

The Existence of Customary Rights of Customary Law Community and Its Regulation in the Era of Special Autonomy of Papua

Roberth Kurniawan Ruslak Hammar¹

Abstract

The protection and recognition of customary rights of Customary Law Community is a constitutional imperative according to the implementation of Article 18B of the 1945 Constitution. In order to minimize the conflict between government, employers and the community, it is necessary to understand the characteristics of customary rights of each tribe in Papua, and legitimize them as local legal products in order to accelerate the development and welfare of the community. This research, conducted in Manokwari during 2008-2009, determined the existence of customary rights of the Arfak Customary Law Community. The purposive sampling technique was used to identify 52 respondents from Arfak Indigenous natives. This research adopted normative-empirical methods in order to review and analyze the descriptive data collected from the respondents. The results of the research indicate that: (1) Implementation of the protection and recognition of communal land rights in Tanah Papua has been accommodated in Law Number 21 Year 2001 and it is realized in Special District Regulation Number 23 Year 2008 namely: customary law community rights recognized and protected by the State, Government, Provincial Government, District / City, which is implemented through customary rights research on indigenous and tribal peoples committed by the committee, and accommodated in the decision of the Regent / Mayor. (2) Arfak Customary Law Community owns customary right of Arfak tribe, sub tribe that is Hatam, Moile, Sougb, Meyah., Mnu custom right, customary right of Kerek level and family, and arrangement and utilization customary right arranged by each - Mananir according to its level.

Key words: *Existence of Customary Rights, Arfak Society, Special Autonomy*

Introduction

The pluralistic Indonesian society of various tribes and languages is an integral part of the Indonesian nation that should be nurtured, respected and given recognition for the sake of survival and existence in the Republic of Indonesia. Article 18 B of the 1945 Constitution states that: (1) The State acknowledges and respects special or special regional government units regulated by law (2) The State acknowledges and respects the unity, customary law community and rights traditional as long as it is alive and in accordance with the development of society and the principle of the Unitary State of the Republic of Indonesia, as governed by law.

¹ Assistant Professor, STIH BINTUNI, Papua Barat, Indonesia, roberthammar@yahoo.com

Cornelis van Vollenhoven (1974-1933), the Dutch law scholar on traditional legal system of Indonesia, the *Adat* had divided customary jurisdictions into 119 regions, however currently the customary law environment in Indonesia has more than what was established by Vollenhoven. As a result, there now exists several customary law environments developed by customary law communities with their leadership structures possessing a hold over natural resources as well as people's customary rights. The Indonesian constitutionally stipulated in Article 28I of the 1945 (3) that cultural identity and the rights of traditional communities should be respected in harmony with the development of the times and civilizations. In order to realize the recognition of the existence of Indigenous People with their customary rights, it is necessary to conduct research to reveal the reality of the existence of the customary Rights of Indigenous People in Indonesia. This will help in understanding the application of legal functions as social and or social engineering tools as a means of social control.

The Arfak Customary Law Community, which is a genealogical-territorial society consisting of Hatam, Sough, Meyah sub-tribes and that spread in Manokwari District, South Manokwari, Arfak Mountains, Tambrau, Bintuni Bay Regency, has a distinctive cultural identity of Papua and has a distinctive traditional right collectively called *Jiyaser jide dihei* or *Jijoug yeyin mebi*. There is not much knowledge about the customary rights of customary community though it is known that these rights contribute to the efforts made to minimize the possibility of horizontal and vertical conflict. As a result, the welfare coveted by the Customary Law Community in Papua could really become a reality (Abidin, Bakar, & Haseeb, 2014, 2015; Abidin & Haseeb, 2015; Abidin, Haseeb, Azam, & Islam, 2015; Abidin, Haseeb, & Islam, 2016; Abidina, Haseeb, & Jantan, 2016).

