

LEGAL PROTECTION OF INDIGENOUS RIGHTS IN LAND REGULATION IN INDONESIA

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Received: 20.05.2020

Revised: 17.06.2020

Accepted: 04.07.2020

Abstract

The existence of indigenous law community existed long before the independence of the Republic of Indonesia on August 17, 1945. This is also related to the existence of the common rights of Indigenous law community, which was referred to as indigenous (*ulayat*) rights of Indigenous law community. This Indigenous right exists because of the legal relationship between the Indigenous community (as the subject) and its communal rights (as an object) which emerge the authority for the subject to carry out legal actions against the Indigenous right. Indigenous rights because they are Indigenous rights, it can be said that all of them are unwritten so that they are vulnerable in terms of proof and legal protection. Thus this research intends to answer the problem: (1) how is the form of legal protection of the Indigenous rights of indigenous peoples in land regulations in Indonesia so far?, and (2) what is the ideal concept of legal protection of the Indigenous rights of indigenous peoples in land regulations in Indonesia which legal certainty? This study uses a normative juridical approach. Type of analytical descriptive research. The main data source in this study is secondary data. The secondary data include: primary legal materials in the form of laws and court decisions, especially decisions of the Constitutional Court, secondary legal materials such as books, journals, seminar results and research results, and tertiary legal materials in the form of dictionaries and encyclopedias. The analysis was carried out qualitatively. Based on the results of the study it can be concluded: (1) Legal protection of the Indigenous rights of indigenous people in land regulations in Indonesia is contained in the Constitution (the 1945 Constitution of the Republic of Indonesia) and in the Basic Agrarian Law (Law No. 5 1960) along with other regulations. The form of protection is the recognition of Indigenous rights as long as they are still really alive. Since the recognition is only normative, then the legal certainty of the existence of Indigenous rights to Indigenous communities is lacking (2) The ideal concept of legal protection of the Indigenous right of Indigenous law community of land regulations in Indonesia with legal certainty is that needs normative recognition, and also needs confirmation of Indigenous rights of Indigenous community in the form of declaratory determination.

Keywords--- Legal Protection, Indigenous (*ulayat*) Rights, Land Regulation

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DOI: <http://dx.doi.org/10.31838/jcr.07.08.322>

INTRODUCTION

After the Indonesian people proclaimed their independence on August 17, 1945, and on the next day, August 18, 1945 it was formulated the main forms and joints of the Unitary State of the Republic of Indonesia, the arrangement of land was based on the purpose of establishing the Republic of Indonesia. As stated in the preamble to the 1945 Constitution of the Republic of Indonesia (1945 Constitution), the aim of establishing the Unitary State of Republic of Indonesia is, among others, to "advance public welfare". In the context of promoting public welfare, the relationship between Indonesian people and their land is carried out and summarized in the provisions of Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which confirms the basic policy regarding the control and use of existing natural resources, with the words: "The earth and water and the natural resources contained therein are controlled by the State, and are used for the greatest prosperity of the people" (Umar Ma'ruf, 2014, p. 2). But both in the torso and in the explanation of the 1945 Constitution of the Republic of Indonesia, there is no explanation regarding the nature and scope of the state's right to control, which includes the earth and water, and the natural resources contained therein. In the explanation of the 1945 Constitution of the Republic of Indonesia, only an affirmation is given, that the earth and water and natural resources contained in the earth are the main points of people's prosperity, because it must be controlled by the state and used for the greatest prosperity of the people (Umar Ma'ruf, 2010, p. 5).

