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Constitutionality of Indigenous Law Communities in the Perspective of Sociological Jurisprudence Theory

Sapto Hermawan
Faculty of Law, Universitas Sebelas Maret
Author's email saptohermawan_fh@staff.uns.ac.id

Muhammad Rizal
Faculty of Law, Universitas Sebelas Maret
Author's email emrizalfahlevi@gmail.com

Farchana Haryumeinanda
Faculty of Law, Universitas Sebelas Maret
Author's email farchana.nanda@gmail.com

Yella Hasrah Cahya Oktiviasti
Faculty of Law, Universitas Sebelas Maret
Author's emailyellahasrah@gmail.com

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ABSTRACT

Objective: This study aims to determine the existence and position of customary law communities in Indonesia and to examine how the constitutionality of customary law in Indonesia is from the perspective of sociological jurisprudence.

Method: The method used in this research is a normative juridical approach which is focused on examining various kinds of laws and regulations and theoretical concepts. In this study, researchers examine the 1945 Constitution of the Republic of Indonesia, Law No. 41 of 1999 concerning Forestry, until the Constitutional Court Decision No. 35/PUU-X/2012 concerning Customary Forests, while for the theoretical conceptual approach the researcher examines the concept of customary law, and the concept of customary law communities and their relation to the concept of sociological jurisprudence.

Finding: The results of the study show that the concept of

Corresponding Author:
Muhammad Rizal
emrizalfahlevi@gmail.com

customary law as part of the State of Indonesia when viewed from the perspective of Sociological Jurisprudence as a law that grows and lives in society. Juridically, the traditional rights of indigenous and tribal people are also constitutional rights because they are stated in the constitution, as emphasized in Article 18 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, in relation to sociological jurisprudence, the new positive law will be effective if its implementation is appropriate and contains the principles that live in society. The gravity of the law is not found from the law itself, but from the community. So it is proper that the content and protection and recognition related to the existence of customary law are regulated in laws and regulations.

Usage: This article can provide input for policy makers, especially the central and local governments regarding the urgency of the formation of a draft law on customary law communities, where the law is expected to provide legal protection to the rights of indigenous peoples because indigenous peoples have existed long before the Republic of Indonesia was formed so that its existence was recognized in the Constitution.

Novelty: Legal certainty regarding the constitutionality of customary law in Indonesia is particularly important for indigenous peoples, and extremely useful for recognizing the existence of indigenous peoples in Indonesia. Determining the constitutionality of customary law in Indonesia in the perspective of sociological jurisprudence will ensure legal certainty in relation to customary law, which until now there are no explicit rules governing customary law in Indonesia.

Keywords: *Customary law community, constitutionality, sociological jurisprudence.*

PREFACE

Indonesia as an archipelagic country has more than 16,671 islands whose names have been standardized and have been reported to the United Nations (Direktorat_p4k, 2020) provide a real description that Indonesia has abundant diversity, not only in its natural resources but also includes social and cultural diversity of indigenous peoples in each region. The existence of cultural differences between indigenous peoples in each region is something that needs to be protected by law. The importance of acknowledging indigenous peoples is because before the Unitary State of the Republic of Indonesia was formed, customary law communities existed, so that the state constitution also mandates recognition and respect for indigenous peoples, this is stated in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia which states:

> *"The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated by law."*

Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia is the main basis for the protection and recognition of indigenous peoples in Indonesia. A number of laws also recognize the existence of customary law communities, such as Law Number 32 of 2009 concerning Environmental Protection and Management, Law Number 19 of 2004 concerning Stipulation of Government Regulation in Lieu of Law Number 1 of 2004 "Regarding Amendment" to Law Number 41 of 1999 concerning Forestry into Law, and Law Number 18 of 2013 concerning Prevention and Eradication of Forest Destruction. Furthermore, the Indonesian government is also part of the 114 countries that participated in the UNDRIP (United Nations Declarations on the Rights of Indigenous Peoples) declaration which was ratified at the UN General Assembly on September 13, 2007.

However, in practice these provisions have not been fulfilled by the government, the rights of indigenous peoples have not received maximum protection, this is because their territories are included in concession areas such as plantations and mining. This is also reinforced by the statement of President Jokowi on Wednesday, September 25, 2019 while chairing a limited meeting at the Presidential Palace in Jakarta which said the need to accelerate investment and various laws and regional regulations that hinder investment can be eliminated, this statement is a threat to the public. customary law, such as discrimination to human rights violations, expropriation of territory, and criminalization of indigenous and tribal peoples, due to investment in government development projects such as road construction, irrigation, and mining permits.

