning that the Constitutional Court has
reinforced the position of adat law as the main legal
norm (lex superior) in the formulation,
establishment and enforcement of national agrarian
law. Theories that justify the restoration of
custodial law positions that guarantee the right of
legal protection of the rights of indigenous peoples
are stufen theory (Hans Kelsen) and the theory of lawfulness of the rule of law (Satjipto Rahardjo and J.J. Bruggink). The legal theories are used by the Constitutional Court to cancel the authority of the state (government) to control or claim customary land as state land or forest.

2. External Factor

2.1. Community Custom Through Government Institution

One of the indicators supporting the protection of the rights of indigenous peoples is the efforts of indigenous peoples to advocate for rights in government institutions. The target of the research focus is how much indigenous peoples are fighting for rights through government agencies. The most relevant government agencies are the police and the Ministry of Justice and Human Rights. Data from the research result that the internal factor is not getting the attention of the indigenous people themselves. Several internal factors have been studied by previous researchers, as written by John Haba that:

There are five internal constraints of the community in supporting the rights of indigenous peoples, namely: (1) Weak strengthening of local organizations and rules of the game; (2) lacks strong leadership and is acceptable to all 'factions'; (3) Low commitment and consistency to the interests of indigenous peoples; (4) Being vulnerable to face local, national, regional and global capital pressures over existing natural resources, and (5) being powerless in negotiating with local governments to prepare local regulations that favor the existence and rights of indigenous peoples.xiii

The statement provides information that the condition or reality of indigenous peoples to date will have difficulty in fighting for their rights. This condition is obviously an internal factor for the empowerment of indigenous peoples. In spite of this, there are several regions in Indonesia whose communities are struggling to defend the rights of the community as an effort to support internally indigenous peoples' rights. Nevertheless, there is an internal potential that indigenous peoples hope is the adherence of customary law values and norms established by customary councils / customary heads. This internal potential supports the struggle for the enforcement of the rights of indigenous peoples. The enforcement of customary law values and norms in the respective communities was responded by respondents as shown in Table 6 below:

<table>
<thead>
<tr>
<th>No</th>
<th>Respondent Answer</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>To be valid</td>
<td>33</td>
<td>44,00</td>
</tr>
<tr>
<td>2</td>
<td>Hesitation</td>
<td>26</td>
<td>34,66</td>
</tr>
<tr>
<td>3</td>
<td>Not be valid</td>
<td>16</td>
<td>21,33</td>
</tr>
<tr>
<td></td>
<td>Totals</td>
<td>75</td>
<td>100</td>
</tr>
</tbody>
</table>

(Source: primery data 2016)

Based on the data Table 6 shows how customary law values and norms are still adhered to and obeyed in relation to their customary land law. From the side of law enforcement theory (Satjipto Rahardjo and JJJ Bruggink) and legal culture (L.M. Friedman) it appears that the people's obedience to the law is the real position which is the main supporting factor for the fulfillment of indigenous rights among indigenous communities.

The high percentage of customary law rule (44.00%) that regulates the land shows the degree of customary law norms and institutions present among the community. Nevertheless, within the Kaili Traditional community there are variations in the practice of customary law. The highest percentage of respondents responded about it is shown in table 7 below:

<table>
<thead>
<tr>
<th>No</th>
<th>Respondent Answer</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>TopoLedo</td>
<td>29</td>
<td>38,66</td>
</tr>
<tr>
<td>2</td>
<td>TopoRai</td>
<td>5</td>
<td>6,66</td>
</tr>
<tr>
<td>3</td>
<td>TopoUnde</td>
<td>9</td>
<td>12,00</td>
</tr>
<tr>
<td>4</td>
<td>Topo Tara</td>
<td>16</td>
<td>21,33</td>
</tr>
<tr>
<td>5</td>
<td>Topo Dai</td>
<td>8</td>
<td>10,66</td>
</tr>
</tbody>
</table>
The high percentage of KaiiliTopo Tara's community because of its adat institutions is active in solving land problems based on customary law. They get more legal certainty (peace certainty) and peace (benefit) than if they settle land disputes through the judiciary (PN). This reality according to the author is an internal support factor for the community because some of the land issues settled peacefully by the community itself (non litigation) through the existing customary institutions. The settlement of land disputes, seen in the national agrarian (law enforcement), is part of law enforcement because the customary law system is a legal system recognized as part of the national agrarian legal system (positive law). That is why in the effort of empowerment and protection of customary law, efforts to resolve disputes, especially land disputes can be processed and decided and resolved through customary institutions and have binding power. The theory underlying the strength of binding the decision of customary institutions is a theory of recognition which in theory is mentioned that a rule of law that binds a person when the rule of law is accepted as a norm of behavior. The acceptance of a verdict is not merely dogmatically based but the verdict, in the context of (justice), has provided benefits to the parties. The validity of the decision of the customary court is referred to in the direction of JhonRaws which he calls the rationalization of expediency. The rationalization of benefit in the view of John Rawls embodies the principle that in fairness as fairness the concept of rights is higher than (utility). From these findings indicate that the acceptance of the enforceability of customary law values and norms is influenced by the interen factor, namely the decision of customary institutions to give justice in the sense that customary institutions have responded and granted citizens’ rights as a form of the highest and rational

2.2 Custom Institution

Supporting factors that come from non-government is the involvement of customary institutions in implementing and advocating the rights of indigenous peoples. Several customary institutions which become institutions where communities propose or fight for traditional rights (indigenous peoples) and the involvement of NGOs serve as indicators of internal factor support as shown in the following table:

Table 8. Results of Research on the Existence of Indigenous Institutions in its Community in Central Sulawesi Province

<table>
<thead>
<tr>
<th>No.</th>
<th>Respondent Answer</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>There are</td>
<td>57</td>
<td>76.00</td>
</tr>
<tr>
<td>2</td>
<td>Nothing</td>
<td>3</td>
<td>4.00</td>
</tr>
<tr>
<td>3</td>
<td>Don’t Know</td>
<td>15</td>
<td>20.00</td>
</tr>
<tr>
<td></td>
<td>Totally</td>
<td>75</td>
<td>100</td>
</tr>
</tbody>
</table>

Source: Prymer data, 2016

The existence of customary institutions is very important considering that adat institutions have duties and functions in indigenous peoples. Many cases in indigenous peoples are settled through customary institutions. In addition, efforts to empower adat institutions also involve several NGOs engaged in advocacy, training and socialization activities have been working to support the upholding of indigenous rights in Central Sulawesi Province. Several NGOs are involved in enforcing and advocating indigenous peoples rights as Table 9 below:

Table 9. Non-governmental Organizations involved in Advocacy of Indigenous Peoples' Rights in Central Sulawesi Province

<table>
<thead>
<tr>
<th>No.</th>
<th>Name NGO</th>
<th>Advocate Schedule</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>LPA Awam Green</td>
<td>Problem illegal logging in Tuva and reclaiming in Marena and to dig mechanism finishing custom conflict</td>
<td>Sigi Regency</td>
</tr>
<tr>
<td>2.</td>
<td>Yayasan Red White</td>
<td>Promotion Reconstruction Law custom draft like understand about netizen custom in there</td>
<td>Sigi Regency</td>
</tr>
</tbody>
</table>
Based on these data, there are efforts systemically conducted by NGOs to build public confidence in the importance of indigenous peoples' existence. That is because the advocacy activities of customary institutions become very important in order to function properly with all the underlying motives. According to Arifin and other indigenous leaders stated that:

"Their motives reinforce adat and its role, among others, so that customary law is enforced effectively, customary institutions can work well and custom territory is maintained. The motive is often accompanied by examples of violations of customary law and the role of customary institutions in resolving such violations with a firm and consistent logic of customary law." \(^{xv}\)

Furthermore, in addition to this description, there is the expectation of indigenous peoples that all activities related to the land are always communicated with adat institutions as proposed by Marena and Tuva customary figures, that:

These immigrants should respect local customs by recognizing local customary law. In accessing the land, they should ask for the blessing of customary institutions as has happened to the previous generation of migrants. As Mahori said, "There is no opening of any artificial land so, it must first be customary law and divided by customary institutions. My parents as the customary head used to distribute the land to the settlers and Sinduru people." \(^{xvi}\)

