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Indigenous Peoples and Customary Law in Lolayan District, Bolaang Mongondow Regency in a Modern State

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ABSTRACT

Indigenous peoples are an orderly unity in which members are not only bound to the place of residence where a particular area, both in worldly terms as a place of life and in spiritual relations as a place of worship of ancestral spirits (territorial), but also bound to hereditary relationships in blood alliances and the same familiarity of a customary relationship (genealogical). Each indigenous community has customary Law that is used to regulate all problems that occur within the familiar environment. The second use in legislation is that indigenous peoples and customary Law are often used interchangeably in laws and regulations but lead to the same subject. Some argue that customary Law is a law left over from the past so that it is less comfortable with modern life like now, which is entering the era of modernization. Such an opinion is not wrong, but not all are true. Sayskan is right because it is recognized that customary Law is traditional, while life in the current era demands everything modern. This is not entirely true because there are several laws formed that are introduced from Customary Law. These two entities, both customary communities and Customary Law, include the same people and live on the same earth therefore, naturally, indigenous peoples also get the same rights as other countries, such as equality of public services and law enforcement. Related to the relevance of global customary Law in the global era. In the age of globalization, it is necessary to follow the pattern of becoming a peer again. Therefore, the continuity of customary Law becomes very important. Customary Law is no longer limited to indigenous Indonesian Law that must be maintained. Still, more than that, traditional Law should have a function as a "filter tool" for the entry of foreign influences into Indonesia. This filtering is what we do not currently have as a great nation.

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1. INTRODUCTION

In the development of customary Law in the world, the total population in the world inhabiting 90 countries that still maintain the lives of indigenous peoples is around 374 million. International indigenous peoples celebrate every August 9 as International Indigenous Peoples Day. The United Nations Declaration on the Rights of Indigenous Peoples on 13 September 2007

adopted the United Nations Declaration on the Rights of Indigenous Peoples.

In the records of the Alliance of Indigenous Peoples of the Archipelago, there are approximately 2371 indigenous communities spread across 31 provinces in the country. The distribution of the largest indigenous communities is in Kalimantan Province with a total of 772 indigenous communities and Sulawesi, as many as 664 indigenous communities, Sumatra reaching 392 indigenous communities, Bali and Nusatenggara 253 indigenous communities, Maluku with 176 indigenous communities, Papua 59 indigenous communities and Java 55 indigenous communities. All indigenous communities are members of the Alliance of Indigenous Peoples of the Archipelago (AMAN).

Referring to the constitution of the 1945 Constitution, 2 articles are the basis for the existence of indigenous peoples, namely Article 18 B, paragraphs 2, 3, and Article 32 as follows:

- Article 18, paragraph 2, the State recognizes and respects the unity of indigenous peoples and traditional rights as long as they are alive and by the development of society and the principles of the Republic of Indonesia as stipulated in the Law
- Article 28, paragraph 3, cultural identity and traditional society are respected by the development of times and civilizations.
- Article 32
    1. The State promotes Indonesian national culture amid world civilization by guaranteeing the community's freedom to maintain and develop its cultural values.
    2. The State respects and maintains the regional bis belly as a national cultural property.

The relationship between indigenous peoples and customary Law in Indonesia is the interaction and integrity of indigenous peoples growing in cultural wealth and tradition. It then becomes a diversity of identities, cultures, traditions, languages, and beliefs. However, that variety, the reality, is pseudo. There is an ontological reversal: The State is more accurate than the people of Customary Law. Structurally speaking, he is considered "the other". Left alive but within the limits of tolerance. While from the point of view of bureaucratic ideology and national security, "the other" is still considered dangerous. In short, these anomalies need to be domesticated, homogenized, and territorialized.

The problem of indigenous peoples and the State arises when State law negates the existence of indigenous peoples and the function of the unwritten rules they profess [1], [2]. These tensions occur at the local, national, and international levels in terms of recognition, respect, and protection of the rights of indigenous peoples, which, according to the 1945 Constitution, are the primary obligations of the State [3]. Not infrequently, the tension then triggers horizontal and vertical turmoil. This is due to the State organizers not giving enough space or ignoring the existence of the socio-political structure of indigenous peoples. On the other hand, when there is a conflict over natural resources between customary law communities, companies, and the State, the community is always stigmatized as a party that hinders development and disturbs public order. This pattern of community scapegoating manifests the abuse of the State's right to use violence.