Investment capitalism that continuously creates agrarian conflicts in Indigenous Peoples (Walhi, 2020). Based on data from HuMa (Society for Community-Based and Ecological Legal Reform) in 2018 it was stated that there were an increase in hundreds of natural resource conflicts involving an area of 2.1 million hectares of land which resulted in approximately 176,637 indigenous victims. Furthermore, referring to data from AMAN (National Indigenous Peoples Alliance) in 2019, there were agrarian conflicts that resulted in the victims of 125 indigenous communities spread over almost a third of Indonesia's territory (Walhi, 2020). Until now, the regulations regarding customary law communities have not been integrated and are still sectoral in nature, even various laws pertaining to customary law communities do not support each other. The implementation of guarantees for indigenous peoples and their rights of origin has so far only been limited to state recognition through the constitution, but the constitutional guarantees for indigenous peoples have not been implemented systematically and consolidatively if we look at several articles in the Forestry Law which have actually robbed the constitutional rights of indigenous peoples to access and manage their customary forests through investment licensing instruments for company owners to take over customary forest areas to be used as plantations, mining, or industrial forest

plantations so that it does not provide justice for indigenous peoples. On the basis of the above problems, therefore, the author intends to examine the constitutionality of customary law communities by describing the existence of indigenous peoples in Indonesia and the constitutionality of customary law in Indonesia in the perspective of sociological jurisprudence so that the importance of the legal umbrella for the existence of customary law is important.

RESEARCH METHOD

This study uses a type of normative juridical research (Legal Research), which focuses on the application of rules or norms to the applicable positive law (Ibrahim, 2006) by reviewing various kinds of laws and regulations as well as references that are theoretical concepts and then connecting them to the problems that are the subject of discussion (Marzuki, 2009). The approach in this study uses a statute approach, namely the 1945 Constitution of the Republic of Indonesia, Law No. 41 of 1999 concerning Forestry, to the Constitutional Court Decision No. 35/PUU-X/2012 concerning Customary Forests. **In addition, it also uses a conceptual approach by studying the views and doctrines in legal science, legal concepts and relevant legal principles, such as the concept of customary law, and the concept of the Indigenous Law Community and its relation to the concept of the sociological jurisprudence school.**

RESULT AND DISCUSSION

The Existence of Indigenous Law Communities in Indonesia

The existence of customs is very plural with the uniqueness or characteristics of each region in Indonesia. Indigenous peoples have existed since Pre-Hindu times. Legal experts are of the opinion that the living and developing customs that ruled the way of life of the people at that time were Polynesian Malay customs. Until then came religions in each region, where each religion has a different culture from the original culture so that it affects the pure culture that has long dominated and dominated the life of the community (Arliman, 2018). Each has different customary laws due to the influence of religion, for example, Aceh is influenced by Islam, Bali and Java are influenced by Hinduism, while Maluku and Ambon are influenced by Christianity. The difference is due to the entry of Arabs, Chinese and Europeans. So that it became the kingdom of Sriwijaya, Airlangga and Majapahit (Pide & SH, 2017). As for customary law, it means the result of acculturation of pre-Hindu customs regulations with religious regulations so that it becomes a living law in society even to this day.

The term customary law was first put forward by Christian Snouck Hurgronje in 1891-1892 during observations in Aceh for the benefit of the Dutch colonial rulers. The term customary law in Dutch used by Christian Snouck Hurgronje is *“Adat Recht,”* used to separate customs from customs that have legal sanctions or for social control. The results of Christian Snouck Hurgronje’s research, produced a work entitled *De Atjehers* (People of Aceh) in 1894 (Wulansari & Gunarsa, 2016). According to him, the important legal basis for the people of Aceh is not written law, but is in findings in real, everyday events. According to

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Aceh people, a religious or legal expert is an expert and has the doctrine that religious and customary law go hand in hand in the state (Damanik, 2019).

In 1904 the Dutch government (Kuyper Cabinet) proposed a plan related to colonial law to completely reform customary law in its colonies, but this attempt failed and was met with opposition from the indigenous people. Finally, the Dutch accepted that customary law was part of the law applied in the colonies (Mansur, 2018). Starting in 1927, the Netherlands implemented Cornelis van Vollenhoven's conception, the contents of which were to carry out a structured recording of the customary law, beginning with an observation, the aim was to develop the law and support judges in terms of passing on judicially according to customary law provisions (Arliman, 2018). Before that, the term customary law was known as the Religious Law, People's Institutions and Customs (Arliman, 2018).

Until then, since being used by Cornelis Van Vollenhoven *"adat recht"* or customary law has become famous. This term was developed scientifically under the title *Het Adat Recht van Indie* (Dutch Indies customary law) by Cornelis Van Vollenhoven in 1903 (Damanik, 2019), so he was known as an expert on customary law in the Dutch East Indies (Mustaghfirin, 2011). Since then, research on customary law in Indonesia has been dominated by the thoughts and ideas of Cornelis Van Vollenhoven (1874-1933) and became a professor at the law faculty of Leiden University.

