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Moronene Indigenous Recognition and Protection Regulation Hukaea Laea in Bombana County

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Abstract

Regulations on the Recognition and Protection of Customary Law Communities are not always effective. This study was to determine the concept of recognition and protection of the Customary Law Community in Rawa Aopa Watumohai National Park. This research is a normative legal research. The results of the research are First, the law still provides conditional recognition of indigenous peoples, which limits their space. second, that the recognition and protection of the customary MHA of Moronene Hukaea Laea in Bombana Regency has not been maximized. They have received recognition and protection through a recognition of perda, but their customary territory still has the status of designating a National Park Area, so they cannot use it as customary land.

Keyword: *Recognition, Protection, Indigenous Peoples.*

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1. Introduction

The term*'indigenous peoples'* became known around the world and became increasingly recognized by many countries, after the International Labour *Organization* (ILO) declared *the Convention Concerning Indigenous and Tribal Peoples in Independent Countries*on 27 June 1989. The term *indigeneous peoples*[3] used in the ILO Convention 169 was also adopted by the World *Bank* in the implementation of development funding projects in a number of countries, especially in third countries, such as in Latin America, Africa, and Asia Pacific.

Today, about 370 million people who are members of the indigenous legal community living in more than 70 countries around the world, make up 5% of the world's population. Meanwhile, 80% of the total diversity ofhaya ti on the planet is thriving in 22% of the earth's territory which is the residence of indigenous legal peoples. The researchers stated that when biodiversity is threatened, it will also threaten the relationship between indigenous peoples and their homelands that have been long and hereditary, and will threaten the health and welfare of indigenous peoples. The continued environmental damage jeopardizes their continued relationship with the environment that has been practiced for thousands of years, such as collecting medicines, hunting, fishing, and agricultural activities (Corntassel & Bryce, 2012).

Recognition*(erkenning)* terminology means the process, manner, act of confessing or admitting, while *admitting* means 'declaring entitlement'. Recognition in the context of the existence of a state, namely the existence of a state or government that manifestly exercises effective power in a region called de *facto recognition,* in addition to legal

recognition (de*jure)*followed by certain legal actions, such as diplomatic exchanges and the making of treaties of the two countries (Abubakar, 2013).

Kelsen, in his book *"GeneralTheory of Law and State",* describes confession in relation to the existence of a state as follows: There are two actions in a confession, namely political action and legal action. Political action to recognize a country (read: the existence of indigenous legal peoples-*writers)*means the state recognizes and intends to establish political relations and other relationships with the recognized community, while legal action is the procedure put forward above established by international law (read: national law-*author)*to establish state facts (read: indigenous peoples-*writers)*in a case kongkret.

Recognition of the existence of indigenous peoples varies greatly from sector to sector as well as forms of recognition of the existence of indigenous peoples by different local governments. In addition to policies governing the existence of indigenous legal communities, there are also international agreements that have been partially ratified into the policy of the Indonesian law and also discourses at the National level regarding the form of recognition of the existence of indigenous legal peoples (Salam, 2016).

The Basic Agrarian Law of 1960 has tried to realize the recognition of customary law, meaning that customary law is seated in the national legal system. But in practice the application and regulation of its derivatives, is far from reality.

According to Syamsudin (2008), state law has a different perspective to customary law. In particular, revitalization should be done by looking at customary law as a source of law (Abubakar, 2013). The discussion of this paper is more on the context of the Custodiness and protection of the Indigenous People of Moronene Hukaea Laea in Bombana Regency.

2. Research Methods

On the basis of these problems, this research is normative legal research, and the search for materials is more emphasized on primary legal materials, namely the relevant legislation used to see and determine how far MHA Moronene Hukaea Laea in Bombana District has recognition and protection as legal standing. In addition, secondary and tertiary materials are also used, namely various materials, concepts available in various relevant textbooks.