Additionally, various Customary rights conflicts in Papua have affected the development acceleration in all sectors including inhibiting investment as stated by the Assistant I of the Papua District Secretary Doren Wakerwa in Biak 11 November 2017 (www.beritasati.com), or customary right conflict in Timika, namely the Amungme tribe with Freeport, the case of Wamena airport, as Representative BPK of Papua (jayapura.bpk.go.id; national.kompas.com; <https://suarapapua.com>); or the conflict between MHA Papua with provincial and district government (Jabat Merat Adat Nusantara <https://parliamentmagazine.co.id>); while tribes in Papua seek to defend their Customary Land (www.mongabay.co.id); and conflict of uluriy land of Sumuri tribe with Genting oil company (www.tifa-news.com); the customary right conflict between the

government and the customary law community occurred in Manokwari-West Papua (Hammar, 2016: 220-225).

The study of the Customary rights arrangement is done by reviewing the legislation with content analysis techniques. While research on the existence of customary rights of Customary Law Community Arfak was implemented in Manokwari in the period 2008-2009, the study aims to know the existence and regulation of customary rights of customary law community Arfak. The sampling of respondents was based on purposive sampling technique and 52 members of Arfak Customary Law Community leaders namely Menir, Moskur, Andigpoi from Hatam, Moile, Meuku, Sougb Tribe were chosen for this study.

This research adopted normative-empirical methods in order to review and analyze the descriptive data collected from the respondents. The problems in this research are formulated as follows (1) How is the customary rights arrangement made in Papua Special Autonomy Law? (2) How is the customary rights arrangement made in Arfak Customary Law Community?

Literature Review

Understanding Customary Rights

Cornelis van Vollenhoven was the professor in *adat* law and guided many great scholars of his time. He formulated the customary rights as the right of a customary law community (tribe, village, village union) to control all the land in its territory. Thus, the subject of customary right is a society of customary law, whether single or regional partnership, but not the right of the individual, and also according to Roestandi Ardiwilaga is also the right of a family.²

Cornelis Van Vollenhoven put forward the notion of *beschikkingsrecht* as follows:

"*Beschikkingsrecht* is the authority of one or other legal partnership to control the untreated or processed land and water within its territory for the benefit of its citizens or foreigners (for the

² Maria S.W. Sumardjono. 1982. *Puspita Serangkum, Aneka Masalah Hukum Agraria*, Andi Offset, Yogyakarta, p. 5

latter usually by a levy), it shall be entitled with the responsibility of the legal partnership over what is happening in the region ".³

With regard to *beschikkingsrecht Ter Haar*⁴ argues that:

"The hamlet community (*dorpsgemeenschap*) and the territorial community (*streekgemeenschap*) are entitled to the land, have a certain right to the land, and exercise that right, inwardly and inwardly. Based on the entry into force of the exit, the community as a ruling entity picks up the proceeds from the land by refusing others to do so, as well as the unity of which it is responsible for the outsiders of the community for delinquents in its territory already done by people who can not be found. Based on the entry into force of the right, the society regulates the collection of results by its members, based on collective rights, and for each member to obtain its lawful share, the community also confronts its members, by limiting the demands and individual rights (for the benefit of the community) and by the release of lands directly entailed by the interests of the peoples of the individual enterprises that collect the results for themselves.

Maria S.W. Sumardjono⁵ argued that the customary right covers all the land in its entirety, which means covering unexploited lands as well as lands that have been cultivated. It is also stated that the name for customary right (*beschikkingrecht*) in Indonesian is rare or absent. However known names are for declaring the enactment of the *beschikkingrecht* (environment rather than *beschikkingrecht*, *beschikkingskring*),⁶ for example : *Patuanan in Ambon* which means the neighborhood belongs, *panyampeto in Kalimantan*, in the sense of the food producing region, *wewengkon in Java*, *prabumian in Bali*, *pawatasan in Kalimantan* which all mean limited area, *Totobuan in Bolaang Mongondow* which means land forbidden to others, *Ulayat in Minangkabau* which means the territory of the guardian, the administrator, the regional head and so on.

³ M.G. Ohorella. 1993. *Hukum Adat Mengenai Tanah dan Air di Pulau Ambon dan Sumbangannya Terhadap Pembangunan Hukum Agraria Nasional (UUPA) dan Undang-Undang Lainnya*. Hasanuddin University PPS Dissertation, Makassar, p.172

⁴ Ter Haar dan B. Poespanoto 1983. *Asas-asas dan Susunan Hukum Adat*, 7th Edition, Pradnya Paramita, Jakarta, p. 71.