C. Van Vollenhoven succeeded in creating the foundation for the study of customary law as an independent school of legal thought. C. Van Vollenhoven divides 19 different customary law areas of the archipelago, based on culture, language, customs and habits, each region has different laws with different legal dialects from each other (Purwanto, 2017). According to his research, the 19 customary law areas are (1) Aceh, (2) Gay, Alas, Batak and Nias (3) Minangkabau, Mentawai, (4) South Sumatran, Enggano, (5) Malay, (6) Bangka, Belitung , (7) Kalimantan, (8) Minahasa, (9) Gorontalo, (10) Toraja, (11) South Sulawesi, (12) Ternate Regency, (13) Maluku, (14) West Irian, (15) Timor Islands, (16) Bali, Lombok, (17) Central Java, East Java, Madura, (18) Solo, Yogyakarta, (19) West Java, Jakarta.

Each customary law community has different forms and types of local wisdom. It has a tangible appearance that includes institutions, customary procedures, customary values, procedures for dealing with nature, and space utilization mechanisms. Local wisdom cannot be separated from the existence of customary law communities. Territorial similarity, genealogical on territorial similarity, genealogical and territorial genealogy which then has implications for the authority it has (Konradus, 2018).

Some of Van Vollenhoven's students, such as his successor as professor of customary law at Leiden, F.D. Holleman and the highly influential Indonesian student Soepomo strengthened this allure by lifting the orientalism and idealism implied in Cornelis van Vollenhoven's work to a level of abstraction that made custom suitable to be included as part of the nationalist ideology. Emphasis on harmony, solidarity, and the primacy of the community over the protection of individual rights and communal land rights or customary rights (Davidson et al., 2010). According to Cornelis Van Vollenhoven, if someone wants to know the law that grows on earth because of the diversity of its characters from ancient times to the present, then the

integrity of the Indies rule gives birth to a source that is not boring to study, this statement which contains justification that legal pluralism in the customary environment is something that unique, interesting and embody the characteristics of Indonesian society (Abubakar, 2013).

Initially, Cornelis Van Vollenhoven at that time wanted the codification of customary law, he himself drafted a book of customary law that applies to the entire Dutch East Indies *(adatwetboekje voor heel indie)* which is binding in trade and civil matters for all people regardless of religious origin, however, as Cees Fasseur pointed out, asserting that codification would actually jeopardize the status of customary law itself as the group's "living law" and would limit its harmonious development over time, customary authority must ultimately rely on cosmic or spiritual foundations, not on the rules of human engineering (Davidson et al., 2010).

The history before Indonesia, when the Dutch East Indies described that customary law was unwritten and not separated from other laws, namely between civil, criminal and constitutional law in a real way as known by western law, even though customary law is guided by the rules of life and it consistently become a law that is obeyed, obeyed by the people with full confidence that customary law regulations hold legal force (Pide & SH, 2017). So it is said that the law exists in every society. Customary law is a component of community culture, cannot be separated from the soul and way of thinking of the community.

Some examples of customary law that are still alive in Indonesia today are the Baduy customs of Lebak Regency, Banten, they carry out filling of traditional leaders by appointment instead of election, starting with the wangsit received by the previous *puun*/king, although in this way, the community order is very peaceful and prosperous (Ulum, 2014). In addition, there is a custom from Rejang Lebong district, Bengkulu province, although there are many immigrants in Rejang Lebong district, the community still adheres to its customary law along with its positive law. Their customary law is contained in Kelpeak Ukum Adat Ngen Ca'o Kutei Jang, Rejang Lebong Regency, the customary institution that has the most role in realizing the guidelines for customary law. *Jenang Kutai*, the name of the village judge, plays a role in solving various problems in the community. As for the implications of the application of customary law, it looks harmonious in the community and all interact together as family ties. Every time there is a problem, it is resolved peacefully so that it does not cause division and resentment between people (Devi, 2016).

According to Ter Haar, the customary law association *(adatrechtsgemeenschap)* is defined as a legal community from the layers of indigenous Indonesian society that is interwoven in a physical and spiritual unit, acting as an organizational unit based on certain actions, where the entire community unit takes place and is interwoven due to the existence of a special provision or rule, namely the rule of customary law. Regarding customary law, some legal practitioners and academics tend to deny the validity of customary law by mentioning the rule of law against the position of customary law at the bottom rung of the ladder. (Putro, 2013).

The development of law does not lie in legislation, court decisions, even in science in the field of law, but in society itself (Susilowati, 2000). In line with the teachings of "Sociological Jurisprudence" from Eugen Ehrlich that law is living law. Sociological jurisprudence proves that the study of law requires records of social facts in implementing the law (Budi Pramono, 2020). He does not view the law as a rule outside the members of society, but is constructed and expressed in their own behavior or actions (Simarmata, 2018).