3. Regulation of Recognition and Protection of Indigenous Peoples of Moronene Hukaea Laea in Bombana Regency

There are 2 (two) main issues why the regulation of Recognition and Protection of Indigenous Peoples has not been effective. Based on the Academic Text of the Draft Law on Indigenous Peoples, states that the text of recognition and constitutional protection of indigenous peoples still leaves two main issues:

a. *First,*recognition of indigenous peoples is put on the conditions as long as it is alive, in accordance with the development of the community and the principles of the Republic of Indonesia. This requirement also stems from the requirements that have been introduced by the Law under it. On many sides, the normative requirement becomes an obstacle to the recognition and protection of the existence of the rights of indigenouspeoples, because the phrase "as long as it is alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia" in fact causes the recognition effort itself to stop

more on the discourse concerning indicators of these requirements. Some operational laws and regulations do not even have similar indicators to translate the constitutional requirements of the existence of indigenous peoples.

b. *Second,* the constitution introduces two terms, namely Unity of Indigenous Peoples (Article 18 B paragraph 2) and Traditional Society (Article 28 I paragraph 3). There is absolutely no explanation for both terms. Law No. 6 of 2014 on Villages has tried to translate Article 18 B paragraph (2) of the 1945 Constitution by introducing "indigenous villages" as the equivalent of "unity of indigenous peoples." But it turns out that the application of the Law still leaves the main issue concerning the social unit of indigenous peoples, where the term indigenous people can not be accommodated perfectly in the terminology "indigenous village" introduced by the Village Law.

Meanwhile, in the Draft Report on The Legal Review of the Mechanism of Recognition of Indigenous Peoples law states that the recognition and protection of the rights of indigenous peoples is important, because it must be recognized the traditional side of indigenous legal people born and has existed long before the Unitary State of the Republic of Indonesia was formed (Sukirno, 2013). But in the development of traditional rights that must conform to the principles and spirit of the Unitary State of the Republic of Indonesia through normative requirements in the legislation itself. On many sides, the normative requirements become constraints on the existence of the rights of indigenous peoples, because:

1) *First,* in the practice of organizing development, the formulation of the phrase "as long as it is alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia" is interpreted that the presence of the rights of indigenous peoples as a recognized institution as long as it does not conflict with the spirit of development, so that there is an impression of the government ignoring the rights of indigenous peoples. While factually in the community there is a spirit of reaffirming the rights of indigenous peoples.

2) *Second,* in the 1945 Constitution it is stated that the traditional rights of indigenous peoples are respected as long as they are alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are stipulated in the law. The issue that arises is the law on what or how the arrangement regarding the recognition of the rights of indigenous peoples. That is, it is still unclear what the legal form or substance of the arrangement is. So there are regulated in the law, but there are also general arrangements at the local level that are set out in the respective localregulations.

Article 18B of the 1945 Constitution states that "the state recognizes and respects the unity of the MHA and its traditional rights as long as it is alive and in accordance with the development of society and the principles of the Republic of Indonesia, which are stipulated in the law". The phrase "regulated in law" indicates that a form of recognition and respect for the MHA and its traditional rights is exercised "in law", not "by law". The point is that the arrangement does not require a specific law on the recognition, but it is done in various laws, and this has been done by Indonesia. Previous descriptions have addressed various laws governing the recognition and respect of MHA rights, both in the context of governance and in the context of human and cultural rights. All laws governing land and natural wealth have governed the recognition and respect of the existence and rights of the MHA.

As stated above that the arrangement of further arrangements and determination of the existence and rights of the MHA is a regional authority. In that, the appropriate legal form for the regulation and determination of the existence and rights of MHA is the product of local law, especially local regulations (Perda). There are even sectoral laws such as forestry and plantations that require the Existence of a Regulation to recognize the existence and rights of MHA. Thus, local governments, especially districts / cities need to be encouraged to immediately establish a Regulation related to the recognition of the existence and rights of MHA (Muezzin, 2014).

The reason for the delegation of regulatory authority was based on the diversity of MHA conditions in each region. Uniformity of its arrangements in the form of universal laws is considered inappropriate because it is not necessarily relevant to certain areas that do not have or no more MHA. Even for areas that have MHA, the conditions are different. There are districts / cities even provinces that have the same MHA as Minangkabau called Nagari, Aceh called Mukim, Java called the village. But there are also many districts / cities that have different forms of MHA unity. Therefore the model or arrangement should also be distinguished.