⁵ Maria S.W. Sumardjono. 1982. *Op.Cit*, p.5.

⁶ *Loc. Cit.*

Signs of Customary Rights

Cornelis Van Vollenhoven⁷ gave 6 (six) special marks on the existence of customary right, namely:

- "1. Only the legal community itself and its citizens can freely use the wild land located within its territory.
2. foreigners (outside the legal community) may only use the land by permission, its use without permission is seen as a offense.
3. for the use of the land is sometimes for the community collected recognition, but for people outside the legal community is always levied recognition.
4. Indigenous peoples are responsible for certain offenses that occur within its territory, which offense cannot be prosecuted.
5. Indigenous peoples cannot relinquish customary rights, transfer them or alienate them permanently.
6. Indigenous peoples still have intervention (intensive or less intensive) of the processed lands."

The Customary Right Applies Both Inside and Out

Maria S.W. Sumardjono⁸ argued that the legal community has power over the land within its territory, whether it has been cultivated or not. The right has an inward force to the members of the legal community so that each person receives his share of the proceed obtained under the rights of the customary law community, limits one's rights and takes certain land for the common good. For example, a legal citizen has the right to hunt or collect forest products for his own use and his family. With certain procedures he can obtain the right to open the land which then if done continuously can be his, whose rights are unlimited but also known restrictions of the legal community. If his property is not properly done so that it becomes a shrub (Kei: *ibut kait*) then the rights to the land may be lost and the land may be cultivated by other members of the community.

⁷ *Ibid*, p.6-7.

⁸ Maria S.W. Sumardjono. 1982. *Op.Cit*, p.7.

If the customary rights apply here, it also contains the consequences that if the fellowship falls away, leaving no heirs and regulation, then the legal community would become his heirs. However, the law also states that, for public interest, certain parts of the land can be reserved in its territory for public residence, tombs, general pengembalaan, roads, office, and reserve forest.⁹

Muhammad Isa,¹⁰ argued that the functions or activities of customary rights to the land appear in the inward function of:

"a. Members of the legal alliance who have certain rights over the object of customary right, namely:

- 1) Right to land: land clearance rights, right to collect the proceeds, establish a dwelling place, the right to shepherd.
 - 2) Right to water: using water, catching fish and others.
 - 3) Rights to forests: rights to hunt, rights to harvest forest products and so forth.
- b. The return of customary right to land in the event that its owner goes uncertain, dies without inheritance or signs of opening the ground has become extinct.
- c. The Guild provides land for the purposes of fellowship; The Guild provides land for communal purposes, such as land for cemeteries, occupations and so on.
- d. Assistance to legal partnerships in land transactions in which heads of associations may act as regulators

Maria S.W. Sumardjono,¹¹ argues that the force of applying out of the customary right means that the legal community is confronted with outsiders where such persons are prohibited from using the land in their territory and the community as a union responsible for crimes committed in its territory if the offender not known. For outsiders, it is permissible to collect the results of the customary rights of a legal community by asking permission, after which to pay recognition and retribution. Such rights that can be enjoyed only during one harvest, and the outsiders are also not allowed to buy or even inherit the agricultural lands.

⁹ Maria S.W. Sumardjono. *Loc.Cit.*

¹⁰ Muhammad Isa. 1985. *Kecenderungan Pengaruh Pensertifikatan Tanah Terhadap Pelestarian Tanah Adat (di Minangkabau)*, view in Sayuti Thalib (editor), *Hubungan Tanah Adat dengan Hukum Agraria di Minangkabau*. Jakarta, p. 23-24.

¹¹ Maria S.W. Sumardjono. 1982. *Op.Cit*, p. 7.