In the structural relations of indigenous peoples, ethnicities, nations, and states, the State needs to consider several views [4]–[6]. Recognition of genuine autonomy, namely the legal and political space to take care of oneself, the question of the right to living space: land and natural resources within customary territories, and the question of the inseparability of several rights owned for generations (a bundle of ownership), and the question of traditional institutions as socio-political structures in communities that represent communities [7]. This must be considered because the structural gap during the Post-New Order period is not narrowing but gaping. What is

pawned is the most essential of the people's lives, namely their identity and human rights.

Therefore, customary Law that is needed in the era of globalization or modern times is traditional Law adapted to the circumstances and development of the times. So, familiar Law shows a dynamic nature that can quickly develop according to the times because it has universal values. Thus, indigenous peoples and their traditional rights as long as they are alive and by the development of society and the principles of the State itself [8].

2. LITERATURE REVIEW

2.1. Customary Law

Understanding Customary Law According to Snouck Hurgronje, in his book "De Atjehers," customary law "adat recht" refers to a system of social control living in Indonesian society. It was introduced scientifically by Cornelis Van Vollen Hoven, an expert on customs in the Dutch East Indies before becoming Indonesia [9].

The position of customary Law in the legal system in Indonesia has a constitutional position similar to the work of Law in general that applies in state life in Indonesia [10], [11]. Customary Law applied to native Indonesians and foreign easterners during the Dutch East Indies era.

The basic foundations of Indonesian customary Law are:

- 1945 Constitution
- Law Number 6 of 2014 concerning Villages
- Provisional Constitution of 1950
- Article 131 1. 5. Jis art. 75 new and old R. R.
- Article 134. 1.5
- Emergency Law No. 1 of 1951 Government Gazette No. 9
- Law No.19/1964 and Law No.14/1970

2.2. Modern Law

Marc Galanter asserts that modern Law is, among others, territorial, impersonal, universal, and rational by emphasizing the utility of Law for society so that talking about Law is often associated with where the Law grows and develops [12].

The process of modern state formation is part of a history of institutional "differentiation" that shows how the main functions of society came to the forefront throughout the process [13]. There is the increasing social organization of society through elaborating the abovementioned tasks. Modern Law applied in Indonesia (and many other countries) has an archetype that has its source in European Law.

2.3. Environmental Legislation

Government regulation laws related to environment and forestry

- Law No. 5 of 1960 concerning Agrarian Principles
- Law No. 41 of 1999 concerning Forestry
- Law No.18 of 2013 concerning the Prevention and Eradication of Forest Destruction
- Law No. 3 of 2020 concerning Mineral and Coal
- Law No. 32 of 2009 concerning Protection of Environmental Management.
- Government Regulation No. 27 of 1999 concerning Environmental Impact Analysis
- PP No. 27 of 2012 concerning Environmental Permits
- PP No. 24 of 2018 concerning Electronic Integrated Business Licensing Services
- Decree of the Minister of Environment and Forestry No. 08 of 2006 concerning the Preparation of AMDAL
- Minister of Environment and Forestry Regulation No. 13 of 2010 concerning UKL-UPL and SPPL
- Minister of Environment and Forestry Regulation No. 05 of 2012 concerning Types of Businesses and Activities Required by AMDAL
- LH Minister Regulation No. 16 of 2012 concerning Guidelines for LH Document Preparation
- LH Minister Regulation No. 17 of 2012 concerning Guidelines for Community Involvement in the LH and IL Impact Analysis Process

- Government Regulation No. 54 of 2000 concerning Environmental Dispute Resolution Service Providers Outside the Court

3. METHODS

3.1 Time and Duration of Research

The research time was carried out for 1 year since this research proposal was approved, and the research location was located in Lolayan District (Bakan Village, North Tanoyan Village and South Tanoyan) in Bolaang Mongondow Regency - North Sulawesi.

3.2 Stages

The stages of research to be carried out include:

1. Literature Study
2. Data collection
3. Field studies and interviews
4. Report generation

3.3 Data Collection Methods

To get quality information there is a method or way to get it. Research is done to obtain information. However, we need accurate and quality data to get information. The techniques for data collection in this study are as follows:

a. Interview

It is a data collection technique using questions and answers or direct dialogue with parties related to the research. In this case, the author shows a question and answer to the person concerned.

b. Observation

That is the method of collecting data by directly reviewing the object under study. The author now observes the entity concerned to get accurate and convincing data.