For the founding fathers, arranging agrarian tenure is a mandate mandated by the constitution in accordance with Article 33 of the Constitution, that land must be able to create justice, prosperity

and prosperity for all Indonesian people (M. Nazir Salim and Westi Utami, 2019, p. 29). In order to give meaning to Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, Anang Husni stated: These basic provisions show the basic principle of the relationship between the state and citizens relating to land. The basic provisions contained mainly the intention to erase the basic principles known in the Dutch East Indies, meaning the role of the state as the owner as used in the *domein verklaring* principle. This principle of dominion is not known in the joint legislation of agrarian legislation in Indonesia. In addition to the fact that the principle of *domein verklaring* is contrary to the legal awareness of the community and the principle of state administration, it also does not need the state to be the owner of land. More precisely, if interpreted by the state as an institution of "dominating" (not "owning") land. In Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia - the word being controlled actually contains the meaning of the purpose of utilizing natural resources for the prosperity of the people. This means that state control over natural resources is permitted if it is utilized for the prosperity of the people. If this is distorted, the meaning developed by the State is contained in the *domein verklaring* principle. The purpose of utilizing natural resources for people's prosperity is an ethical imperative (Anang Husni, 2009, p. 84).

The Indonesian people who inhabit 17,508 islands consisting of around 370 ethnic groups with 67 main languages represent the diversity of the Indonesian nation (Julius Sembiring, 2018, p.1). Today these tribes are bound to the Indigenous law community and some are separated from the unity of the Indigenous law community.

The existence of indigenous peoples has existed long before the independence of the Republic of Indonesia on August 17, 1945. As a country, in Indonesia today there are various indigenous peoples with a total of 2,332 communities with Indigenous laws that have been passed down for generations (M. Nazir Salim and Westi Utami, 2019, p. 141). Related to this, the existence of the common rights of the Indigenous law community which is referred to as the Indigenous rights of the Indigenous law community is very important to consider. This Indigenous right exists because of the legal relationship between the Indigenous community (as the subject) and its communal (as an object) which emerge to the authority for the subject to carry out legal actions against the Indigenous rights (Julius Sembiring, 2018, p. 2). Indigenous rights because they are Indigenous rights, it can be said that all of them are unwritten so that they are vulnerable in terms of proof and legal protection.

Thus this research intends to answer the problem: (1) how is the form of legal protection of the Indigenous rights of indigenous peoples in land regulations in Indonesia so far?, and (2) what is the ideal concept of legal protection of the Indigenous rights of indigenous peoples in land regulations in Indonesia that has legal certainty?

RESEARCH METHODS

This research uses a normative juridical approach in the form of an approach based on laws and regulations. Type of analytical descriptive research by describing the results of research conducted (Ronny Hanitijo Soemitro, 1989, p. 34).

The data used are secondary data in the form of primary legal materials which are primarily the 1945 Constitution of the Republic of Indonesia and land-related regulations, as well as secondary legal materials such as books, journals, seminar results and research results, as well as tertiary legal materials in the form of dictionaries and encyclopedias (Soerjono Soekanto, 2006, p.21). Data were then analyzed qualitatively and presented descriptively analytically.

DISCUSSION

Legal Protection of the Indigenous Rights of Indigenous Law Communities in Land Regulation in Indonesia

Indigenous (*Ulayat*) are the rights held by a Indigenous law community to control land and its contents in the area of its territory (Language Center of the Ministry of National Education, 2003, p. 382). While the word *ulayat* itself means region (Language Center of the Ministry of National Education, 2003, p. 382). Syahmunir stated the word *ulayat* came from Arabic which had the meaning 'being taken care of' and 'supervised', so according to him the Indigenous rights were the power to administer, supervise and also control (In Julius Sembiring, 2018, p. 12-13)

Boedi Harsono stated that in fact the right for Indigenous Law did not give a name. The name refers to the land which is the territory of the legal community concerned. Many regions have names for the area of their territory, for example the land of the region as belonging (*pertuanan* - Ambon), as a place to feed (*panyampeto* - Kalimantan), as a restricted area (*pewatasan* - Kalimantan, *wewengkon* - Java, *prumumian* - Bali) or as land that is forbidden to others (*totabuan* - Bolaang Mongondouw). Also found are Indigenous land rights with the terms: *Torluk* (Angkola), *Limpo* (South Sulawesi), *Muru* (Buru), *Payar* (Bali), *Paer* (Lombok), and *Ulayat* (Minangkabau) (Boedi Harsono, 2003, p. 186).