Outward function, according to Muhammad Isa,¹² can be seen in the incarnation, among others: (a) prohibit to buy or receive land pledge (especially where customary rights are still strong); (b) to get the right to pick up the land requires permission and to pay "recoqnitie" or retribution; (c) the responsibility of the fellowship of customary reactions, in the case of the occurrence of a *delict* in the territory of which the culprit is unknown. In the case of this exit function, the head of the fellowship represents the fellowship ".

Objects and Privileges of Customary Rights

Customary right applies to the territory include; land, water, forest, plants and animals. Against the land which has been endeavored the influence of customary rights is not the same. Maria S.W. Sumardjono,¹³ argued that in various regions there are 3 (three) levels of difference as follows:

"1. The customary right becomes strong because if there is no owner or the owner falls to the legal community, the legal community can then pass it on to another member of the legal community, but the new owner is bound by the rules of the legal community in the sense that it cannot transfer the rights to the land and whenever he fails to work the soil can be taken back (*kempitan, los, playangan*).

2. Strong customary rights to the land belong to the core of the population as long as there are sons and owners who constantly work on the land; the legal community cannot allow changes to the core property, should not be inherently deviated from the rule of law society (rice field *pekoelen, gogolan*, in Java).

3. In addition to the land belonging to the nucleus was obtained agricultural land that customary rights have been thinned, the legal community intervention very little, the owner can freely sell the land (*sawah yasan* in Java) ".

The waters which are controlled by customary rights are rivers and sea lanes along the coast, or according to customary law of Ambon lease called *labuhan*, and also *meti* or *metiin* in the Kei islands, whereas forest areas occupied by customary rights are forest products and wildlife in the forest.

¹² Muhammad Isa. *Op.Cit*, p. 23-24.

¹³ Maria S.W. Sumardjono. 1982. *Op.Cit*, p. 8-9.

Implementation of customary rights, individual rights may be limited to the interests of the legal community. According to Maria S.W. Sumardjono,¹⁴ herein lies the privilege of Customary rights, namely the mutual relationship between customary rights and private rights. Customary rights also include individual rights to land, intensive cultivation of land will give rise to a strong right between the tenants and the land and therefore the customary right becomes weak. However, if the land cultivated is left by the concerned and not maintained anymore, customary rights become strong again. Although the community fellowship is always intensive, but customary rights can become strong again, for example, when a cultivator behaves very badly, dies or leaves his / her area of residence. The right is returned to the legal community and the legal community can determine to grant the land rights to a new tenant.

Bushar Muhammad¹⁵ put forward the scope or object of customary right as follows: (a) Mainland; (b) Water (waters such as times, lakes, beaches and waters); (c) The plants grow wild (trees, fruits, trees that can be picked up for woodworking and firewood, etc.); (d) Wild animals that live freely in the forest.

Discussion

Customary right in the perspective of Special Autonomy

The Arfak Customary Law Community in its daily life recognizes the unwritten rules or norms that regulate, bind and defend, and have sanctions, and are referred to as customary law. Law Number 21 of Year 2001 states that customary community is indigenous Papuans who live in the territory and are bound and subject to certain customs with a high sense of solidarity among its members.¹⁶ This understanding was developed by the Papuan People's Assembly, as stated in the Regional Regulation of the Province of Papua Number 23 of Year 2008 on the customary Right of customary law community and Tribal People customary law community on the Land that: Customary Law Community is indigenous Papuan people who since birth have lived in the region

¹⁴ Maria S.W. Sumardjono. *Op.Cit*, p.9.

¹⁵ Bushar Muhammad. 1995. *Pokok-Pokok Hukum Adat*, 10th edition, Pradnya Paramita, Jakarta, p.105.

¹⁶ See Article 1 point 1 of Law number 21 Year 2001 on Special Autonomy for Papua Province.

certain and bound and subjected to certain customary laws with a high sense of solidarity among its members.¹⁷

Customary Law Community of course has property both material and immaterial. Material riches include land, on which there are forests, lakes, rivers that give them life. With regard to land, forest and water rights, the Customary Law Community recognizes the Customary Right. The Arfak Customary Law community defines Customary right in the broad sense as a right that is controlled by citizen alliances (tribe, village, *faam*) which includes the right to exploit the land, forest, water, hunt, take the forest product.