3.4 Metode Penelitian

This research uses empirical juridical research methods, where empirical juridical research is to conduct field research by looking at existing reality and conducting interviews directly and seeing facts in the field regarding the development or condition of indigenous peoples in Dumoga region and its surroundings in Bolaang Mongondow Regency - North Sulawesi.

This study takes primary and secondary data for use by researchers in addition to reading books, articles, previous research, and other scientific works. The preliminary and secondary data are used with qualitative descriptive methods. Namely, the author explains, elaborates, and describes existing problems associated with this research, then concludes.

4. RESULTS AND DISCUSSION

Article 18B paragraph (2) of the Constitution of the Republic of Indonesia stipulates that: "The State recognizes and respects the unity of indigenous peoples and their traditional rights as long as they are alive and by the development of society and the principles of the Unitary State of the Republic of Indonesia, which are stipulated in law," is a constitutional mandate that must be obeyed by state administrators, to regulate recognition and respect for the existence of indigenous peoples in a statutory form.

Law 6 of 2014 on villages defines a village as a legal community unit that has territorial boundaries that are authorized to regulate and manage government affairs, the interests of local communities based on community initiatives, rights of origin, and traditional rights that are recognized and respected in the government system of the Republic of Indonesia.

There are several reasons for the State to recognize and provide protection for Indigenous Peoples, namely:

First, the Indigenous Peoples' population in Indonesia is relatively large. Currently, AMAN has 2,449 Indigenous communities, with individuals reaching 20 million out of an estimated total population of 40-70 million Indigenous Peoples in Indonesia. Reflecting on these data indirectly legitimizes Indonesia as a country with a high multicultural heritage. Thus, the legacy of Indigenous Peoples should be safeguarded and protected. Because it is not impossible, the number of Indigenous Peoples' population will continue to decrease yearly due to Indonesia's development paradigm,

which increasingly leads to the destruction of Indigenous Peoples and their customary territories. And the most important thing is that claiming to be a multicultural country without recognizing the existence of Indigenous Peoples is a form of betrayal.

Second, in line with the theme carried out in HIMAS 2022, Indigenous Peoples in Indonesia are rich in traditional knowledge, including food or agricultural systems, medicines, and others that can be adopted as solutions to various current problems. This is also in line with what was conveyed by UN Secretary-General Antonio Guterres: "Traditional knowledge.

Indigenous Peoples can offer solutions to many of our common challenges." This was proven when the world was hit the COVID-19 pandemic, where most Indigenous Peoples survived amid social restrictions and crises. Self-defense mechanisms, which have long been practiced, make the pandemic not a new challenge so that - through various experiences or hereditary wisdom- Indigenous Peoples can survive, even strengthen in several indigenous territories. We can see this learning from the resilience or resistance of the Punan Tubu Indigenous People in Kalimantan, who have known the kelapit tradition, where to avoid illness or transmission, residents are taught to live separately in small groups consisting only of nuclear families. The Topo Uma Indigenous People in Central Sulawesi did the same thing. They have local knowledge of infectious diseases, so the distance between villages in their customary territory is quite far [14]. There, each family has a polompua or a kind of garden house that is used to seclude themselves while gardening.

In addition to knowledge of self-defense mechanisms, Indigenous Peoples are familiar with the management and use of natural resources reasonably and sustainably. For example, the Sasi Ikan Lompa ritual in Maluku, where fish will be kept and not be disturbed for a year, after which fish can be caught when traditional leaders declare the fish old enough. A similar tradition is also carried out by the Indigenous People of Sihaporas, North Sumatra, under Bombongan Pool. The management and utilization of forest products carried out by Indigenous Peoples has proven to maintain the balance of nature. It is born from the spirit of Indigenous Peoples who make forests or indigenous territories part of the cosmos that merge with their spirituality. Indigenous Peoples have always maintained a balance between nature and humans. This is reflected in one of them from how Indigenous Peoples in Papua refer to forests as Mother.