Living law embodies a legal paradigm that considers customary law as living law in society (that is true law living law), namely the interests and practices that exist in society (Damanik, 2019). Customary law is the influence of this school, then by Dutch thinkers emerged customary law theories such as C. van Vollenhoven, Ter Haar, Hollenman and others regarding the diversity of customary law in Indonesia.

Sociological jurisprudence school about the importance of living law. Eugen Ehrlich (1862-1922) was an Austrian leader in the sociological jurisprudence school, he presented the concept of living law and did not necessarily reject the presence of state law (Susilowati, 2000). According to Eugen Ehrlich, positive law will have efficient force if it contains the rules that live in society. The main source and form of law is custom (Shomad & Thalib, 2020). The gravity of the law is not found in the law itself, but grows in society.

Eugen Ehrlich's Sociological Jurisprudence teaching begins with the rule of law from custom or custom very much agrees with Savigny. Friedrizh Carl Von Savigny, the main thinker of the history of law who is known for the concept of the soul of the nation *(volksgeist)* as a source of law, according to him, law is not made but law lives and develops with society. Savigny urges that the law is in accordance with the history of its development, attached to the social life of the community, such as the language used, the applicable manners, and so on. The existence of each law is different in both the place and time of its enactment; the law must be seen as the embodiment of the soul of a nation.

Law in Indonesia comes from two sources, namely the law that comes from foreign countries, namely the Netherlands and the law that was formed and developed in Indonesia, namely the original customary law. Customary law is convention, not drafted through legislation and not codified, if you are going to apply customary law as positive law, it is necessary to combine the two concepts, namely the construction of customary law in the legal system as a thought of legism and customary law in the system of historical schools. The two different points of view where the teachings of legism realize law-making can be carried out by law, while the teachings of history reject the equalization of law with the law.

The issue of injustice to indigenous peoples is still common today. Judging from history, the existence of indigenous peoples during the New Order (1966-1998) was not recognized, let alone their rights. The government's policy at that time neglected the rights of indigenous peoples over their natural resources and territories. After that, during the Reformation period with the second phase of the amendment to the 1945 Constitution of the Republic of Indonesia, indigenous peoples had begun to be recognized in the constitution, which stated:

> *"The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated by law."*

Supported in several policies under it such as Law no. 32 of 2009 concerning Environmental Protection and Management, and several laws related to the field of natural resources, such as Law No. 19 of 2004 concerning Amendments to Law no. 41 of 1999 concerning Forestry and Law no. 18 of 2004 concerning Plantations.

Recognition and protection of Indigenous Law Communities - also carried out through international and international conventions - shows how important the role of Indigenous Peoples is actively in constructing policies for sustainable natural resource development. However, international conventions and statutory policies in Indonesia have not been able to touch the aspects of the life of indigenous and tribal peoples. The reality is that some policies still negate the rights of indigenous peoples and even manage to imprison them.

YLBHI stated that data from the Alliance of Indigenous Peoples showed that there were 125 victims of criminalization in forest areas in 10 regions. The area distribution is in North Sumatra, South Sumatra, Bengkulu, South Kalimantan, North Kalimantan, West Nusa Tenggara, South Sulawesi, Central Sulawesi, East Nusa Tenggara, and North Maluku. Apart from these cases, there are also cases of criminalization in the plantation and mining sectors (Herwati, 2019). The existence of indigenous peoples and their laws is a historical fact that the government cannot deny or avoid. There are still many facts of injustice in the form of territorial confiscation, criminalization, discrimination, and human rights violations against the community, as if the government still behaves and is half-heartedly accepting, acknowledging, and legitimizing the existence of indigenous peoples with all their laws.

The importance of policies to protect indigenous peoples and customary law. Some of the policy principles regarding indigenous peoples' rights are Public Land, Public Forest, Private Land, and Private Forest. This principle is the basis for the policy on the rights of indigenous peoples between granting rights and recognizing rights, This principle embodies the principles for the policy of indigenous peoples' rights to land, natural resources, including other invisible property rights of indigenous peoples. (Sugiswati, 2012). These principles need to be clarified so that policies do not overlap which result in cases of unilateral taking of confiscation of customary lands, territories, water, and other natural resources. In addition to protecting, local wisdom and diversity are constructed with policy norms related to the existence of indigenous peoples in the region. Policies that refer to norms that are pro to customary law communities, pro to justice and pro to local wisdom.

Ehrlich emphasized the consideration of the diversity of social institutions with coercive normative power. His views are extremely useful and reflect the growing interaction between legal and social institutions (Sugiswati, 2012). The law must aim to create maximum suitability and harmony to meet the needs and interests of the community.

