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Recognizing Customary Land Rights (Bescikkingsrecht) in the Regional Autonomy

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ABSTRACT

At the beginning of decentralization is the assumption there will be carved up between the District and the City ground in Indonesia. It was said because local governments are required to drive the potential of the region as an autonomous region without depending on the central government. Regional development is inseparable from the land in the area. Meanwhile, according to customary law, between the ground and customary separated. Land should not be sold or mortgaged to others. Customary law community is only authorized to enjoy the results of their communal land. However, the local government requires disclosure of communal land tenure for the sake of land ownership rights to the collateral banks for investing in the region in the development of local autonomy. Based on this research issue is, first, how the existence of customary rights in autonomy? Second, whether the efforts to address the issue of customary rights in the development of local autonomy? The method used is the method library (library research) using data analysis of induction and deduction. The obtained results of the study that the existence of customary rights in autonomy continues to be recognized as long as there has clear jurisdiction, recognized, administered and utilized by traditional law partnership in question. While efforts were undertaken in recognizing customary rights of indigenous law fellowship is with the effort that customary rights are recognized in positive law in Indonesia.

INTRODUCTION

Since the Reformation much legal order and move drastic behavior, moving from zero to 180 degrees. So taboo in the New Order, a problem common in the time of reform. Much emerging reform agenda in the framework of the improvement of the New Order regime that runs for about 32 years, among others Autonomy.

Autonomous Region starting from MPR No. XV/MPR/1998 on Regional Autonomy, followed the enactment of Law No. 22 of 1999 as amended by Act No. 32 of 2004 and the last Law 23 of 2014 on Regional Government. At first granting regional autonomy to the Regency/ City has provoked a polemic among local governments in Indonesia. With autonomy owned by Regency / City has been a confusion reign in the area, namely the absence of a hierarchical relationship between the Governor and Regent/Mayor, because accountability Regency/City administration is to each of Parliament, which makes Loosening the relationship between the Governor and the District/Town in at that time. Then the next problem the assumption of Local Government in implementing regional autonomy should explore the potential that exists, including the issue of land carved up between one region to another. With they're carved up between one region to another showing signs of division among the political elite in our country. So there is an area that asks for parting with the Unitary Republic of Indonesia, such as; Riau Province.

Theirs carved up the area with the aim that the larger the area of a region. The theory that the land area of a region will expand the opportunity to gain greater local revenues to finance local autonomy of each. With all the potential of regional autonomy in the area should be able to mobilize all sectors especially the centers of the economy, trade and the service sector in meeting the needs of the area, with hopes of autonomous regions can survive without depending on the central government.

Local Government in developing regions, can not be separated from the land available in the area, either as land under development and regional development. It is as stated Maria S.W. Sumardjono (1998), that the need for the availability of land for development purposes, provide opportunities for land acquisition for various projects, both for the benefit of the State/public interest or for the benefit of business, on a large scale or small scale. Because the State land available is no longer sufficient in number (case even then depending on the definition of state land), then to support trending aforesaid purposes, the object is land rights,

whether owned by individuals, legal entities, and the public customary law). Meanwhile, according to the teachings of Minangkabau tradition, between the ground and customary must be separated. Land should not be sold or mortgaged to others. Customary law community is only authorized for picking or enjoy a communal result of the communal land (Nurullah Dt.Perpatih Nan Tuo, 1999).

Based on that there is a common thread between the government and the association of customary law, as there are two interests of mutual support between the parties. The authorities need the land as the development of the region, while the common law partnership to maintain its existence against the interests of the future regeneration while maintaining the customary law as part of the positive law. Moreover, with the birth of regional autonomy laws are expected to have their customary rights empowerment in achieving the objectives of regional autonomy itself. Based on that the problem in this research is, first, how the existence of customary rights in the Autonomous Region? Secondly, any efforts to address the issue of customary rights in the development of local autonomy?

METHODS

The method used is the method of literature (library research), which is a series of activities conducted by collecting data based on the literature, such as literature or books and research as well as studies related to problems in the research, reading and recording and processing of materials research. Then the data has been collected and analyzed by the technique of induction and deduction.