Third, in addition to inheriting traditional food and medicine traditions that are proven to survive today, Indigenous Peoples have also inherited customary Laws still in force. If elaborated more deeply on established Law, it can be an alternative to our positive legal mechanism. This relates to Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, which says, "Judges as enforcers of law and justice, are obliged to explore, follow, and understand legal values and a sense of justice that lives in society." Understanding legal values and a sense of justice that lives in society (living law) is a form of recognition of customary Law, considering that de jure traditional Law is recognized as a source of Law in Indonesia. So far, we are still struggling with the legacy of colonial Law, which sometimes confuses us. Thus, it is time for the noble values inherited by Indigenous Peoples to be elevated to become one of the primary sources of positive Indonesian Law. As H. P. Panggabean said in his book entitled Judicial Practice in Handling Customary Law Cases of the Tribes of the Archipelago, "The basis for the enactment of customary law in Indonesia is philosophical, the affirmation of Pancasila as a source of legal order that is very meaningful for customary law because customary law is rooted in the culture of the people so that it can incarnate a real and lively feeling of justice among the community and transmit the personality of the people and nation of Indonesia."

Fourth, amid the openness of information flows and a borderless world, aka globalization, it has implications for changes

in mindsets, behaviors, and lifestyles that lead to the growth of a culture of individualism, consumerism, egoism, and others contrary to our national values. So, efforts can be made to stem this, one of which is by mainstreaming Indigenous Peoples as the vanguard. This can be done by introducing Indigenous culture to various existing institutions.

Fifth, Indigenous Peoples will permanently be alienated when viewed in the logic of capitalist liberal development. However, if the Government can change this paradigm into sustainable development, empowering Indigenous Peoples is the answer. As mentioned above, Indigenous Peoples are the entities that best understand how we can grow and develop without damaging the environment.

As a fundamental question of researchers, can indigenous peoples defend forests against mining lords? The answer is Yes. Because the Constitutional Court establishes indigenous peoples as groups whose ownership of an area is recognized. Said Kuntoro Mangkusubroto, Head of UKP4. Customary forests are now officially legalized as indigenous communities, no longer owned by the State [15]. This recognition came from the Constitutional Court decision number 35/PUU-X/2012 regarding customary forests, which canceled several paragraphs and articles regulating the existence of typical forests in Law Number 41 of 1999 concerning Forestry so that the local indigenous people will not become "beggars," "slaves" in their area.

Furthermore, the question is whether indigenous peoples can reject miners or mining entrepreneurs who damage the quality of local customs. Answer Yes, according to Law Number 41 of 1999 Article 61 (Still in Force), the Government is obliged to supervise forest management organized by Regional Governments. Article 62 (Still in Force): The Government, Local Government, and communities manage the control and use of forests by third parties. Article 63 (Still in Force), In carrying out forestry supervision as referred to in Article 60 paragraph (1), the Government and Regional Governments are authorized to monitor, request information, and inspect the implementation of forest management. Article 64 (Still in Force) The Government and communities supervise the implementation of forest management that has national and international impacts. Regulation of the Minister of Agrarian Affairs No. 5 of 1999 concerning Guidelines for solving customary rights problems of indigenous peoples. Law No. 2014 on Villages Article 110 states that familiar villages have the right to form standard village regulations as long as they do not conflict with laws and regulations and PP 224 of 1961 concerning the implementation of land distribution and compensation awards.

The village, a legal community unit, has the right of origin and traditional rights in regulating and taking care of the interests of the local community and plays a role in realizing the ideals of independence based on the NRI Constitution of 1945. On that basis, Law No. 6 of 2014 concerning Villages (abbreviated as Law No. 6 of 2014) was formed. In Law No. 6 of 2014, there are regulated and Customary Villages referred to by other names. In Law 6 of 2014, Customary Villages are regulated in Article 1 number 1, which shows that villages, with their autonomy, have the authority to organize governance and development based on their original structure and rights of origin. The regulation regarding Customary Villages is specifically related to the right of birth, especially in authority to administer based on the right of source, including the power to form Customary Village Regulations.

The authority to form Village Regulations is further affirmed in Article 110 of Law Number 6 of 2014 concerning Villages (Law Number 6 of 2014) as the local scale authority of Villages, which states: "Customary Village Regulations are adjusted to customary law and customary norms applicable in Customary Villages as long as they do not conflict with the provisions of laws and regulations."