Legislators should pay attention to the laws that work in society, because it is because of public awareness that laws are found that are not made and grow attached to their souls. Legislative institutions as people's representatives must be able to explore, accommodate and accommodate legal awareness in the community, especially regarding the rights of indigenous peoples. Because it is undeniable that Indonesia comes from indigenous peoples together with the laws that live with them and the diversity that exists in their respective regions.

Constitutionality of Customary Law in Indonesia in the Perspective of Sociological Jurisprudence

Historically, in 1983 Snouck Hurgronje in a book entitled *De Atjehnese* described the concept of customary law. Snouck Hurgronje mentions customary law as *Adatrecht* (customary law) which is definitively the law that applies to indigenous people/indigenous people or native Indonesians and foreigners who existed during the Dutch East Indies period (Djuned, 1992). C. Van Vollenhoven also explained the meaning of customary law in a book entitled *Adatrecht*. Van Vollenhoven stated clearly that literally, the law that lives in society (customary) is part of the law that applies to native Indonesian people and transforms it as an object of knowledge. positive law knowledge and lectures to be used as a separate lecture discussion. Van Vollenhoven also made customary law as the embodiment of the rules that must be applied and implemented by the *gubernemen* judges (Pudjosewojo, 1984).

Taqwaddin, in his dissertation entitled *"Mastery of Customary Forest Management by Customary Law Communities (Mukim) in Aceh Province"* explains that by definition, the notion or meaning of indigenous peoples is different from that of customary law communities. Because the concept of indigenous peoples is a general definition to refer to certain communities with very distinctive and certain characteristics. In contrast to the customary law community which is a juridical definition referring to an association/group of people/community who live and live in an area (ulayat) residing and growing in a certain environment, having wealth and leaders who have the duty to protect the interests of the group (both out or in) even has a regulatory structure or a system of legal and governmental order (Taqwaddin, 2010). In the dissertation, indigenous peoples are matched with the definition of customary law communities, as is generally found in various literatures and laws and regulations.

In fact, every province in Indonesia has customary law community units with their own diversity, uniqueness and characteristics that have existed for centuries. Customary law communities are basically a group of people who are very organized, acting as a unitary group, by settling in a certain area and area, having leaders or rulers, having their respective customary laws/rules and having the value of the customary wealth of their own group either it is in the form of tangible and intangible objects and controls a number of natural resources within its territory and scope (Taqwaddin, 2010).

The National Commission on Human Rights and the International Labor Organization (ILO) Convention in 1986 are of the view that the constitutional rights of indigenous peoples/communities include (MKRI, 2012): These include minority rights and customary law communities, land rights, rights to equality, rights to protection of the environment, and rights to fair law enforcement.

Rights to land and natural resources (SDA) are the most important rights for indigenous peoples/communities because the existence of these rights is one measure of the existence of an indigenous community. In the United Nations provisions concerning the rights of indigenous peoples, the issue of rights to land/are and natural resources is regulated in Article 26 paragraph 1 and paragraph 2 which substantially explains that Indigenous peoples have the right to land, customary territories and resources owned by them whose tenure has been traditional for a long time and also explains that Indigenous Peoples are also entitled to the status of ownership, use, and utilization of customary land on the basis of customary ownership.

Abdon Nababan explained that of a number of categorizations of indigenous peoples' rights, the most frequently stated is (Yance Arizona, 2012): The right of control to management and even use of customary land and the right to have full power over self-regulation in accordance with the provisions of customary law and the wisdom or diversity of each (including the law, namely the customary court). Customary law is closely related to the view of Sociological Jurisprudence theory. Sociological Jurisprudence is a form of embodiment of the unity of Legal Science with its social science base (including social sciences). Even in the concept of Sociological Jurisprudence theory, in the context of justice, judges are required to understand the flow of Sociological Jurisprudence well so that the living law, several aspects such as: political, social, economic, and cultural aspects must be considered by judges to produce a decision that not only meets the principles of formal justice but also substantial justice even social justice in national law enforcement (Suteki, 2013).

The view of Sociological Jurisprudence emphasizes how the law with all its characteristics and uniqueness is applied and used by society. In implementing the law, there is an interaction between the law and the behavior of the people (culture/customs) who use it. Sociological Jurisprudence contains content regarding the social meaning of law. And the relation between social structure and legal science can also be seen by reviewing the history of the law being formed and implemented which basically depends on the social structure of the community (Suteki, 2013).

Juridically, traditional rights have been regulated in a number of laws and regulations, this emphasizes that in fact traditional rights or customary rights are constitutional rights because the recognition of customary/traditional rights that live, grow and thrive in Indonesian society is mentioned in the constitution, namely Article 18 paragraph (2) of the 1945 Constitution of the Republic of Indonesia which states that *"The state recognizes and respects customary law community units and their traditional rights..."* This makes it clear that all traditional rights of indigenous peoples are included in constitutional rights that must be recognized.