Van Vollenhoven with his Leiden school named the Indigenous community's Indigenous land as *beschikkingrecht* (Julius Sembiring, 2016, p. 23). While Maria S.W. Soemarjono (2019, p. 10) stated that Indigenous land (right) is land sub-subject to Indigenous law communities that have public and private

authority. The public here is intended as the authority to regulate the use of the land, and private is the right to own, occupy and work on the land.

In the 1945 Constitution of the Republic of Indonesia (1945 Constitution) early period (18 August 1945), there was no statement of protection of the Indigenous rights or Indigenous rights of the Indigenous law community. Only with the amendment of the 1945 Constitution in 2000 (the Second Amendment), constitutionally there was legal protection in the form of recognition of Indigenous rights as Indigenous rights. Article 18B paragraph (2) of the 1945 Constitution (Second Amendment, August 18, 2000) states "The state recognizes and respects the unity of Indigenous law communities and their Indigenous rights 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 as stipulated in the law invite ". In Article 281 paragraph (3) of the 1945 Constitution (Second Amendment, August 18, 2000) stated: "Cultural identity and traditional community rights are respected in accordance with the development of time and civilization".

Furthermore, in several laws that provide legal protection for Indigenous rights, are:

a. Law No. 5 of 1960 concerning the Basic Rules of Agrarian Principles known as the BAL/UUPA. Article 3 states: "Bearing in mind the provisions in Articles 1 and 2, the exercise of Indigenous rights and similar rights of Indigenous law community, as long as in reality they must still be such that they are in accordance with national and state interests, which based on national unity and may not conflict with other higher laws and regulations.

According to the National Law Reform Consortium and the Agrarian Reform Consortium, this shows the concept of legal recognition of indigenous peoples' rights to agrarian resources is conditional recognition whose practice is not able to meet the needs of indigenous groups for guarantee and full legal protection. This acknowledgment is based on the State's Right to Control which is reflected in Article 2 of the BAL. However, the concept of "control" contained therein after being critically analyzed turned out to be beyond the concept of "control" contained in Article 33 (3) of the 1945 Constitution which is daily used as an umbrella, protector and justifier (KRHN-KPA, 1998, p. 140).

General Explanation number 3 of the BAL/UUPA states that among other things the Indigenous rights will be considered, as long as the rights are in fact still in the legal community concerned. The interests of a legal community must be subject to broader national and state interests and their Indigenous rights must be in accordance with those broader interests. It cannot be justified, if in today's state of nature a legal society still maintains the absolute content and exercise of its Indigenous rights as if it is independent of its relationship with the legal communities and other regions within the state as a unit. But this does not mean that the interests of the legal community concerned will not be considered at all. Maria S.W. Soemardjono stated the need to address the existence of Indigenous rights, proactively, objectively, rationally, by encouraging the issuance of the Indigenous Rights Law and especially the law regarding the constitutional rights of indigenous peoples (Maria S.W. Soemardjono, 2008, p. 4).

As a follow-up to Article 3 of this BAL/UUPA on the issue of Indigenous rights from the viewpoint of the Ministry of Agrarian further, see Regulation of the Minister of Agrarian Affairs / Head of the National Land Agency Number 5 of 1999 concerning Guidelines for Settlement of Indigenous Rights of the Indigenous Law Community and Instruction of the Head of BPN No. 2 of 2000 concerning Implementation of PMNA/Ka. BPN Number 5 of

1999 concerning Guidelines for the Settlement of the Indigenous Rights Rights of the Indigenous Community, which was later replaced by Regulation of the Minister of Agrarian Affairs and Spatial Planning / Head of the National Land Agency No. 9 of 2015 concerning Procedures for the Determination of Communal Rights in Land of Indigenous and Peoples Legal Communities in Certain Areas, and finally replaced by Regulation of the Minister of Agrarian Affairs and Spatial Planning / Head of National Land Agency No. 10 of 2016 concerning Procedures for Establishing Communal Rights in Land of Indigenous and Peoples Legal Communities in Certain Areas. Related to this later will be discussed in discussion no.2 below.