RESULTS AND DISCUSSION

Results and discussion of this research can not be separated from the issues raised as the formulation of the predetermined, namely: how the existence of communal land in the Autonomous Region and any efforts to address the problem of communal land in the development of local autonomy.

3.1. Existence of Land Rights in the Autonomous Region

3.1.1. The mention of Land Rights in Various Regions

These customary rights derived from the right of association on the ground or seignorial rights, which by Van Vollenhoven in Soerojo Wingjodipuro (1983), call basic hiking rechts.

This term is different in each region, such as Patuan (Ambon), wewengkon (Java), Panyempoto (Borneo), tatabuan (bolaan Mongondow), limpo (South Sulawesi), communal (Minangkabau) and Luat (Batak), Prabumian (Bali) and Nur (Buru). Then, according to Yance Arizona (2009), that the term customary rights derived from the Arabic "Wilayatun", which means an area that is under the control of a group of people. Ter Haar, Seopomo, said indigenous peoples' rights over the territory of his life which is termed "seignorial rights", while Hazarin named to fill "collective rights" (Yance Arizona, 2009). Thus we can conclude that customary rights are the rights of union law to use or cultivate certain land for the benefit of the indigenous fellowship along acclaimed run continuously by indigenous societies.

3.1.2. Basic Law of Land Rights

These customary rights are rights that are owned by indigenous persecution in Indonesia, the arrangement has existed since the days of empire-kingdom in the archipelago, such as; their "seignorial rights", which is something the right of association of the land area. Then the "Letter Pikukuh" (Charter), issued by the Royals with the purpose of confirmation of the boundaries of the federal territory. Later in the Dutch Colonial era, with the enactment; "Village Ordinance" with Staatsblaad 1941 No. 356 and "Highways Ordinance" with the 1931 Statute No. 6 (Soerojo Wignjodipuro, 1983).

Then after Indonesia's independence was born of Law No. 5 of 1960 on Principles of Agricultural Law. Then this Act elaborated by various regulations such as land rights; Regulation of the State Minister of Agrarian / BPN No. 5 of 1999 on Guidelines for Issue Resolution Land Rights of Indigenous Peoples.

Thus it is clear that the legal basis of customary rights it is a rule that has been alive since the days of the kingdoms of the archipelago advance to the colonization of the Dutch Colonial and until now governed by Act No. 5 of 1960 and the Regulation of the Minister of Agrarian/ BPN No. 5 1999, and other regulations that determine land rights.

3.1.3. Existence of Land Rights

Does the existence of customary rights are still recognized in today's modern era or just history in the scientific knowledge of Indonesian law? Then whether customary rights are still recognized and implemented in the legislation, the judge's decision, or simply complement the repertoire of national law, so that its presence remains in the law that dies

(die law) as well as the Dutch colonial era that continues to ignore the customary rights of this.

Actually, since the independence of Indonesia the right of association of indigenous peoples of Indonesia was recognized in 1945, it can be seen in Article 18 of the 1945 Constitution which reads: The division of regions in Indonesia over a large area and small, with the structure of government established by law, to perceive and remember basic consent of the state government system, and the rights of origin in areas that are special. Later in the elucidation of 1945 affirmed that in Indonesia, there are territorial State 250 zelfbesturende land chapin and volksgemeens chapin, such as villages in Java and Bali, Nagari in Minangkabau, village, and clan in Palembang and so on. The regions that have the original arrangement, and can, therefore, be considered as areas that privilege.

Then to set out more about the fellowship of customary law are set out in Act No. 5 of 1960 on Basic Regulation of Agrarian Principles, article 3 specifies that the implementation of customary rights and rights similar to that of communities customary law, so far as the fact still exist, must be such that in accordance with the national interests and the state, which is based on the unity of the nation and must not conflict with the laws and other regulations is higher. Similarly, the Minister of State for Agrarian Affairs/Head of BPN No. 5 Tahun1999, that the implementation of customary rights is all in fact there is still performed by indigenous and tribal peoples concerned by ketetentuan local customary law (Article 2, paragraph 1), whereas in paragraph 2 of Article 2 determined that the customary rights of indigenous peoples is still considered to exist when.

1. There is a group of people who feel bound by customary legal order as residents along a particular legal partnership, which recognize and apply the provisions of the alliance in their everyday lives.