In the historical record of law, in 2012 the Constitutional Court granted a request for a review of the Forestry Law submitted by 3 customary law community alliances, namely Kenegerian Kuntu Indigenous Law Community Unit, the Archipelago Indigenous Peoples Alliance, and Kasepuhan Cisitu Indigenous Law Community Unit. In the petition for review, the three questioned the substance contained in the Forestry Law, including those contained in Article 1 point 6 of the Forestry Law which states that customary forest is state forest located within the territory of customary law communities and Article 4 paragraph (3) of the Forestry Law which affirms that control over forests by the state shall continue to take into account the rights of indigenous peoples, as long as in reality they still exist and are recognized for their existence, and do not conflict with national interests. In grammatical interpretation, the two articles reduce the rights of indigenous peoples in Indonesia, indigenous peoples in Indonesia also lose their existence in owning and managing customary forests. This can also potentially lead to arbitrary actions by the government to take over the rights to the existence of community units/customary law communities over their customary forest areas to be converted into state forests, which in turn is given and/or handed over to the owners of capital through various licensing schemes to be exploited without paying attention to and considering the rights and diversity and local wisdom born and living in the customary law community unit in the area.

In considering its decision, the Constitutional Court based on the 1945 Constitution of the Republic of Indonesia, namely Article 18B paragraph (2) and Article 28I paragraph 3, has provided an acknowledgment and legal certainty for the existence of customary forests as a form of customary rights for indigenous peoples. This is a juridical consequence of the recognition of customary law as "living law" whose existence has been clear in Indonesia until now. Therefore, to position or place customary forest in the definition of state forest is to ignore and reduce the rights of the community/customary law community. The Constitutional Court finally stated that *"customary forest is forest located within the territory of customary law communities,"* not as meaning *"customary forest is state forest located within the territory of customary law communities"* (Miftakhul Huda, 2013).

In the opinion of the author, based on the decision of the constitutional court no. 35/PUU-X/2012 concerning Customary Forests, this strengthens the constitutionality of customary law in Indonesia which was initiated and through the recognition of customary forests as stated in the ruling. However, the decision of the Constitutional Court is only *Declaratoir* or can be called a decision that only explains or stipulates a situation so that it does not have executive power, or in other terms the decision of the Constitutional Court is a *constitutief* decision, which creates or eliminates a situation, it does not need to be implemented. The decision of the Constitutional Court is final, but factually it shows that the final decision of the Constitutional Court is often not responded positively by other state institutions (not realized yet) (Handayani et al., 2019). Borrowing Hamilto's opinion (Laksono et al., 2016), The judiciary is a branch of power that is (functionally) the weakest and most vulnerable, even to be able to execute a decision, the judiciary must be supported and assisted by other branches of power, namely: executive and legislative powers, because

the executive has a tool in the form of a sword (weapon), while the legislature determines the budgeting/state finances. This is on the contrary, with the judicial branch only authorized at the level of deciding cases. So that the decision of the Constitutional Court is not of an implementation character (Laksono et al., 2016).

From the description above, according to the author, the concept of customary law is part of the Indonesian state and if viewed from the perspective of Sociological Jurisprudence as a law that grows and lives in society, as the author explained in the previous section, sociological jurisprudence views the importance of living law. Eugen Ehrlich (1862-1922) explains that the concept of living law does not necessarily reject the presence of state law (Susilowati, 2000). In Eugen Ehrlich’s view, the implementation of positive law will only be effective if it is appropriate and contains the principles that live in society. Because of its essence, the most important source and form of law is customary law (Shomad & Thalib, 2020). The gravity of the law is not found in the law itself, but in society. So, it is proper that the content related to the existence of customary law are regulated in laws and regulations. The Constitutional Court’s decision is an extraordinarily strong juridical basis that the existence of customary law in Indonesia has been constitutionally existing and there needs to be rules that become the implementation of the Constitutional Courts Decision.

In fact, there are a number of legal products that are the implementation of the Constitutional Court’s decision, including Law no. 6 of 2014 concerning Villages, Minister of Forestry Regulation No. P.62/Menhut-II/2013 concerning Amendments to the Regulation of the Minister of Forestry No. P.44/MENHUT-II/2012 concerning the Inauguration of Forest Areas, Ministry of Home Affairs Regulation No. 52 of 2014 concerning Recognition Guidelines and Protection of Indigenous Law Communities, as well as Regulation of the Minister of Agrarian Affairs and Spatial Planning (ATR) No. 10 of 2016 concerning Procedures for Determining Communal Rights to Land of Indigenous Law Communities and Communities Located in Certain Areas.