b. Law No. 39 of 1999 concerning Human Rights. Article 6 paragraph (2) states: "Cultural identity of Indigenous law community including the right to Indigenous land is protected, in harmony with the times". In the Elucidation of Article 6 paragraph (2) it is stated: "In the context of upholding human rights, the national cultural identity of Indigenous law community, Indigenous rights which are still clearly upheld by the local Indigenous law community, remain respected and protected as long as they do not conflict with the principles a rule of law state with the essence of justice and people's welfare".

c. Law No. 41 of 1999 concerning Forestry. In this Law many norms regulate Indigenous law communities, including:

(1) Article 4 paragraph (3): "Forest control by the state continues to consider the rights of Indigenous law community, as long as in reality it still exists and its existence is recognized, and it does not conflict with national interests .By Decision of the Constitutional Court Number 35 / PUU-X / 2012 Article 4 paragraph (3) is declared not to have binding legal force as long as it is not interpreted "Forest control by the state still takes into account the rights of indigenous peoples, as long as it is still alive and in accordance with community development and the principles of the State Indonesian republic unity regulated in law".

(2) Article 5 paragraph (3): "The government determines the status of the forest as referred to in paragraph (1), and paragraph (2), and the Indigenous forest is determined as long as in reality the relevant Indigenous law community still exists and its existence is recognized.

By Decision of the Constitutional Court Number 35 / PUU-X / 2012 Article 5 paragraph (3) is amended to: "The government determines the status of the forest as referred to in paragraph (1), and the Indigenous forest is determined as long as in reality the relevant Indigenous law community still exists and is recognized its existence.

(3) Article 5 paragraph (4): "If there is no longer any relevant Indigenous law community, the Indigenous forest management rights will return to the Government."

(4) Article 67 paragraph (1): "Indigenous law communities as long as in reality they still exist and are recognized as having the right to: a. collect forest products to meet the daily needs of the indigenous peoples concerned; b. carry out forest management activities based on existing Indigenous law and not in conflict with the law; and c. get empowerment in order to improve their welfare.

(5) Article 67 paragraph (2): "The confirmation of the existence and elimination of the Indigenous law community as referred to in paragraph (1) shall be stipulated by a Regional Regulation."

(6) Meanwhile in the General Explanation it is stated: "Anticipating the development of the aspirations of the people, then in this law forests in Indonesia are classified into state forests and private forests. State forest is forest that is on land that is not encumbered with land rights according to Law Number 5 of 1960, including forest forests that were previously controlled by Indigenous law communities called *ulayat* forests, marga forests, or other designations. The inclusion of forest forests controlled by Indigenous law community in the sense of state forests, is a consequence of the right to control and

administer by the State as an organization of power of all people in the principle of the Unitary State of the Republic of Indonesia. Thus the Indigenous law community as long as in reality it still exists and its existence is recognized, it can carry out forest management activities and the collection of forest products. While private forest is forest that is on land that has been encumbered with land rights according to the provisions of Law Number 5 of 1960 concerning Basic Regulations on Basic Agrarian Matters, such as ownership rights, cultivation rights and usage rights."

(7) In the Elucidation of Article 5 Paragraph (1) it is stated: "State forest can be in the form of Indigenous forest, namely state forest which has been handed over to the Indigenous law community (*rechtsgemeenschap*). The Indigenous forest was previously called community forest, clan forest, forest estate, or other designations. Forests managed by Indigenous law community are included in the definition of state forests as a consequence of the right to control by the State as the organization of power of all people at the highest level and the principle of the Unitary State of the Republic of Indonesia. The inclusion of Indigenous forests in the sense of state forests does not negate the rights of Indigenous law community as long as the reality still exists and their existence is recognized, to carry out forest management activities."