2. There is certain communal land that became the living environment of the residents of the law partnership and takes place daily life purposes.

3. There is the customary legal order regarding the maintenance, control, and use of lands which apply and obeyed by the citizens of the legal partnership.

Then during the current reform with the 1945 amendment, the existence of the customs union is increasingly recognized, this is in accordance with the amendments to the second

paragraph of Article 18B (2), which reads "The State recognizes and respects units of indigenous and tribal peoples and their rights traditional rights throughout alive and in accordance with the development of society and the principles of the Unitary Republic of Indonesia which is regulated by the law ". Then in Article 28 paragraph (3) of 1945 reaffirmed that: "The cultural identity and traditional rights be respected in line with the times of civilization".

Thus it is clear that customary rights since the kingdom of the archipelago, then the Dutch Colonial until Indonesia's independence, customary rights are still recognized. However, according to Maria S.W. Sumardjono (1998), that "the recognition of the fact that recognition of the existence of indigenous communities and their traditional rights, commonly called customary rights, often inconsistent in the implementation of national development".

To determine whether there is a legal alliance (rechts gemeenschap) by Ter Haar in Koesnoe (1998), are 1) there is a group of people. 2) subject to an order. 3) have self-government. 4) The property has its own well in the form of material and immaterial objects.

Meanwhile, according to Koesnoe (1998), to determine the presence or absence of customary rights on indigenous and tribal peoples simply by observing a process that indigenous and tribal peoples are concerned about when to begin there and how their indigenous and tribal peoples concerned. It was, among others, can be answered by considering the following matters:

1. Does the territory is concerned there is a union group that organized?

2. As the group thus whether the organization was taken care of by the board are adhered to by its adherents?

3. When did the group that is in the soil environment is concerned (he explained how many generations)?

4. Does the group follow a homogeneous tradition in his life, so that the group can be regarded as a legal union?

5. How do the origin of the tradition of the group that is a unity in the soil environment?

Similarly, according to Maria S.W. Sumardjono (1998), that the criteria for deciding the

presence or absence of customary rights, should be viewed from three things: 1) the existence of customary law communities that meet certain characteristics as the subject of customary rights. 2) their land/territory with certain boundaries as lebensraum which is the object of customary rights. 3) the authority of indigenous people to perform certainly.

As with the Hazarin (2010), that: "they are always recognized customary rights, but may not be used if contrary to law, shrimp and common interests of the nation".

While the object of customary rights itself by Soerojo Wignjodipuro (1983), consists of four parts, namely: 1) Land (mainland), 2) Water (water like; times, the lake, the beach along the waters) 3) Plants that live wild (fruit trees, trees for timber or firewood, etc.), 4), the wild life animals.

Based on the above-mentioned opinion and, where customary rights associated with the object itself, then the hitherto customary rights are still recognized by the legal community (Association law).

If so, does the customary rights recognized by the legislation and or the judge's decision? Legally indeed customary rights were recognized, but when cases have customary rights to the realm of the court, the judge is always faced with two alternatives. Firstly, land rights that have the evidence as a communion of customary law. Second, land rights which do not have evidence as pesekutuan customary law. Finally, the judge, in this case, has always sided with the rule of law (legal justice), analogous to the less than clear directions in deciding a case relating to the ownership rights.

It can be concluded that it is still customary rights legally recognized customary rights when it has the jurisdiction clear, admittedly, taken care of and exploited or used by the common law partnership.

3.2. After the birth of the Land Rights Act Autonomy

Does the enactment of Law on Regional Autonomy both the Law No. 22 of 1999 and Act No. 32 of 2004 on Regional Government, will bring a negative impact on traditional rights held by the alliance of customary law that has hundreds of years? It concerns a negative impact on the regional autonomy of customary rights is quite reasonable because it can not be denied that the philosophy of local autonomy is granting the authority to regulate and manage

household autonomy of each region. This is in accordance with Article 1 (6) of Act 32 of 2004 provides that: Autonomous Region, hereinafter called the area, is a unit of community had the territorial boundaries of the authority to regulate and administer governmental affairs and public interests at its own initiative by aspirations of the people in the system Repbulik Unitary State of Indonesia.

