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Community Relationship"**

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“ENCOURAGING A BETTER ASEAN COMMUNITY RELATIONSHIP”



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UNIVERSITAS ATMA JAYA YOGYAKARTA

LAW, BUSINESS, AND SOCIAL JUSTICE (IC-LBSJ 2016)

**“ENCOURAGING A BETTER ASEAN
COMMUNITY RELATIONSHIP”**

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For more information, contact us at:

Atma Jaya University Publisher

Moses Gatotkaca 28 Street, Yogyakarta, Indonesia 55281

Phone. (+62) 0274-561031, 580526, Fax. (+62) 0274-580525

E-mail : penerbituajy@gmail.com

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PREFACE

The 2016 International Conference On Emerging Issues In Law, Business, And Social Justice (IC-LBSJ 2016) was held on the campus of Universitas Atma Jaya Yogyakarta in Yogyakarta Province, Indonesia during 16-18 June 2016. The 112 participants, had many fruitful discussions and exchanges that contributed to the success of the conference. Participants from some countries (Timor Leste, South Korea, Lesotho, Yangon, Philipina) made the conference truly international in scope. The 41 abstracts and full papers that were presented on three days formed the heart of the conference and provided ample opportunity for discussion.

The abstracts and full papers were split almost equally between the three main oral session at different rooms. Of the total number of presented abstracts and full papers are included in this proceedings volume. There were 3 Invited speakers who talk collaboratively in plenary speech in their expert on the emerging issues in law, business and social justice especially to encourage a better ASEAN communities relationship. They are: Professor Gabriel Moens, Professor of Law, Curtin Business School, Departemen of Law, Curtin University, Australia, with the topic: Business Dispute Resolution perspective, in the context of ASIA community relationship; Professor Danture Wickramasinghe, Chair in Management Accounting Adam Smith Business School, University of Glasgow, United Kingdom, with the topic: international accounting perspective in the context of ASIA community relationship; Dr.M.Parnawa Putranta, MBA, Ph.D, Director of Graduate Program of Universitas Atma Jaya Yogyakarta, with the topic: Business ethic perspective, in the context of ASIA community relationship; and FX Endro Susilo, S.H,LLM, Dean of Law Faculty of universitas Atma Jaya Yogyakarta, with the topic: environmental law perspective, in the context of ASIA community relationship.

These conference covered the full range of the conference topics in three days. Among the speakers were several law, business, and social justice expert, young scientists, namely, postdocs and students, who brought new perspectives to their fields. This session was closed by a special gala-dinner to honor all of the presenters, and to honor the best paper of the conference. The conference was fully funded by Universitas Atma Jaya Yogyakarta. The next IC-LBSJ will be held in 2018. We expect that these future IC-LBSJ conference will be as stimulating as this most recent one was, as indicated by the contributions presented in this proceedings volume.

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LEGAL PROTECTION TO INDIGENOUS PEOPLE IN THE LAW ON VILLAGE

Mulyanto

Law and Society Department, Law Faculty, Sebelas Maret University

Email: sheemoel@yahoo.com

Mobile phone: 0813 2904 6451

Mohammad Adnan

Law and Society Department, Law Faculty, Sebelas Maret University

Email: mohammadadnan@yahoo.com

Mobile phone: 0857 2833 6863

ABSTRACT

The objective of research was to explain law protection to indigenous people in Act of Village. The research method employed was a normative law research because Act of Village becomes its focus of study. The research material used was secondary data, the one obtained from the result of literary study related to research material. Secondary data consisted of primary and secondary law materials. The instrument of collecting data used was literature review. The analysis of data and law material was conducted qualitative using hermeneutic interpretation method. The result of research showed that the existence of Indigenous People was a social reality that had longer existed than Indonesia Country had. Such the reality had gotten law protection from government. In Human Right perspective, the recognition on traditional rights of Indigenous People should be interpreted referring to Human Right law by imposing state obligation to respect, to protect, and to meet the Human Rights of indigenous people. From juridical perspective, indigenous people had gotten law protection governed in Act of Village.

Keywords: indigenous people, human rights, law protection.

A. INTRODUCTION

The concept of Indigenous People stems to the concept of constitutional people. The term "constitutional people" (society) is a transliteration from Dutch term *rechtsgemeenschappen*, called indigenous people in legal study library (Taqwaddin, 2010). The concept of indigenous people was introduced for the first time by Cornelius van Vollenhoven. The feature of

indigenous people is when people observe any ethnics in Indonesian nation, it can be seen a so broad bottom part, a society consisting of interconnected bands; related to nature invisibly, to outside world and to material nature, so that they behave in such a way that to give a clear description, the band can be called *rechtsgemeenschappen* (Poesponoto, 1979).

