

LEGAL PROTECTION OF CUSTOMARY LAW COMMUNITIES OVER ULAYAT LAND FORESTS

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Abstract: This study aims to analyze the concept of customary land customary law, as well as to examine the protection of indigenous peoples in a customary land forest. The type of research in this writing is a normative juridical research method. The approach used in this study is a Statute Approach and a case approach. The results showed customary forests, sometimes referred to as customary forests, are forests within the territory of customary law communities. To be designated as customary Forest, local customary law communities can apply to the Minister of Environment and Forestry. Customary Forests, before Indonesian law is, protected as the legal protection of customary land. This legal protection is a form of concrete action from the state in implementing the mandate of the Constitution of the Republic of Indonesia Constitution of 1945 contained in Article 18b. Moreover, in this case, the government has issued a decree of the Minister of Environment and Forestry to establish customary forest areas and the rights and obligations of Indigenous Peoples.

Keywords: Protection; Forests; Indigenous Peoples.

1. Introduction

Indonesia is a large country, one of the largest in Asia and even the largest in Southeast Asia. Not only in terms of area but Indonesia is also supported by abundant natural resources, "with vast forest areas, which allocate 120.6 million hectares or around 63 percent of its land area as Forest Areas."¹ With such a large forest area, it should be guarded and cared for carefully so that it is beneficial for the life of the nation and state. If not, especially if it causes damage, then all the potential benefits of the forest will no longer be felt; it can even cause air pollution and disease for the community. As in the occurrence of fires, the effects are very dangerous, not only for the environment but also for health. There is a need for awareness from the community to maintain the sustainability and usefulness of forests. This

¹ Ruanda Agung, *Status Hutan & Kehutanan Indonesia 2018* (Jakarta: Kementerian Lingkungan Hidup dan Kehutanan, 2018), Pg. xii.

commitment is very important because forest sustainability is not only useful for individuals and at certain times but also for society and the future.

Besides that, in terms of human resources, Indonesia has a very large population, namely “around 275.77 million people consisting of various ethnic groups.”² Indonesia is indeed very well-known for its customs which are still very thick to this day, in fact, “there are still indigenous peoples who are still solid in defending and preserving customary law.”³ The customary law community is a community with a communal form. “A communal society is a society where all areas of life are covered by togetherness.”⁴ Indigenous peoples show a close relationship in interpersonal relations, and the process of social interaction that occurs between humans gives rise to certain patterns which are called “a uniform custom of behaving within a social group.”⁵

The Unitary State of the Republic of Indonesia is a constitutional state in accordance with the state principles contained in the 1945 Constitution of the Republic of Indonesia, in a constitutional state basically there are clear laws and regulations to regulate the life of its people in order to obtain legal certainty. Law is “a norm that invites people to achieve certain ideals and circumstances, but without ignoring the real world and therefore classified into cultural norms.”⁶

As a rule of law, law is used as the main basis in driving every aspect of social life in society, nation and state. Not only that, the law is also often used as a means of social control in society. It can be said that the law is tasked with coordinating and integrating the interests of every individual in society. So that it is hoped that “the interests of one another can go hand in hand and not contradict each other.”⁷ To achieve this goal can be done by limiting and protecting these interests. It is supported by Roscoe Pound's theory is: “Law as a tool of social engineering” (that law is a tool to renew or manipulate society).

The development of civil society (civil society) is “a way of life for a society that adheres to legal values.”⁸ The law is not a goal but a means or tool to achieve goals that are non-juridical in nature and develop due to stimuli from outside the law. “It is the factors outside the law that make the law dynamic.”⁹ With the existence of laws that can regulate social life, of course, it will provide a sense of justice in the community itself, talking about justice in the development of justice also transforms in a new direction in accordance with the development of law in the eyes of society.

In general, it can be interpreted that a rule of law or the rechtsstaat rule of law is a state whose composition is properly regulated in statutory regulations (laws) so

² Data from the Central Bureau of Statistics for 2022

³ Albert Tanjung, “Kedudukan Hutan Adat Di Atas Tanah Ulayat Dalam Pemanfaatan Hutan,” *Populis: Jurnal Sosial dan Humaniora* 4, no. 1 (2021) : 137–48, <https://doi.org/10.47313/pjsh.v4i1.590>.

⁴ Boedi Harsono, *Hukum Agraria Indonesia Jilid 1* (Jakarta: Djambatan, 2005), 187.