Then, in accordance with the principle of local autonomy widest, the initiative for the development of an autonomous region for the interest and welfare of the people, this is in accordance with the Company Law No. 32 Tahun2004, that the authority to manage and organize all administrative matters outside the affairs of the Government defined by the law of this. The area has the authority to make policy areas to provide services, an increase in participation, initiative, and community empowerment aimed at improving people's welfare.

Then explained again in Company Law No. 32 that that line with the principle of regional autonomy must always orient to the improvement of society kesejahteraan to always pay attention to the interests and aspirations of the growing community. Based on the article and explanation of Law No. 32 of 2004 shows that each autonomous region tasked to organize and manage household each with local initiatives in improving well-being and community participation.

With authority and its own initiative in organizing and managing the household each autonomous region, there may not come into contact with all groups in the area, due to the construction carried out must touch all groups without exception, including customary law community unit who have customary land rights who has lived, grown and used hundreds of years ago by perseketuan indigenous people in the area. In the development of an autonomous region, is inseparable from the existence of land in the area of urban physical development as the object. In this case the local government was faced with two dilemmas, first, the autonomous region is obliged to build the area for the welfare of the people, both, but if you hold the construction, dealing with customary law union that does not justify the transfer of rights to customary land to others. While developers or investors want legal certainty on the land under their control for investment in the Bank. So if such condition is that the autonomous region will be going nowhere, without progressing as expected by the Law of the Regional Autonomy.

In-Law Number 32 Year 2004 on Regional Government also regulates land rights, namely

Article 1, paragraph 12, which reads: "The village or called by other names, hereinafter called the village, is a unit of community boundaries area authority to control and manage the interests of the local community, based on the origin and local customs that recognized and respected by the Government administration system of the Republic of Indonesia".

Based on the article shows that decentralization is today also communion custom or customary rights are recognized, even been governed by several laws related to it, such as; 41Tahun Law No. 1999 on Forestry, which specifies that: "Mastery of the State forest by taking into account the rights of indigenous people, along the fact still exist and be recognized, and not contrary to the national interest (Article 17 paragraph 1)".

Besides, with the spirit of reform, which increasingly recognizes that stand in the midst of society, as stated by Von Savigny in Hans Kelsen (1973): "that the law can not be" made "but exist within and is born with the people since begotten in a mysterious way by the volks geist. He consequently denied any competence to legislate, and Characterized customary Observance of law not as a cause but as evidence of its existence ". It means that the law can not be "made" but there is the old and was born with the people because it is played in a mysterious manner by the conscience of the people (volks geist). Therefore, he refused any competence to make laws and looked at the observance of the customs law not as a cause but as a proof of its existence. So many law on regional autonomy era that recognizes the existence of the customs union rights, for example; Law No. 22 of 2001 on Oil and Gas, Law No. 20 of 2002 on Electric Power, Act No. 7 of 2004 on Water Resources, Law No. 18 of 2004 on Plantations, Law No. 38 of 2004 on the road, Act No. 31 of 2004 on Fisheries, Government Regulation No. 6 of 1999 on forest exploitation and the collection of forest products in production forests.

The proliferation of legislation which would recognize communal rights have been issued in some areas it rules on the union relating to indigenous and tribal peoples, namely:

1. Provincial Regulation of Bali No. 6 of 1986 on the Status and Role of Indigenous Villages function as a unitary Community Customary law in the Province of Bali.

2. Regional Regulation of the Province of West Sumatra No. 13 of 1983 on the Nagari voted Unity of Indigenous People in the Province of West Sumatra.

3. Decree of the Governor of the Province of Lampung No. G / 362 / B.II / HK / 1996 on

Conservation Institute Highways As Indigenous Unity of Indigenous People of the Territory Indigenous communities in the regency in the province of Lampung regency.

4. Decree Kakanwil East Kalimantan Provincial Forestry Number 4653 / KWL / RRL-1/1993 on Land Issues and Indigenous Rights.

5. Decree of the District Head of Level II Kapuas Hulu Tahun1998 No. 59 on Guidelines for the Use of Communal Land / Rights Similar to That and Land Property Rights of Indigenous To The Company's interests.