Briefly, Ter Haar formulates it as an organized permanent band with its own power and richness in the form of visible and invisible object. Indigenous people (*adatrechtsgemeenschap*) are an organized permanent group of people with power and authority of managing distinctive wealth (richness) in the form of objects, either visibly or invisibly (Soemadiningrat, 2002).

Other customary law experts conceive indigenous people in Java, clan in South Sumatra, *nagari* in Minangkabau, *kuria* Tapanuli, and *wanua* in South Sulawesi. Hazairin (1981) defined it as a societal unit having equipments to stand alone, that is, having law unity, ruler unity and living environment unity based on the mutual right to land and water for all of its members.

Indigenous people leader affiliated in *Aliansi Masyarakat Adat Nusantara* (AMAN = Archipelago Indigenous People Alliance) formulates indigenous people as a group of individuals bond to its customary law order as the collective citizen of law alliance because of shared residence based on hereditary (Alting, 2010). In the form and structure of constitutional society constituting customary law alliance, its members are bond to territorial and genealogical factors.

Territorial indigenous people or constitutional alliance is an organized permanent, the members of which are bond to a certain residence area, either secularly as life place or spiritually as the ancient spirit adoring place. Meanwhile, an organized community unit the members of which are bond to same lineage from one ancestor, either indirectly or because of marriage or customary tie, is called genealogical law alliance (Hadikusuma, 2003).

The existence of customary law plurality as well as its assumers can be conceived from customary law environment and its *kukuban*, because indigenous people entitis are closely related to customary law environment. Without the presence of indigenous people entity, customary law cannot survive. Customary law is generally spoken rather than written, but it prevails effectively within its society, because it always accommodates the values to which the corresponding society adheres. The very simple and less detailed formulation will not reduce the society's respect and compliance with it (Sudjito, 2014).

An area with uniform feature and customary law characteristics overall is called *Rechtskring* by Van Vollenhoven, or law circle. Other addresses are customary law environment, customary law area, and customary law area (Soepomo, 2003). Customary law environments as well as law *kukubans* (*rechtsgouw*) or sub-customary law environment and division including 19 law

kukuban, for example, in Aceh, Batak, Mentawai, Minahasa, Bali, Lombok, Java, and etc (Soekanto, 2010). Based on the construction, it can be observed the diverse customary law environments in Indonesia. It shows the plurality of customary law community (indigenous people) in each of customary law environments and each of *kukubans* (part/section) of customary law environment (Kusumohamidjojo, 2000).

The existence of customary law society has received protection *de jure* in legislation enacted in Indonesia. For that reason, specifically the research will discuss law protection for indigenous people in Act of Village.

B. METHOD

This study was a normative law research because it studied Act of Village as its focus. Normative law research puts a norm system according to principles, norms, legislation principle, court verdict, agreement and doctrine as its research object (Ali, 2010). Research material employed secondary data, the one deriving from the result of literature review related to the material of research (Dewata, 2010). Secondary data is the preexisting data. By the binding power, there are three law materials: (a) primary law material with binding power, namely, UUD 1945 (1945 Constitution) and Law No.6 of 2014 about Village; (b) secondary law material explaining primary law material including various books, articles, journals, paper, research report, related to research object; and (c) tertiary law material providing clue or explanation about primary and secondary law material like Dictionary.

The instrument of collecting data used in this research was literature review. Literature review was used to collect literatures relevant to research topic (Creswell, 2009). Analysis of data and law material was conducted qualitatively using interpretation method. Interpretations used were futuristic interpretation and hermeneutic interpretation by considering the synchronization of legal text and context vertically and horizontally to the relevant legislation (Hamidi, 2011). From the result of analysis, answer to the problem formulated will be found, and so will be the conclusion of research that can be the basis for formulating the recommendation of research so that this research can be beneficial as expected.

C. DISCUSSION

1. The existence of Indigenous people from Human Rights Perspective

Factually, Indigenous People have their own area, but still existing in a broader scope, Republic of Indonesia country. In this case, Indigenous People has autonomy to develop rules, habits, and systems, but in other bigger legal power environment surrounding it, the power coming from the state.