Based on the Decision of the Constitutional Court Number 35 / PUU-X / 2012, naturally the Elucidation of Article 5 paragraph (1) specifically related to Indigenous forests is declared as part of state forest which has no legitimacy. This means that Indigenous forests are not part of the State's forests, but of course they remain as part of the State's Controlling Rights as the organization of power of all people at the highest level and the principle of the Unitary State of the Republic of Indonesia.

d. Law No. 22 of 2001 concerning Oil and Gas. Elucidation of Article 34 Paragraph (2): "What is meant by recognition in this provision is recognition of the existence of Indigenous community's Indigenous rights in a region, so that the settlement can be done through consultation and consensus based on the relevant Indigenous law in question".

e. Law No. 20 of 2002 concerning Electricity. Article 35 paragraph (6) mandates: "In the case of land that is used by holders of Electricity Supply Business Permits, there is Indigenous and similar land from Indigenous law communities as long as the reality still exists, the settlement is carried out by Electricity Supply Business Permit holders with the relevant Indigenous law communities in accordance with the laws and regulations in the field of land by taking into account the provisions of local Indigenous law ".In the Elucidation of Article 35 paragraph (6) an understanding is given of what is Indigenous land, Indigenous rights and Indigenous law communities. Communal (*ulayat*) land is defined as a plot of land on which there are Indigenous rights of a particular adat community. Indigenous rights are the authority according to Indigenous law owned by certain Indigenous law communities over certain areas which are the living environment of its citizens, arising from outward and internal relations between generations and the unbroken community between the Indigenous law community and the area concerned. While the Indigenous law community is a group of people who are bound by their Indigenous legal arrangements as citizens together with a legal alliance due to the similarity of their dwellings or on the basis of descent. It was further stated that the existence of *ulayat* land was determined based on local regulations.

f. Law No. of 2003 concerning Geothermal Energy. 27 Article 16 paragraph (3) letter a states: "Geothermal Mining Business Activities cannot be carried out in: a. burial sites, places that are considered sacred, public places, public facilities and

infrastructure, nature reserves, cultural reserves, and land owned by indigenous peoples".

g. Law No. 18 of 2004 concerning Plantations. Article 9 paragraph (2): "In the case that the required land is the Indigenous land rights of indigenous peoples who in fact still exist, precede the granting of rights as referred to in paragraph (1), the applicant of the right is obliged to hold consultations with the Indigenous law community holders of Indigenous rights and citizens who hold the right to the land concerned, to obtain an agreement regarding the surrender of land, and compensation.

In the Elucidation of Article 9 paragraph (2), it is stated that the criteria for the Indigenous law community are in fact still exist, if they meet the following elements:

- (1) the community is still in the form of a community (rechtsgemeinschaft);
- (2) there are institutions in the form of Indigenous authorities;
- (3) there is a clear Indigenous law area;
- (4) there are institutions and legal instruments, especially traditional justice which are still adhered to; and
- (5) there is an inauguration with regional regulations.

h. Law No. 38 of 2004 concerning Roads. Article 58 paragraph (3): "The holder of land rights, or users of state land, or Indigenous community Indigenous law, whose land is needed for road construction, is entitled to compensation". In the Elucidation of this Article, it is stated that Indigenous land is a plot of land on which certain Indigenous law communities have Indigenous rights. While the Indigenous law community is a group of people who are bound by the Indigenous legal order concerned as a joint citizen of the legal alliance on the basis of shared housing or descent.

i. Law No. 26 of 2007 concerning Spatial Planning. General Explanation number 9f states the guarantee "the involvement of indigenous peoples in every process of organizing spatial planning".

j. Law No. 27 of 2007 concerning Management of Coastal Areas and Small Islands. In Article 61 paragraph (1) it is stated "The Government recognizes, respects, and protects the rights of Indigenous Peoples, Traditional Communities and Local Wisdom for Coastal Areas and Small Islands that have been used for generations. While in paragraph (2) it is stated: "Recognition of the rights of Indigenous Peoples, Traditional Communities and Local Wisdom as referred to in paragraph (1) is used as a reference in the sustainable management of the Coastal Areas and Small Islands."