The phrase 'as long as it does not conflict with the provisions of laws and regulations' based on the provisions of Article

110 of Law Number 6 of 2014 above means that Customary Villages have the right to form Customary Village Regulations as long as they do not conflict with laws and regulations. Therefore, the Customary Village Regulations must be monitored to avoid conflict with laws and regulations. Problems arising from parameters as long as they do not conflict with the provisions of rules and regulations will give rise to the authority of the Government to use its power in canceling the Customary Village Regulation.

The Indonesian State as a modern state has a philosophy in interpreting customary Law, namely that all familiar law peoples are indigenous, not vice versa. Not all indigenous peoples are everyday law people. Often, people experience misunderstandings in distinguishing and determining indigenous peoples and customary law communities.

Why do indigenous peoples need to get their rights? Because Indigenous peoples live safely, grow, and develop as a community group by their human dignity and dignity and be free from discrimination and violence. This provides legal certainty for indigenous peoples to enjoy their rights. So by itself, customary Law can answer all legal problems the community faces in everyday life according to specific regions.

Before independence, customary Law existed and needed to be preserved because it regulated indigenous peoples to be more orderly. Indonesia consists of various tribes and ethnicities, and each tribe has its own customary Law. So, everyday law communities must be respected, and we protect their existence for the integrity and unity of the Republic of Indonesia. This is because the Law has existed since ancient times and is still valid and adopted by every customary law community concerned, wherever they are.

We know that Indonesia's independence from its proclamation on August 17, 1945, until today has been 77 years, approximately what the central community government has given to our community (BMR people) about customary rights, especially in the recognition of community communal rights in the form of typical land/customary forests. De facto or de jure who say that this is the right of the BMR community does not yet exist. This is not in line with the ownership of customary forests in other areas and existing lands such as in Yogyakarta, Sumatra, Papua, and even the nearest in the Ternate Sultanate. On average, they already have legal standing regarding customary land/customary forest ownership. In Bolaang Mongondow Raya, there has not been, even if only in the form of PERDA.

The PERDA that came out of the kotamobagu about the Customary Regional Regulation is not related to customary forests but only talks about the composition of traditional councils and marriage procedures in the kotamobagu village areas [16]. The question of the community around the research site is that the birth of Law No. 5 of 1940, the embryo of making this Law, is based on customary Law. Then, PP no.24 of 1961 was born, which gave the distribution of rights to local governments or descendants of the king regulated by the Central Government based on the percentage regulated by the PP. In Article 18 paragraph 2 B and Law no.6 of 2014 concerning villages related to the interests of indigenous peoples, especially in Bolaang Mongondow Raya in general and more specifically in North Tanoyan and South Tanoyan villages, Lolayan District to this day, they are members of the upstream Tanoyan ongkak community united to continue fighting for their rights in their village area of 3600.96 hectares which they propose to become a customary forest area to the local Government so that at least in issue a regional regulation on the traditional forest area they are fighting for and Alhamdulillah until today has received a response from the local Government because it has been registered.

5. CONCLUSION

1. The village, a legal community unit, has the right of origin and traditional rights in regulating and taking care of the interests of the local community and plays a role in realizing the ideals of

independence based on the NRI Constitution of 1945.

2. Law Number 6 of 2014 concerning Villages Article 18B paragraph (2) stipulates that: "The State recognizes and respects the unity of indigenous peoples and their traditional rights as long as they are alive and by the development of society and the principles of the Unitary State of the Republic of Indonesia, which are stipulated in law"
3. The Indonesian State as a modern state has a philosophy in interpreting customary Law, namely that all familiar law peoples are indigenous, not vice versa. Not all indigenous peoples are everyday law people.
4. From the interviews totaling 15 respondents, there are similar perceptions from Bakan, North Tanoyan, and South Tanoyan villages about the role of indigenous peoples and customary Law in the region and surrounding areas in Bolaang Mongondow Regency. The existence of indigenous peoples, customary laws, and customs that have grown and developed since the ancestors are still maintained and preserved.
5. Until today, the community in Bolaang Mongondow does not have legal standing on Customary Law in general and, more specifically, in the place of this study, namely Bakan, North Tanoyan, and South Tanoyan villages.
6. It has a large and heterogeneous area and population.
7. Vast geographical and natural resource potential with the potential for additional dense population will cause various conflicts in the field of environment (mining and forest destruction).
8. With a long struggle, especially the North and South Tanoyan communities outside Bakan village, their request to the local Government regarding the proposed recognition of customary forests covering an area of 3600.94 hectares has been registered even though they do not have a local regulation.

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