6. Decree of the District Head of Level II Kerinci No. 96 of 1994 on village-owned Forest Area Processing and Indigenous Forests in Forests Hulu Air Lumpur, Gunung Raya Subdistrict, Regency of Kerinci.

7. Decree of the Head of the Bangko Sarolangon Tk.II No. 225 of 1993 on Indigenous Forest Location Determination Pangkalan Jambu village in New Village Sungai Jambu Base manage The District of Sarolangun Bangko.

Thus it is clear that the existence of customary rights is increasingly a concern for the government in enacting laws that live amongst the people as said Von Savigny in Hans Kelsen (1973), that the law is not made by a government agency but is derived from the law of middle life being surrounded society. The same thing is what is said by Yulia Mirwati (2010), that customary law is the law of life amongst the people as an incarnation of the legal sense. So that a national law that is expected is the law of laws that live and thrive in the midst of society. A good law according to Satjipto Rahardjo (2009) is the law of life and the community.

3.3. Efforts Troubleshooting Land Rights in Development of Regional Autonomy

The problem is the lack of implementation of customary rights to those rights when entered into the realm of law, even if jointly acknowledge and declare that the customary rights still exist and are recognized as legal bargain that lives and thrives in the midst of society. We are proud as a nation Indonesia has been able to establish the existence of customary law as the basis of national law in the delivery of Agrarian Law. But true what was said by Satjipto Rahardjo (2007), that if we want the customary law into the national legal basis, whether the people who traditionally may act to manage their forests, in order not cleared by foresters that

in fact armed with the modern law?

Notwithstanding the common law partner ship ensures that the rights which have been controlled and owned by the customs union can be recognized in national laws, even international law.

1. National Discourse

Nationwide efforts of the customs union that the customary rights recognized nationally (Martua Sirait, Chip Fay, and A.Kusworo, 2000) are:

a. Regulations agreed in the era of reform set out in the new paradigm of the Department of Forestry wherein Basic Law of Forestry No. 5 of 1967 are considered no longer appropriate in the present, so it needs to be revised to provide broader opportunities for the public to be involved in forest management, With the revisnya of BFL No. 5 of 1967 with the Forestry Law No. 41 of 1999 there will be changes in PP and SK in accordance with the commitments contained in the new Forestry Law that. Of the existing discourse seen there will be a separate government regulation governing Indigenous Forest Management.

b. In the Congress of Indigenous People in Jakarta on 15-16 March 1999, indigenous and tribal peoples in Indonesia requires the recognition of indigenous peoples district and the desire to build the concepts and independent thinking in forest management.

c. In a workshop on Traditional Forest Existence Reforms Committee of Forestry and Plantation in Jakarta on March 25, 1999, concluded the need for recognition of the existence of indigenous forest and management rights by indigenous and tribal peoples in forestry legislation.

d. Roundtable Discussion on the restoration of the rights of indigenous peoples organized by the National Human Rights Commission and ELSAM in Jakarta March 24, 1999, agreed that the interests of indigenous peoples must be accommodated within the provisions of the Act, Regulations and their implementation.

e. Currently, the MPR Working Committee has included the MPR on Agrarian Reform that is more aligned to the Farmers and Indigenous People as one of the agenda. Agrarian reform not only gives access land ownership to farmers but also to the indigenous peoples who have a strong relationship with the land and resources alumna. However MPR on Agrarian Reform

not been given priority to be resolved. Agrarian Reform cargo is expected to be included in the amendment of 1945 target to be completed in 2002.

2. International Discourse

Recognition of the rights of indigenous people these days tend to increase, it appears on one of the peaks of respect for the existence of indigenous and tribal peoples in 1993 Indigenous People Year by the United Nations (UN), which is no more than a series of agreements convention world government emphasized the importance of the UN member states to immediately implement the empowerment of indigenous peoples. The world convention among others (Martua Sirait, Chip Fay, and A.Kusworo, 2000) are:

a. The International Labor Organization (ILO) 169 1989, in which the articles are referred to: Article 6 for the principle of participation and consultation in the overall decision-making process that impacts on these communities on a national level. Article 7 to Article 12 covers various aspects of the relationship between "customary law system" and a "national legal system". Article 13 to Article 19 contains the setting of "The rights of the indigenous land".