k. Law No. 2 of 2012 concerning Land Procurement for Development in the Public Interest. In the Elucidation of Article 40 it is stated that: "Compensation for the loss of Indigenous land rights is given in the form of replacement land, resettlement, or other forms agreed upon by the Indigenous law community concerned.

l. Law No. 11 of 2013 concerning Ratification of the Nagoya Protocol on Access to Genetic Resources and the Equitable and Balanced Benefit Sharing Arising from Utilization for the Convention on Biological Diversity. The General Explanation, among others, states: "Traditional knowledge relating to genetic resources is an inseparable part of genetic resources and is inherited from the ancestors of indigenous peoples and local communities to the next generation"

m. Law No. 6 of 2014 concerning Villages. Article 1 number 1 states; "A village is a village and a Indigenous village or what is referred to by another name is a legal community unit that has the authority to manage and manage government affairs, the interests of the local community based on community initiatives,

original rights, and / or Indigenous rights that are recognized and respected in the government system of The Unitary State of the Republic of Indonesia". Based on this, the existence of a legal community unit in the form of a Indigenous village is recognized in the Village Law. Meanwhile in Article 76 paragraph (1) it is stated "Village assets can be in the form of village land, Indigenous land, village markets, animal markets, boat moorings, village buildings, auction bills, auctions of agricultural products, village-owned forests, village-owned springs, baths general, and other village assets. From the formulation of Article 76 paragraph (1) it is stated that "*ulayat* land is an asset of the village".

Based on what is determined in the Basic Law and in the Law as mentioned above it can be concluded that the protection of the Indigenous rights of Indigenous communities is normative in the form of:

- 1) Respected and recognized, provided that they are still alive and in accordance with the development of society and the principles of the Unitary Republic of Indonesia
- 2) Rights to Indigenous land are protected, in harmony with the current development.
- 3) In the event of a dispute, the settlement can be done through consultation and consensus based on the relevant Indigenous law.
- 4) Geothermal mining business activities cannot be carried out on lands owned by indigenous peoples.
- 5) Communities of Indigenous law, whose land is needed for development, are entitled to compensation. Compensation for Indigenous land rights is given in the form of replacement land, resettlement, or other forms agreed upon by the Indigenous law community concerned.
- 6) The involvement of indigenous peoples in every process of organizing spatial planning.

Legal protection as mentioned above is normative. The point is general in statutory regulations. Of course this has not been able to cause a strong binding or legal certainty if it is not in the form of any particular plot / area of land declared as Indigenous rights of certain Indigenous law communities. If the legal protection is only normative, then naturally the existence of Indigenous rights to Indigenous communities is lacking.

The Ideal Concept of Legal Protection for the Indigenous Rights of the Indigenous Law Community

In the Regulation of the Minister of Agrarian Affairs / Head of the National Land Agency No. 5 of 1999 concerning Guidelines for Settlement of Indigenous Community Communal Land Rights Issues (Ministerial Regulation 5/99), Indigenous Rights are defined as authority which according to custom belongs to certain Indigenous law communities in certain areas which are the environment of their citizens to take advantage of natural resources, including land, in the area, for its survival and life, arising from an outwardly and inwardly and uninterrupted relationship between the Indigenous law community and the area concerned. While the definition of Indigenous land is a plot of land on which there are Indigenous rights of a particular Indigenous law community. The Indigenous law community by Ministerial Regulation 5/99 is defined as a group of people who are bound by their Indigenous legal arrangements as a common citizen of a legal alliance due to the similarity of residence or on the basis of heredity.

This Ministerial Regulation 5/99 in 2015 was replaced by Regulation of the Minister of Agrarian Affairs and Spatial Planning / Head of the National Land Agency No. 9 of 2015 concerning Procedures for Establishing Communal Rights in Land of Indigenous and Peoples Legal Communities in Certain Areas (Ministerial Regulation 9/15). In this 9/15 Ministerial Regulation even though as a substitute for Ministerial Regulation 5/99 but the term Communal Rights is no longer known, the