The legal product does not comprehensively regulate the customary law community with all the special rights of the customary law itself, such as Law no. 6 of 2014 concerning Villages which only focuses on the interpretation and recognition of traditional villages. Article 98 of the Village Law recommends that further arrangements related to the recognition of customary villages be left to the Regional Government (Uliyah, 2015). Minister of Agrarian and Spatial Planning Regulation No. 10 of 2016 concerning Procedures for Determining Communal Rights to Land of Customary Law Communities and Communities Located in Certain Areas also only regulates the technical determination of customary land communal rights which substantively and implementatively submit the determination of communal land rights of customary law communities to the Regional Government.

A number of these legal products have not been able to regulate explicitly and holistically related to customary law communities, such as setting limits on the area of customary land. The publication of data from the Indigenous Peoples Alliance of the Archipelago noted that until 2020 there were still 118 Indigenous communities in conflict with the government in terms of resource and land management (Hilmy, 2020). Data with similar problems was also published by the Association for Community-Based Law Reform

and Ecology (HUMA) which stated that there were 326 natural resource and land conflicts that occurred in Indonesia and as many as 176,337 people are indigenous peoples who fight for and maintain the management of natural resources in their customary lands (Hilmy, 2020).

The data shows that several legal instruments as an implementation step of the Constitutional Court's decision related to indigenous peoples have not been able to accommodate the problems of indigenous peoples that stem from the problem of customary land. This is because a number of these regulations have not specifically dealt with indigenous peoples and customary land rights. The determination of the boundaries of customary land in each area really needs to be implemented as a step for legal certainty and becomes the implementation of the Constitutional Court Decision. The author is of the opinion that a legal product is needed that regulates the interpretation and important provisions in a holistic manner related to customary law communities in Indonesia. The regulation is in the form of a law which is a special protection and legal certainty for indigenous peoples. However, the Law also provides a transfer of authority to local governments in determining the extent of customary land boundaries in Indonesia, because local governments are very understanding of the construction and social constellation of indigenous peoples in their respective regions (Uliyah, 2015).

CONCLUSION

The existence of indigenous peoples and customary law is a historical fact that cannot be denied or avoided by the government. There are still many facts of injustice in the form of territorial confiscation, criminalization, discrimination, and human rights violations against the community, as if the government is still half-heartedly accepting, acknowledging, and justifying the existence of indigenous peoples with all their rights and obligations. The concept of customary law as part of the Indonesian state and if viewed from the perspective of Sociological Jurisprudence as a law that grows and lives in society, good law must be law that is in accordance with the law that lives among the people, the government must be able to explore and be obliged to accommodate legal awareness that lives in society, especially regarding the rights of indigenous peoples.

Juridically, the traditional rights of indigenous peoples are also constitutional rights because they are stated in the constitution, as confirmed in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. The guarantee of recognition and respect for customary law will not materialize by itself, for that the ambivalent attitude of policy makers towards indigenous peoples must be balanced, corrected, and fixed through the utilization of the constitutional rights of indigenous peoples themselves. The need for a law as a legal umbrella for the protection and fulfillment of the rights of indigenous peoples in order to provide certainty and benefits for the general public which is expected to improve the quality of natural resource governance in Indonesia and can prevent agrarian conflicts and environmental damage.

REFERENCES

Abubakar, L. (2013). Revitalisasi hukum adat sebagai sumber hukum dalam membangun sistem hukum Indonesia. *Jurnal Dinamika Hukum*, *13*(2), 319–331.

Arliman, L. (2018). Hukum Adat Di Indonesia Dalam Pandangan Para Ahli Dan Konsep Pemberlakuannya Di Indonesia. *Jurnal Selat*, *5*(2), 177–190.

Budi Pramono, D. R. S. (2020). *SOSIOLOGI HUKUM*. SCOPINDO MEDIA PUSTAKA.

Damanik, D. (2019). *Jalannya hukum adat Simalungun*. Simetri Institute.

Davidson, J. S., Henley, D., & Moniaga, S. (2010). *Adat dalam Politik Indonesia*. Yayasan Pustaka Obor Indonesia.

Devi, S. (2016). Orang Rejang dan Hukum Adatnya: Tafsiran atas Kelpeak Ukum Adat Ngen Ca'o Kutei Jang Kabupaten Rejang Lebong. *Jurnal Antropologi: Isu-Isu Sosial Budaya*, *18*(1), 39–50.

Direktorat_p4k. (2020). *Masyarakat Hukum Adat*. Www.Kkp.Go.Id.

Djuned, T. (1992). Asas-asas Hukum Adat. *Fakultas Hukum Unsyiah*.

Handayani, I. G. A. K. R., Karjoko, L., & Jaelani, A. K. (2019). Model Pelaksanaan Putusan Mahkamah Konstitusi yang Eksekutabilitas Dalam Pengujian Peraturan Perundang-Undangan di Indonesia. *BESTUUR*, *7*(1), 36–46.