The recognition of Indigenous People existence and their traditional rights governed in Articles 18B clause (2); 281 clause (3) and 32 clause (1) of 1945 Constitution. Article 18B clause (2) governed that the state recognizes and respects indigenous people entity as well as their traditional rights as long as they are still alive and consistent with the society development and the principle of Republic of Indonesia Country, governed in law. Article 281 clause (3) reads: "*Identitas budaya dan hak masyarakat tradisional dihormati selaras dengan perkembangan zaman dan peradaban* (Cultural identity and right of traditional community is respected in line with time and civilization development)". Constitutional approach to Article 281 clause (3) of 1945 Constitution is Human Rights (HR) approach. It can be seen clearly in the procedure of 1945 Constitution putting Article 281 clause (3) of 1945 Constitution in Chapter XA about Human Rights along with other human rights.

Article 32 clause (1) reads, "*Negara memajukan kebudayaan nasional Indonesia di tengah peradaban dunia dengan menjamin kebebasan masyarakat dalam memelihara dan mengembangkan nilai-nilai budayanya* (State promotes Indonesian national culture amid world civilization by ensuring the society freedom in maintaining and developing cultural values)". Meanwhile Article 32 clause (2) reads, "*Negara menghormati dan memelihara bahasa daerah sebagai kekayaan budaya nasional* (State respects and maintains local language as national cultural wealth)". This stipulation becomes constitutional foundation in viewing society from cultural dimensions. The right governed in this stipulation is the one to develop cultural values and local language with cultural approach. The construction of Articles 32 clause (1) and clause (2) of 1945 Constitution is not as complex as that of Article 18B clause (2) and Article 281 clause (3) of 1945 Constitution because it is not followed with constitutional preconditions.

It is noteworthy that Article 18B clause (2) lies in Local Government Chapter, while Article 281 clause (3) lies in Human Right Chapter. The two articles of 1945 Constitution in fact still use the concept of "conditional recognition and respect". In addition, the two articles govern "traditional rights" and "traditional community's right". From legal theory perspective, recognition is related to meta-norms. H.L.A Hart mentions three types of meta-norms: recognition, change, and authority norms. Particularly, recognition norm is the one determining which behavior norm contains certain constitutional community that should be complied (Sidharta, 1999).

The recognition can be studied from Human Right theoretical perspective. The relationship between government and citizen in Human Right framework generates human rights within citizen on the one hand, and state obligation on other hand. Human Right theory identifies 2 (two) forms of basic state obligation

based on Economic, Social, and Cultural Right Covenant: (1) obligation of conduct and (2) obligation of result (Atmaja, 2012).

Obligation of conduct includes: (1) obligation to recognize, (2) obligation to promote, (3) obligation to respect; (4) obligation to protect and obligation to fulfill. Particularly, obligation to recognize means the one to recognize economic, social, and cultural rights as human rights (Zen, 2007). In relation to indigenous people entity, the obligation to recognize means the one to recognize the rights of indigenous people entity as human rights.

Human rights theory also identifies violation approach. Maastricht guide defines the basic characteristics of Social, Economic and Cultural right infringement in relation to three types of obligations: obligation to respect, obligation to protect, and obligation to fulfill. Maastricht guide mentions that the failure of undertaking one or all of those obligations is the infringement against these rights. Maastricht guide also elaborates as follows:

- 1) Obligation to respect. State should respect Human Right without intervening with. This obligation requires the state not to take action leading to the limited access to the corresponding right.
- 2) Obligation to protect. This obligation requires state to ensure that there is no infringement against corresponding rights by third party and to give sanction to the offender.
- 3) Obligation to fulfill. It requires the state to take legislative, administrative, fiscal, judicial actions, and other adequate action in order to meet all of those rights completely (Chapman, 2003).

Constitutionally, the state's obligation over human right is governed in Article 28I clause (4) of 1945 Constitution (UUD NRI 1945) stated that protecting, promoting, enforcing and fulfilling human rights are the state's responsibility, particularly the government's". The word "protecting" does not actually exist in Article 28I clause (2) of 1945 Constitution. Previously, the word "protecting" includes in draft amendment to Article 28 of 1945. Then it is removed as it is conceived that word "protecting" has been included in "recognizing". This debate occurred in the 51st meeting of PAH I BP-MPR on Jun 29, 2000, with the agenda of fraction's end perspective on the finalization result of second amendment to 1945 Constitution.