Based on Law Number 21 of Year 2001 on Special Autonomy for Papua Province, Article 1 General Provision defines Customary Right as follows: "Customary Right is a right of communion owned by certain customary law community over a certain area which is environment of its citizens, the right to use the land, forest, and water and its contents in accordance with the laws and regulations." With regard to the protection of the rights of Indigenous Peoples, Article 43 states that the Government of Papua shall recognize, respect, protect, empower and develop the rights of indigenous peoples. Recognition of customary rights is also accommodated in the Special Region Regulation of Papua Province stated that the Customary Right of customary law community on land is a right of communion belonging to certain Customary Law Community to a certain area which is the environment of its citizens, including the right to exploit land and all its contents in accordance with the laws and regulations.

In accordance with the mandate of Law Number 21 of Year 2001 regarding Special Autonomy for Papua Province in Article 43 paragraph (1), (2), (3) and (4) that recognition, respect, protection, empowerment and development of customary law community rights and or individual rights of customary law communities on land is a necessity, whether viewed from an international, national and regional perspective. The Customary rights of customary law community and/or individual rights of customary law community of land in Papua Province mandates that there should be a careful research activity with a research methodology that can be accounted for by a research committee established by the Regent / Mayor by Decision of Regent / Mayor, except in the case

¹⁷ Special Regional Regulation Number 23 Year 2008 on Customary Rights of Customary Law Community and Indigenous Peoples' Right to Land

of a cross-district / city. The research committee should consist of experts, elders, representatives from non-governmental organizations and related technical institutions.

In order to meet the objectives of the study, the researcher found evidence in the form of three criteria which are the determinants of the presence or absence of customary rights of indigenous and tribal peoples and / or customary rights of indigenous people on the land. These criteria are as follows (a) the presence of a group of people who still feel bound by their customary law as citizens with a certain legal partnership, which recognizes and applies the terms of the fellowship in their daily life; (b) there are customary rights of indigenous and tribal peoples and / or individual rights of customary law communities to certain lands which become the environment of the citizens of the legal community and where they take their daily necessities, and (c) there is a customary law arrangement concerning the management, control and use of customary rights of indigenous and tribal peoples and / or individual rights of indigenous and tribal peoples to the land applicable and adhered to by the citizens of the legal community.

The criteria of an area of customary rights of customary law community and or individual rights of customary law community on certain land means that the customary rights of indigenous and tribal peoples and / or individual rights of indigenous people on the land have clear boundaries and are not contradictory to the boundaries of customary rights of indigenous and tribal peoples and / or individual rights of customary law communities on other adjacent lands.

The Customary Right of Arfak Customary Law Community

Arfak Customary Law Community Rights (MHA) relates to the control, utilization of land and other natural resources based on *Tijei* or *Jiyaser jide dihei* or *Jijoug yeyin mebi*¹⁸ that is customary right over their environment. *Jiyaser jide dihei* or *Jijoug yeyin mebi* refers to the area occupied and owned collectively by the *faam* that inhabits a *kampong (minu)*. *Jiyaser jide dihei* or *Jijoug yeyin mebi* apply over land area ie land, forest, river, lake and coast. Each family has an already divided area, with natural boundaries that are mutually recognized by each neighboring family. Although for borders in the forest it is sometimes unclear. Boundaries other than between family property,

¹⁸ Roberth K.R. Hammar. 2011. *Implikasi Penataan Ruang Terhadap Hak Ulayat Masyarakat Hukum Adat di Kabupaten Manokwari Provinsi Papua Barat*, Gajah Mada University Dissertation, Yogyakarta, p. 240.

also border area of village and distrik. However, administrative boundaries do not eliminate the collective ownership of people residing in other districts or villages.