Herwati, S. R. M. (2019). *Kriminalisasi Masyarakat Adat : Ancaman dan Usulan Kebijakan*. Www.Ylbhi.or.Id.

Hilmy, M. I. (2020). Prospek Tanah Adat Dalam Menghadapi Pembangunan Nasional. *WASKITA: Jurnal Pendidikan Nilai Dan Pembangunan Karakter*, *4*(1), 41–56. https://doi.org/10.21776/ub.waskita.2020.004.01.4

Ibrahim, J. (2006). Teori dan Metode Penelitian Hukum Normatif. *Bayu Media, Malang*.

Konradus, D. (2018). KEARIFAN LOKAL TERBONSAI ARUS GLOBALISASI: KAJIAN TERHADAP EKSISTENSI MASYARAKAT HUKUM ADAT. *Masalah-Masalah Hukum*, *47*(1), 81–88.

Laksono, F., Triningsih, A., Ramdan, A., & Karmadaniah, I. (2016). Implementasi Putusan Mahkamah Konstitusi Nomor 92/PUU-X/2012 Terkait Kewenangan Dewan Perwakilan Daerah dalam Pembentukan UndangUndang. *Jurnal Konstitusi*, *12*(3), 542–568.

Mansur, T. M. (2018). *Hukum Adat: Perkembangan dan Pembaruannya*. Syiah Kuala University Press.

Marzuki, P. P. M. (2009). Penelitian Hukum. In *PENELITIAN HUKUM*.

Miftakhul Huda. (2013). *MK: "Hutan Adat" Termasuk "Hutan Hak", Bukan "Hutan Negara."* Www.Mkri.Id.

MKRI. (2012). AKTUALISASI MASYARAKAT HUKUM ADAT (MHA):Perspektif Hukum dan Keadilan TerkaitDengan Status MHA dan Hak-hak Konstitusionalnya. *Usat Penelitian Dan PengkajianPerkara, Pengelolaan Teknologi Informasidan Komunikasi Mahkamah Konstitusi Republik Indonesia*.

Mustaghfirin, H. (2011). Sistem Hukum Barat, Sistem Hukum Adat, Dan Sistem Hukum Islam, Menuju Sebagai Sistem Hukum Nasional Sebuah Ide Yang Harmoni. *Jurnal Dinamika Hukum*, *11*, 89–95.

Pide, A. S. M., & SH, M. (2017). *Hukum Adat Dahulu, kini, dan akan datang*. Prenada Media.

Pudjosewojo, K. (1984). *Pedoman Pelajaran Tata Hubungan Hukum Indonesia*. Aksara Baru Jakarta.

Purwanto, M. R. (2017). *HUKUM ISLAM DAN HUKUM ADAT MASA KOLONIAL: SEJARAH PERGOLAKAN ANTARA HUKUM ISLAM DAN HUKUM ADAT MASA KOLONIAL BELANDA*.

Putro, W. D. (2013). PERSELISIHAN SOCIOLOGICAL JURISPRUDENCE DENGAN MAZHAB SEJARAH DALAM KASUS" MERARIK". *Jurnal Yudisial*, *6*(1), 48–63.

Shomad, A., & Thalib, P. (2020). *Pengantar Filsafat Hukum*. Airlangga University Press.

Simarmata, R. (2018). Pendekatan Positivistik dalam Studi Hukum Adat. *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada*. https://doi.org/10.22146/jmh.37512

Sugiswati, B. (2012). Perlindungan hukum terhadap eksistensi masyarakat adat di indonesia. *Perspektif*, *17*(1), 31–43.

Susilowati, W. M. H. (2000). KRITIK TERHADAP ALIRAN SOCIOLOGICAL JURISPRUDENCE EUGEN EHRLICH. *Perspektif*. https://doi.org/10.30742/perspektif.v5i1.230

Suteki. (2013). *Desain Hukum Di Ruang Sosial*. Thafa Media.

Taqwaddin. (2010). *Penguasaan Atas Pengelolaan Hutan Adat oleh Masyarakat Hukum Adat(Mukim) di Provinsi Aceh*.

Uliyah, M. A. S. & L. (2015). *Adat di Tangan Pemerintah Daerah* (Vol. 4, Issue 1). Epistema Institute.

Ulum, B. (2014). Nilai-nilai Demokrasi dalam Pengangkatan Puun/Raja pada Masyarakat Hukum Adat Baduy. *Kumpulan Jurnal Mahasiswa Fakultas Hukum*, *1*(2).

Walhi. (2020). *Urgensi Pengesahan RUU Masyarakat Adat*. Www.Walhi.or.Id.

Wulansari, C. D., & Gunarsa, A. (2016). *Hukum adat Indonesia: suatu pengantar*. Refika Aditama.

Yance Arizona. (2012). Satu Dekade Legislasi Masyarakat adat. *Epistema Institut*.