Finally, from Human Right perspective, the recognition of Indigenous people's traditional rights in Articles 28I clause (2) and 28I clause (3) of 1945 Constitution should be interpreted referring to the provision of Human Right law by imposing the state with the obligations to respect, to protect, and to fulfill the human rights of Indigenous people entitys. The obligation to respects requires the state to not actually infringing the rights of indigenous people, among others by means of, enacting the laws ensuring the rights of indigenous people.

2. Law Protection to Indigenous People in Act of Village

The Republic of Indonesia state government has been established to protect every Indonesian nation and bloodshed, to promote public welfare, to intellectualize nation life, and to implement the world orderliness based on independence, eternal peace, and social justice. Law No.6 of 2014 about Village was developed with the spirit of applying Constitution's mandate, namely the regulation of indigenous people corresponding to Article 18B clause (2) of 1945 Constitution.

The indigenous people entity is established based on there basic principles: genealogical, territorial, and combination of them (genealogical-territorial). Meanwhile, Law No. 6 of 2014 mentions that indigenous people entity is the genealogical-territorial combination. The implementation of such the indigenous people entity has been existing and living in Republic of Indonesia Country's area such as *huta/nagori* in North Sumatera, *gampong* in Aceh, *nagari* in Pakraman/customary village in Bali, *lembang* in Toraja, *banua* and *wanua* in Kalimantan, and *negeri* in Maluku. One example of indigenous people entity plurality existing in customary law environment and its divisions (*kukubans*) can be observed in the indigenous people entity existing in Bali area. Pakraman as an indigenous people entity in Bali, in Van Vollenhoven's perspective, is one out of 19 (nineteen) *kukuban hukum* (jurisdiction) or *legal circle* (*rechtskring*) (Soepomo, 2003).

In Article 1 Number 1 of Act of Village, village is defined as village and *customary village* or called in other name, furthermore village is a constitutional community units with territorial borders authorized to govern and to manage governmental affairs, local community interest based on community initiative, origin right, and/or traditional right recognized and respected in NKRI (Republic of Indonesia Country) government system. It means that terminologically village is divided into two: village and customary village.

In the explanation of Law No.6 of 2014, it is described that village and other synonym has been existing since the Republic of Indonesia Country had not been established. It can be seen from the explanation of Article 18 of Republic of Indonesia's 1945 Constitution (before amendment) mentioning that "Territorially, in Indonesia Country there are more than 250 "*Zelfbesturende landschappen*" and "*Volksgemeenschappen*", like that in Java and Bali, Nagari in Minangkabau, hamlet and clan in Palembang, and etc. Those areas had Original structure and for that reason, they can be considered as special area. Republic of Indonesia Country respects the position of special areas and any state regulation concerning will recollect the origin rights of area". Therefore, its existence should be compulsorily recognized and ensured for its survival in Republic of Indonesia Country.

Diverse characteristics and types of Village, or its synonym, do not inhibit the founding fathers of this country to choose unity state as its form. Although it is realized that in a unity country, there should be homogeneity, but Republic of Indonesia Country keeps recognizing and ensuring the existence of constitutional community unity and indigenous people entity as well as their traditional rights.

In relation to structure and organization of Local Government, after the amendment of Republic of Indonesia's 1945 Constitutional, the regulation of Village or its synonym, from its government aspect, refers to the provision of Article 18 clause (7) confirming that "Structure and Organization of Local Government is governed in law". It means that Article 18 clause (7) of 1945 Constitution allows the presence of governmental structure in Indonesian government system.

With the construction combining self-governing community and local self-government function, it is expected that the indigenous people entity is so far a part of Village area, arranged in such a way that it becomes Village or Customary Village. Village and Customary Village basically undertakes similar duty. Meanwhile, the difference lies only in the implementation of origin right, particularly pertaining to social preservation of Customary Village, customary village regulation and management, customary peace meeting, composure and orderliness maintenance for indigenous people, and the government governance based on original structure.

Customary village has government, Village financial, and Village Development functions, and gets facilitation and building from Regency/Municipal government. In such position, Village and Customary Village get same treatment from Government and Local Government. For that reason, in the future, Village and Customary Village in the future can change the Village face and effective government governance, efficient development implementation, and community building and empowerment in its area. In similar status, Village and Customary Village are governed distinctively in this Law.

The organization of Village or its synonym has characteristic prevailing commonly in entire Indonesian area, while Customary Village or its synonym has different characteristics from common Village, particularly because the strong customary influence on local government system, local resource management, and social-cultural life of Villagers.