Customary right or in *Moile* called *Yahagom Ideh Hanjop* or *Maubgan Maba Gusi (Sougb)* is controlled by each family, according to the arrangement of tribal chiefs (*Menir*). The customary right of *Ndon* (Arfak Mountains) is divided into regions: *Tumti, Bahamti, Nuhamti* and *Susti*.¹⁹ Customary right (*Jiyaser jide dihei* or *Jijoug yeyin mebi*) understood by Arfak Customary Law Community is : (1) Collective rights possessed by families in *faam* in tribal communities; (2) Arrangement of such rights either to be used or to be distributed to the child is regulated by the eldest child; (3) The rules of inter-family and inter-tribal and inter-tribal *faam* apply general principles, such as *igya ser* etc., which is regulated and supervised by *Menir, Moskur, Andijpoy* from village level, tribe and inter-tribe.

So the customary right in Arfak Customary Law Community can be described as follows: (1) There is a collective right of the tribe that is Arfak (*Ndon*); (2) In a large tribal region is divided into each tribe Hatam, Sougb, Moile, Meyah; (3) The territory of each tribe is subdivided into the village area (*Minu*); (4) The village area is divided into *faam* ownership; (5) *Faam* control is divided into family ownership.²⁰

Scheme: The level of Customary Right of Arfak Customary Law Community

Reality shows that in fact the customary right that is controlled by each family is shared with the customary law community, whether at the tribal level, *faam* or family. Utilization of customary rights sometimes does not avoid disputes. Disputes occur because of differences in attitudes and interests related to the customary rights of natural resource utilization that occurs between citizens within an customary law Community, neither with other Customary Law Community or with other Parties. The settlement is done in stages in front of tribal chief (*Manir*), Vice Chief (*Moskur*) and indigenous elders (*Andijpoi*) from the tribal chief until the village.

If comparisons are made to the presence of Arfak Customary Law Community based on the criteria for determining the existence of customary rights as regulated in (1) Regulation of the Minister of

¹⁹ Roberth K.R. Hammar. 2016. *Penataan Ruang Berbasis Kearifan Lokal*, Calpulis, Yogyakarta, p. 153.

²⁰ Compare with customary land in Minangkabau, in Suriyaman Mustari Pide. 2007. *Dilema Hak Kolektif Eksistensi dan realitas Soasiannya Pasca UUPA*. Pelita Pustaka, Jakarta, p.102-106.

Agrarian Affairs / Head of National Land Agency Number 5 Year 1999 concerning the Guidance on Completion of Indigenous Peoples Rights, (2) Customary Law, Arfak Customary Law Community, then in the social realities of customary right of Arfak Customary Law Community meet the criteria set forth in Minister of Agrarian Regulation no. 5 of 1999 as well as Customary Law Science.

Table 1

Comparison of customary rights criteria according to Minister of Agrarian Regulation no. 5 of 1999, customary law and MHA Arfak.

NO.	Minister of Agrarian Regulation no. 5 of 1999	customary law	MHA Arfak
1.	the existence of a particular customary law community	still a group of people as citizens of a particular customary law community, which is a customary law community,	The existence of Arfak tribe consisting of <i>Hatam, Moile, Sougb, Meyah</i> .
2.	The existence of certain customary rights which become the living environment and place to take the life necessities of the customary law community,	still the territory which is the customary right of customary law community, which is realized as the land belongs to its citizens as "lebensraum"	The existence of customary rights in <i>Ndon</i> to coastal areas controlled by each tribe.
3.	The existence of a customary legal order concerning the management, control and use of customary lands that are observed and adhered by indigenous and tribal peoples.	The existence of indigenous authorities in fact and recognized by the indigenous peoples concerned, performs daily activities as implementers of customary rights.	The presence of <i>Menir, Moskur</i> and customary law arrangements on the management of customary rights obeyed by MHA Arfak, for example <i>Igya ser hanjob</i> .

Conclusion

In the perspective of Special Autonomy, customary rights of customary law community are recognized and protected by States, Governments, Provincial Governments, District / Municipalities, which are implemented through customary rights studies on customary law community conducted by the committee, and are accommodated in the Bupati / Mayor's decision.

This study concluded with findings that Arfak customary law community owns customary rights of ultra-large tribe Arfak, sub-tribe of Hatam, Moile, Sougb, Meyah., Mnu customary rights, Keret level and family's customary rights, and the setting and utilization of customary rights arranged by each mananir according to its level.

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