Communal Rights are there. It seems that the founder of Ministerial Regulation 9/15 replaced the term *Ulayat* Rights with Communal Rights. This communal right in Ministerial Regulation 9/15 is referred to as the common property rights over the land of a Indigenous law community or the common property rights over land granted to the community given to the community within the forest or plantation area. The definition of such Communal Rights does not change in Regulation of the Minister of Agrarian Affairs and Spatial Planning / Head of the National Land Agency No. 10 of 2016 concerning Procedures for Establishing Communal Rights in Land of Indigenous and Peoples Legal Communities in Certain Areas (Ministerial Regulation 10/16). Commenting on the term communal rights, Maria SW Soemardjono stated that it seems that Ministerial Regulation 9/15 equates communal rights with communal rights (Maria SW Soemardjono, 2018, p. 36).

According to him in daily conversation, using the terms "communal rights", "communal land", "communal rights" may be more "free" because there are no legal implications. However, when the term is formulated in legislation, the concept must be clear because there are legal implications. The equation is evident, among others, in the consideration of letter b "that the Indonesian national land law recognizes the existence of communal and similar rights from the Indigenous Law Community, as long as in fact it still exists, as referred to in Article 3 of Law No. 5 of 1960 concerning Basic Rules of Agrarian Principles". According to Boedi Harsono Indigenous rights in the Indigenous law system are the highest tenure rights, which contain 2 elements which are both private and public law. Under Indigenous rights are the rights of the Indigenous Chief and Indigenous Elders who, as officers of the Indigenous law community, have the authority to manage, regulate and lead the allocation, control, use and maintenance of the shared land. The task of this authority is merely public law. Then there are various land rights held by the relevant Indigenous law communities, all of which directly or indirectly come from Indigenous rights, as a collective right. As individual rights which constitute concrete legal relations, the regulation includes the field of civil law. But the regulation of its mastery and use by the Indigenous Law Community and Indigenous Chief includes the field of public law (Boedi Harsono, 2003, p. 183).

Based on the opinions of Boedi Harsono, Maria SW. Soemardjono and Ahmad Nashih Luthfi mentioned above, in terms of forming regulation, want to equate the term communal rights (Indigenous law community, not non Indigenous law community) with Indigenous rights, then first equate the concept of communal rights with communal rights. Communal rights here should not be declared as joint property rights of Indigenous law community because this has implications only as the civil rights of Indigenous law community, so as part of land rights. But it should remain as authority of certain Indigenous law communities over land in certain areas that becomes environment of community's citizens. Therefore this last understanding means the communal rights have public and private dimension and are identical with Indigenous rights. Thus there will be legal certainty of Indigenous community rights related to land with any name, whether communal rights, Indigenous rights, traditional rights or their own naming by the Indigenous law community as a common right, as long as the rights are interpreted as public and private dimensions.

The next issue that requires legal certainty is the issue of registration of Indigenous land rights or communal rights. The Basic Agrarian Law (BAL/UUPA) gives the Government the task of registering land in order to guarantee legal certainty. In Article 19 of the BAL it is stated that the land registration includes; (a) measurement, perpetuation and accounting of rights; (b) registering land rights and transferring land rights; and (c) granting proof of rights documents, as a strong means of proof.

This legal certainty according to R. Soeprapto (In Julius Sembiring, 2018, p. 155) includes: (a) legal certainty regarding the legal subject of land rights (persons / legal entities); (b) certainty regarding the location, boundary, size / size of land or certainty regarding the object of rights; (c) types / kinds of land rights which form the basis of legal relations between land and persons / legal entities.

In the land registration, two data are collected, namely physical data and juridical data. Physical data is a description of the location, boundaries and area of the land and units of listed flats that are listed, including information on the existence of buildings or parts of buildings above it. Juridical data is a description of the legal status of the land parcels and listed flats, rights holders and other parties' rights and other burdens that burden them (Mohammad Fajar Hidayat in M. Shandy Ramadanu and Harfianti <editor>, 2018, p. 31). Land registration in Indonesia is carried out in two ways, namely systematically covering the territory of one village or *kelurahan* or a part of which is mainly carried out on the initiative of the government, and sporadically, namely registration of parcels of land at the request of the holder or recipient of the relevant right individually or en masse (Septina Marryanti and Yudha Purbawa, 2018, p. 191).