Customary Village is in principle an inherited local community governance organization maintained hereditarily that is still recognized and struggled for by Customary Village leader and community in order to function to develop local welfare and social-cultural identity. Customary Village has more dominant origin right that Village does since Customary Village was born as original community within society. Customary Village is an indigenous people

entity historically has territorial border and cultural identity composed of territorial basis authorized to govern and to organize the Customary Village's community interest.

Act of Village has governed village corresponding to 1945 Constitution by putting Village to be located in Regency/Municipal, recognized and respected in Republic of Indonesia state government system. The objectives of Act of Village enactment are, among others: (1) to give recognition and respect to Village that has been existing with its diversity before and after the establishment of Republic of Indonesia country (NKRI); (2) to preserve and to promote custom, tradition, and Villager culture; and (3) to reinforce the Villager as the subject of development.

Article 96 of Act of Village mandates Government, Provincial Local Government and Regency/Municipal Government to organize the indigenous people entity and to establish it as Customary Village. The establishment of Customary Village can be conducted when the following preconditions are met: (a) indigenous people entity and its traditional rights is really still alive, whether territorially, genealogically, or functionally; (b) indigenous people entity as well as its traditional right is considered as consistent with society development; and (c) indigenous people entity as well as its traditional right is consistent with the principle of Republic of Indonesia country (NKRI).

Indigenous people entity as well as its traditional rights still alive should have area and at least meet one of or the combination of following elements: (a) the community, the members of which shared the same feeling within group; (b) customary government regulation; (c) customary property and/or object; and/or (d) customary law norm set. Customary law norm in Bali, in Pakraman Village, is called *awig-awig* (Windia, 2013).

Indigenous people entity as well as its traditional right is considered as consistent with society development when: (a) its existence has been recognized based on the enacted law, either general or sectoral one; and (b) the substance of traditional right is recognized and respected by corresponding indigenous people entity and broader society and not in contradiction with human rights.

Indigenous people entity as well as its traditional right is consistent with the principle of Republic of Indonesia country (NKRI) when it does not harm the existence of NKRI as a political and legal entity not harming the sovereignty and integrity of NKRI; and the substance of its customary law norm is consistent and not in contradiction with the provision of legislation.

The establishment of customary village is carried out with Local Regulation of Regency/Municipal. The establishment of Customary Village after the establishment of Customary Village was conducted by considering the Village Government organization factor, the implementation of Village Development,

Village society building, and Village society empowerment and supporting infrastructure.

The authority of Customary Village based on origin right includes: (a) government regulation and organization based on original structure; (b) *ulayat* or customary territory regulation and management; (c) preservation of Customary Village's social-cultural value; (d) customary dispute settlement based on the customary law enacted in Customary Village in the area corresponding to the principles of human rights emphasizing on the settlement through discussion; (e) the organization of Customary Village justice peace meeting (trial) corresponding to the provision of legislation; (f) composure and orderliness maintenance for Customary Village community based on customary law enacted in Customary Village; and (g) customary law life development corresponding to social-cultural condition of Customary Village.

The implementation of authority based on the origin right and local-scale authority of Customary Village is organized and managed by Customary Village by considering diversity principle. In addition, customary village is assigned authority by Government and Local Government. The assignment from Government and/or Local Government to Customary Village includes the organization of Customary Village, the implementation of Customary Village development, Customary Village societal building, and Customary Village community empowerment as well as funding.

The regulation and organization of Customary Village Government is carried out corresponding to origin right and customary law prevailing in Customary Village that is still alive and consistent with the development of community and not in contradiction with the principle of Customary Village Government organization in the principle of Republic of Indonesia Country. Customary Village Government undertakes Customary Village discussion and conference function corresponding to the original structure of Customary Village or established as a new one on the initiative of indigenous people.

Particularly, institutional structure, position filling, and position tenure of Customary Village Head based on customary law are determined in Provincial local regulation. Basically, Customary Village Regulation is adjusted with customary law and norm prevailing in Customary Village as long as it is not in contradiction with the provision of legislation.

D. Conclusion

In conclusion, the existence of Indigenous People was a social reality that had longer existed than Indonesia Country had. Such the reality had gotten law protection from the state through various existing policies. In Human Right perspective, the recognition on traditional rights of Indigenous People should be

interpreted referring to Human Right law by imposing state obligation to respect, to protect, and to meet the Human Rights of indigenous people. From juridical perspective, indigenous people had gotten law protection governed in Act of Village. As a recommendation, the state in this case government should play an active role in evaluating a variety of policies to realize the protection to the existence and to fulfill the human rights of indigenous people.

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