Based on these data can be seen that the efforts of the community internally to fight for their rights quite aggressive in fighting for their rights independently. Even according to Marea, Rince and Nixen customary figures, the pattern of land ownership and ownership in the place has been long enough. Disclosed that:

The unfairness of lame land tenure has actually been going on for a long time, but the demands are drowned in everyday grunts and are not revealed to government agencies for fear and intimidated apparatus and categorized as PKI, a deadly stamp especially during the New Order period. \(^{xvii}\)

The presence of immigrants in the adat territory should be subject to customary law as the indigenous peoples wish. The effort remains in force and is subject to anyone. Moreover, the presence of NGOs as partners is very helpful for the community and adat institutions to be a strong internal support factor in the framework of protecting the rights of indigenous peoples in Central Sulawesi Province. The results of this study found that in indigenous communities in research sites still exist and exist in performing their duties and functions in society. Existence indicates that the constitutional requirements as indigenous peoples are fulfilled.

**Conclusion**

Based on the description above, the authors conclude that from various affecting factor the protection of indigenous peoples that indigenous peoples with institutional structure is a unity that can not be separated. That is why the criteria required by the constitution and LoGA as (lex superior) are fulfilled. The fulfillment becomes the normative basis that the Kaili customary community structure in Central Sulawesi province is still intact so that traditional rights still exist which must be protected and protected by the government for the existence of indigenous peoples in Central Sulawesi Province.

**Table of references**

<table>
<thead>
<tr>
<th>Source</th>
<th>Reference</th>
</tr>
</thead>
</table>

Decree of the Provincial Governor of Central Sulawesi Number: 592.2 / 8158 / RO.Huk On the Making of the Land Deed and the Submission Letter of Land Tenure, January 27, 1993


Yance Arizoa Malik dan Irena Luzy Ishimora at OUTLOKEPISTEME 2017 in www.google ACCESSIBLE on Thursday, March 30, 2017 at 20.30


cision of MK No.35 of 2012 (attachment).


Bernadinus Steni in the paper "Portraits of the TUGA and Mecca Customs Agreement in Guaranteeing Access to Land", a quote from www.google, accessed Friday, March 31, 2017 at 11.30 WITA.


\[\text{ii}\] Husen Alting, Land tenure of Indigenous People (A Study on Indigenous People of Ternate) Jurnal Dinamika Hukum, Vol.11, No.2011, p.88


\[\text{v}\] Decree of the Provincial Governor of Central Sulawesi Number: 592.2 / 8158 / RO.Huk On the Making of the Land Deed and the Submission Letter of Land Tenure, January 27, 1993


\[\text{vii}\] Yance Arizoa Malik dan Irena Luzy Ishimora at OUTLOKEPISTEME 2017 in www.google ACCESSIBLE on Thursday, March 30, 2017 at 20.30

\[\text{viii}\] ibid.

\[\text{ix}\] Compare the Malik, Arizona and Muhajir 2015: 5 research records that point to the Epistema Institute's research findings in 2015 indicating that 38% or as many as 47 local legal products on dat and forest areas. A total of 11 regulated local law products and as many as 36 local law products are the determination of customary and customary forest areas. There are 21 local law products that mention the size of the territory and attach a map of customary territory (Malik, Arizona and Muhajir 2015: 5). Of the number of local law products of the area, the number of customary areas and forests that have been established through regional legal products is only 15,577 hectares. For example West Sumatra Regulation no. Law No. 16 Year 2008 on Ulayat Land and Utilization, in the local regulation is determined that ulayat land nagari, tribe, people and rajo can be registered as a right to land. However, land registration is not the responsibility of the local government, but rather the task of the National Land Agency a vertical agency. 24 of 1997 on Land Registration does not make ulayat right as the object of registration of land rights.

\[\text{x}\] ibid.

See the decision of MK No.35 of 2012 (attachment).


Interviews Arifin Panjaitan and Roni, former members of Sinduru Traditional Institute in Tuva, February, 28, 2009.

Bernadinus Steni in the paper "Portraits of the TUGA and Mecca Customs Agreement in Guaranteeing Access to Land", a quote from www.google, accessed Friday, March 31, 2017 at 11.30 WITA.

ibid.