Based on the differences in the existence and condition of MHA in each region in Indonesia, it can be distinguished by the regulatory model of recognition and respect for the existence and rights of MHA as follows:

a) For areas where the condition of indigenous peoples homogeneous regulatory model can be done by forming a Regulation on the Existence and Rights of MHA.

b) For areas where the condition of the indigenous legal community heterogeneous regulatory model can be done by forming a Regulation of Determination.

c) For the area that will make the unity of the indigenous legal community as a customary village, as referred to law No. 6 of 2014 on villages, the regulatory model is also separate, namely in the Perda Establishment of Indigenous Village.

According to Zen Zanibar, the traditional right of indigenous legal peoples as well as the cultural identity of customary law and a prerequisite for the existence of indigenous law community unity is the right of autonomy (Zen Zanibar, 2008:7). The right of autonomy of indigenous peoples is the right of indigenous peoples to take care of their own households. According to van Vollenhoven, the scope of autonomy includes activities to form its own legislation *(zelfwetgeving),*carrying out its own*(zelfuitvoering), conducting*its own judiciary (zelfrechtspraak),and performing its own police*duties(zelf-politie)*. "Recognition" referred to is the formal ratification of the customary judiciary that has a special status (Ad Hoc Committee of DPD RI, 2009: 50). Formal ratification means that customary justice is strictly regulated as part of the justice system in Indonesia which has special status and special authority.

Based on this situation, moronene hukaea laea indigenous legal community who have obtained recognition for their existence as indigenous legal community through Bombana District Regulation No. 4 of 2015 but have not automatically obtained their rights to indigenous territory including the right of management and utilization of natural resources. The exercise of its customary rights is still limited by the regulations applicable to a National Park. The recognition of the existence of indigenous legal peoples in this case does not implicate the recognition of authority over the territory and the right to manage orutilize its natural resources (Safiuddin, 2018).

Indigenous legal people who have gained recognition of its existence cannot directly exercise its rights. Especially indigenous legal communities whose customary territory is within a certain area still need determination (Novianti, 2018). Regulation of the Minister of Agrarian and Spatial Affairs / Head of the National Land Agency No. 9 of 2015 on the procedure of determining the communal rights of indigenous peoples and communities within a particular area. This regulation introduces a new term that is communal rights which are joint property rights to the land of an indigenous legal community or a common property of land granted to people in forest or plantation areas.

Fransisco Moga as the Head of The National Park Hall explained, currently hukaea village area is still in the Jungle zone area. An area that is prohibited from conducting community activities conducting agricultural activities.

After the presence of the Regulation, Bombana Regency reported to the Ministry of Environment because the areais located in Nasioana Parkl so that hierarchically, Rawa Aopa Watumohai National Park Hall reported to the relevant Ministry, as a solution step of course there must be a change in zoning (from jungle zoning to traditional Forest Zoning).

According to Mansur Labamba who is the customary chairman of the moronene customary legal community Hukaea Laea that for indigenous peoples it does not matter if the customary territory is partly included in the national park area, but what is desired is a recognition of it. Moronene Hukaea Laea customary law community objected if due to the problem of some indigenous areas related to the National Park so that recognition of the customary territory became delayed. The existence of the rights of indigenous peoples also depends on the recognition of the customary territory, including the entire existence of the customary law known as *Adati Tongano Wonua*. The effort to gain recognition and respect for the existence of this indigenous legal community is for the sake of the continuity of the moronene hukaea laea customary law community.

In the opinion of Derek Hall (2020) the Power of Exclusion *(Darmanto Simapea Translation, Achmad Chorudin).* (2020:63-77)) states that:

> "Claims on land based on tribal identity over indigenous territories, when one group states that they are present first and entitled to exclusively to the other through historical claims and attachment to one particular area, presents dilemmasthat are very difficult tohandle. Claims to tribal-based territories are expanding in Southeast Asia as decentralized programs reaffirm colonial and local concepts of tribalism as the primary justification for access to land, and supported by transnational legal instruments that protect the rights of Indigenous Peoples. In extreme cases, exclusion turns into expulsion by involving violence to ethnic extermination. Usually, the land struggle based on this claim is peaceful, but it is always dobly divided when "local people" make it difficult for "outsiders" to gain or control the land. The government is sometimes prepared to recognize tribal-based territorial ownership as a basis for the legitimacy of claim justification. However, the issue of who gets access is not solved. In much of Southeast Asia, times of war, migration, eviction, and forced displacement make the issue of "who belongs, where" usually flee. Since it is impossible to return everyone to their original place, the issue of how to allocate land to people who realize that they are outside the Land of Ulayat Leluhur but demand the right to life, remains raised. Tribal-based regional claims also clash with other schemes of granting access (and legitimacy of exclusion) in the name of improving population welfare, such as economic growth, conservation, and land needs for the homeless".