Legal certainty regarding rights depends on the truth of the data provided by the rights applicant and the existence of an agreement on land boundaries with the boundary owner (*contradictoire delimitatie*) which is physically marked by the installation of stakes in the field. In terms of the legal certainty of the subject of land rights, the right holder has the authority to act on his property, as long as it is not contrary to the law or violates the rights or interests of others. Some things which are determinants of the birth of legal certainty, can be grouped into a juridical-normative foundation, socio-juridical foundation and land policy. These factors both formally and materially have a very decisive role in the emergence of legal certainty of ownership rights to land that has obtained a certificate (Vina Ainin Salfi Yanti, in M. Shandy Ramadanu and Harfianti (Editor), 2018, p. 140).

Related to the object of rights that can be registered, Government Regulation No. 24 of 1997 concerning Land Registration states that land registration objects include:

- a) Plots of land that are owned with Ownership rights, Cultivation rights, Building rights and Use rights;
- b) Land Management Rights;
- c) Waqf land;
- d) Proprietary Rights of Flat Units;
- e) Mortgage;
- f) State Land.

Thus, Indigenous land is not an object of land registration. The Agrarian Law only provides mechanism for registering Indigenous land through conversion institutions, namely the adjustment of old land rights to land rights as stated in the law, including property rights, cultivation rights, building rights and use rights. However, it should be noted that the mechanism for the conversion of land rights means changing the relevant land entity, which is originally a Indigenous land to a land rights (Julius Sembiring, 2018, p. 157). So when using the provisions in Ministerial Regulation 9/15 as replaced by Ministerial Regulation 10/16 Indigenous land rights (in this case communal land rights) are registered and obtain land rights certificates, then the land entity has automatically changed from Indigenous land to land right.

As a middle way in the context of more legal certainty, the existence of the Indigenous rights is the registered land rights (measurement, perpetuation and bookkeeping rights) but does not turn into a land rights entity. By measuring, perpetuating and

accounting these rights will get clarity of the location, area, and boundaries of Indigenous rights.

Julius Sembiring (2018, p. 159) states that the registration of *ulayat* land in essence does not need to issue a certificate, in the sense that it does not need to be granted land rights, because *ulayat* lands cannot be transferred or pledged in principle. Thus the stages of the process of registering Indigenous land which is carried out is the research (the presence or absence of the *ulayat* land), circumference measurements, and mapping. The graciousness of the subjects of *ulayat* land and the object are taken with a declarative regional regulation, not a constitutive Governor / Regent / Mayor decisions.

With the registration of Indigenous land rights, the State's recognition of Indigenous land rights is not merely normative in the form of recognition in regulations only, but also explicitly stated per area of Indigenous land on behalf of which Indigenous law community. Declarative statements such as this in the form of stipulations in the local Regional Regulation and registration by the local Land Office will give legal certainty for the Indigenous law community concerned. So that legal protection to Indigenous law community for their Indigenous rights can be guaranteed.

CONCLUSIONS

Based on the results of the study it can be concluded:

1. Legal protection of the Indigenous (*ulayat*) rights of Indigenous law community in land regulations in Indonesia is contained in the Constitution (the 1945 Constitution of the Republic of Indonesia) and in the Basic Agrarian Law (Law No. 5 of 1960) along with the other laws. The form of legal protection is the recognition of Indigenous rights as long as the people are still real alive and do not conflict with the national interests of The Unitary State of the Republic of Indonesia. Because the recognition is only normative, then the legal certainty of the existence of Indigenous rights of indigenous peoples is lacking.

2. The ideal concept of legal protection for the Indigenous (*ulayat*) rights of Indigenous communities in land regulations with legal certainty in Indonesia is that needs normative recognition, and also needs confirmation of Indigenous rights of Indigenous community in the form of declaratory determination through regional regulations, and being registered at the National Land Agency without any land certificate needed.

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