b. The 1992 Rio Declaration and Agenda 21 in 1992 in essence to Article 22 emphasizes the need for recognition and empowerment of indigenous and tribal peoples, indigenous and tribal peoples which are expected to get fair treatment.

c. Manuscript draft United Nations on the Rights of Indigenous Peoples (UN Doc E / CN.4 / Sub.2 / 1993/29) affirming the need for siding with the indigenous people who have been neglected.

d. The decision of the World Conservation Strategy "keep away" (Resolution of the World Conservation Strategy, Caring for the Earth) of 1991, which supports a special and important role of indigenous peoples of the world in protecting the environment.

e. Resolution of the 18th General Assembly of the World Conservation Union, IUCN, which unanimously supports the rights of indigenous peoples, including the right to use local natural resources wisely according to their traditions.

f. International Tropical Timber Agreement (International Tropical Timber Agreement) in 1994 in the ITTO Guidelines, stating that forest management activities should recognize the interests of indigenous peoples and other local communities living to depend on forests.

g. IUCN Working Group on Community Involvement in Forest Management (IUCN Mangena Working Group on Community Involvement in Forest Management) in 1996 recommended that the natural forest regeneration in the forest management system by indigenous peoples should be recognized as an alternative forest recovery.

h. Convention on Biological Diversity (Biodiversity Convention) in 1992 has been on the Ratification and legislated by Law No. T in 1994. As a safeguard against intellectual property rights (intellectual property rights, IPR) of indigenous peoples, Exchange Technology (Sharing Technology) and Biosafety (Bio-safety).

i. United Nations Declaration and Program of Action to Combat Racism and Racial Discrimination (Declaration and Program of Action of the UN to oppose racism and racial discrimination) held in Geneva in 1978 in Article 21 recognizes the right of indigenous peoples to maintain traditional economic structures and their culture, including language and a special relationship with the land and natural resources should not be direct of them.

j. World Council of Indigenous Peoples (WCIP) in Kiruna Sweden in 1966 stressed that the rights of indigenous peoples over the land are full property rights, did not see whether they hold formal rights issued by the authorities or not.

k. Manifesto Mexico in the World Forestry Congress to X in 1985 stressed the need for institutional recognition of indigenous peoples and original knowledge to be able to manage forests including forest protection activities and the use and referred to as community-based forest management.

l. Similarly, the results of the World Forestry Congress XI in 1991 in Paris to re-emphasize the importance of siding with marginalized communities including indigenous peoples and also mandates the importance of an action plan called the Tropical Forest Action Plan (TFAP) and each country will make National Forest Action Plan (NFAP), which is also derived from Agenda 21, chapter 11.

m. In the Basic Principles FAO National Forestry Action Plan said the basic principle number 4 on the participation in the planning program Forestry said that the process of consultation involving all stakeholders including indigenous peoples Danke Lom Pok women need to be done and on the principle of the number 5 on the approach Holistic and Inter-sectoral said that indigenous peoples and communities living in the forest should be seen as

inseparable part of the ecosystem.

n. The result of the declaration of the International Alliance of Indigenous-Tribal Peoples of the Tropical Forest (Alliance of Indigenous Peoples in Tropical Forest Region) in 1996 said that; Indigenous peoples recognize that the long-term interests of life will use forest resources sustainably and respect the interests of environmental conservation. Indigenous peoples recognize that the ability of conservation organizations can help improve the development of self-help and get a mutually beneficial relationship based on mutual trust, openness, and accountability.

CONCLUSION

Based on the above description can be concluded as follows:

1. The existence of customary rights in autonomy continues to be recognized as long as there, have clear jurisdiction, recognized, administered and utilized by traditional law partnership in question.

2. While the efforts undertaken in recognizing indigenous rights of fellowship customary law is as follows:

a. In national law endeavored that pesekutuan customary rights recognized and to be a positive law in Indonesia.

b. In areas arranged so that customary rights are recognized through local regulation (Perda) so that its presence can be legally recognized.

c. In international law, customary law partnership seeks to customary rights can be recognized internationally, that are recognized globally, it will automatically become a commodity into national law. With nationally recognized the customary rights will be recognized in accordance with the law which lives among the people of Indonesia.

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