Finally, the double face of exclusion is also seen in aspects of land administration that often frustrate experts, administrators, and investors. Conflicting laws, inconsistent government agendas, overlapping land allocations, fickle priorities, confusing boundaries, poor maps, and incomplete data, all of these can be interpreted as evidence of weak government capacity or a veil for land grab efforts. But this situation also has a positive position that is rarely noticed. The inconsistency of the rules allows various parties to make claims that it is their rights that are recognized. Rules recognizing land rights come alongside rules that authorize expulsion: on the one hand, they legitimize a variety of exclusionary measures: on the other hand, they leave an unresolved dilemma. Depending on the situation, the party tasked with driving farmers out of protected forests or abandoned land in the corner of the plantation can carry out the task according to the rules that support them: or they can choose another way because they know the farmers (perhaps their own relatives or neighbors) not only need hdiup connectors but also have rights to the land. These confusing boundaries provide know-all conditions, and these are well-liked by smallholder farmers when they are threatened with being driven away by being in areas designated as restricted areas. However, obscurity also harbors danger: because it opens up opportunities for officials at various levels to act as tyrants, use their power to expel, threaten, deprive resources, or selectively demand levies.

Precisely sees various factors inhibiting the implementation of the recognition of the protection of basic rights of indigenous peoples, namely:

1) the prominence of symbolization especially in the political scene of indigenous institutions, ceremonies, clothing, and customary titles dominate the symbols of indigenous peoples,
2) conflict resolution of the demands for the return of indigenous lands, can not be done because the group that demands can not be established as a community of customary law,
2) the local government did not do the confirmation of ulayat land and indigenous legal communities because it did not allocate its own budget. This budget elimination is deliberate for fear of the risk of being criticized, questioned and even sued by community groups, and for some governments, the recognition and protection of indigenous peoples is communicated as a movement of secession.

The procedure for giving recognition to the indigenous legal community is stipulated in several laws, namely:

a. *first* Article 67 paragraph (2) law No. 41 of 1999 on Forestry which reads "Confirmation of the existence and removal of indigenous*peoples as referred to in paragraph (1) stipulated by regional regulations*".
b. *The second* is also stipulated in Law No. 6 of 2014 on Villages. In article 96 of the Village Law stated that "The*Government, Provincial Government, and District/Municipal Government conduct the structuring of the unity of indigenous legal communities and are determined to be Indigenous Villages.* "

Based on both laws there is a conflict of norms between the two, in the Forestry Law the recognition of the existence of indigenous peoples is done by means of confirmed while according to the Village Law it is done by being determined to be a Traditional Village. Conflict of norms is one of the legal issues that occur because the laws are not harmonious or overlapping.

4 Conclusion

The Government's recognition of indigenous peoples is still limited to conditional recognition, which limits the movement space of Indigenous people to gain access to their rights, especially ulayat rights.

Moronene Hukaea Laea Indigenous Law Society in Bombana Regency, has not received maximum recognition and protection. This is because in the regulatory regulations on indigenous peoples in Indonesia generally provide a variety of restrictions on indigenous peoples. So that it provides a legal loophole to the application of regulations that are also not maximal. Therights of moronene indigenous peoples in Bombana Regency will also be easily violated by outside corporate powers if the government does not immediately make improvements to the regulation of recognition and protection of MHA in Indonesia, which directly implicates the region.

Moronene Hukaea Laea customary legal community in Bombana Regency who have gained recognition about its existence through perda can not directly use its rights, considering its customary territory is in a certain area still needs a determination that is National Park. The establishment of the Indigenous Legal Community Territory as a National Park is an act of violating the rights of IndigenousPeoples, because long before the establishment, MHA Moronene had first occupied Hukaea Laea Area. So the Government should revoke the status of the national park and restored its function as a Customary Forest.

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