⁵ Theodorson Theodorson dan Soerjono Soekanto, *Hukum Adat Indonesia* (Jakarta: Rajawali Pers, 2005). Pg. 67

⁶ Satjipto Raharjo, *Ilmu Hukum. cet 6* (Bandung: Citra Aditya Bakti, 2006). Pg. 27

⁷ Irianto Tiranda, Fenti Puluhulawa, dan Johan Jasin, “Konsep Ideal Penanganan Perkara Tindak Pidana Korupsi Pungutan Liar Berdasarkan Asas Peradilan” *Jambura Law Review* Issues 1, no. 2 (2019), <https://doi.org/10.33756/jalrev.v1i2.2119>.

⁸ S. H. Moeljatno, *Asas-asas Hukum Pidana* (Jakarta: Bina Aksara, 2002). Pg. 87

⁹ Sudikno Mertokusumo, *Mengenal hukum* (Yogyakarta: Liberty, 1999). Pg. 87

that all powers of its governmental instruments are based on law. Similarly, people cannot act as they wish, which is against the law. The rule of law is a state ruled not by people but by law. In a constitutional state, the rights of the people are fully guaranteed by the state, and conversely, the obligations of the people towards the state must be carried out in full by submitting to and obeying all state laws and regulations. Thus, the meaning of a rule of law state is always associated with internal organizations or state structures that must be regulated according to law. Every action of the ruler, and also the people.

According to Joeniarso, the rule of law principle implies that in administering the state, the actions of the rulers must be based on law, not based on the power or will of the rulers merely with the intention of limiting the powers of the rulers and protecting the interests of society, namely protecting the human rights of members of the community from arbitrary actions. Likewise, according to Sudargo Gautama,

“in a legal state, there are restrictions on state power over individuals. The state is not omnipotent and does not act arbitrarily. The actions of the state towards its citizens are limited by law. Thus, a country can be categorized as a rule of law if the actions of the authorities, authorities, or government clearly have a legal basis as the basis for the actions of the authorities.”¹⁰

In the understanding of the rule of law, it is the law that holds the highest command in the administration of the state. What actually leads to the administration of the state is the law itself in accordance with the principle of the rule of law and not of man, which is in line with the notion of democracy, namely, power is exercised by law. The rule of law, in the material sense, aims to protect citizens against arbitrary actions from authorities so as to enable humans to gain their dignity as human beings. This was reinforced by Thomas Hobbes in the Utilitarian Theory, where he argued that “Actually the law exists to prevent the evolution of humans into homo homini lupus (wolves for fellow humans).”¹¹ Therefore, the essence of the rule of law in the material sense is that there is a guarantee for members of the community to obtain social justice, namely “a condition where members of the community feel reasonable respect from other groups; while each group does not feel disadvantaged by the activities of other groups.”¹²

Indonesia's legal state is a legal state based on the values of Pancasila, which is the philosophy and basis of the state. Pancasila, as the basis of the state, which is a reflection of the soul of the Indonesian nation, must be the source of law for all existing legal regulations. Materially, the Indonesian Law State, which is based on Pancasila in making its legal substance, must uphold and be based on:

1. “The values of Belief in the One and Only God, meaning that the law which is used as the basis for regulating the life of the state must originate from and

¹⁰ B. Arief sidharta, “Kajian Kefilsafatan tentang Negara Hukum,” *Jentera : Jurnal Hukum* (2004) : 124–125, <https://lib.law.ugm.ac.id/ojs/jen/article/view/1047>.

¹¹ Thomas Bambang Murtianto, “Thomas Hobbes: Ketakutan sebagai Dasar Terbentuknya Negara,” *NOVUM ARGUMENTUM* 1, no. 1 (2022): 100.

¹² Lisnawaty W Badu dan Ahmad, “Purifikasi Pemberian Amnesti Dan Abolisi: Suatu Ikhtiar Penyempurnaan Undang Undang Dasar 1945,” *Jurnallus Civile* 5 No. 1 (2021), <https://doi.org/10.35308/jic.v5i2.2547>.

- not contradict divine values and be in harmony with the teachings of existing religions. In this case, laws originating from religious teachings are part of and become one of the sources of laws and statutory regulations;
2. Just and civilized human values, meaning that the law which is used as the basis for regulating the life of the state must originate from and not conflict with universal human values, the values of justice, and the values of civility. Thus, laws and regulations must uphold the value of Human Rights;
 3. The values of Indonesian unity, meaning that the law which is used as the basis for regulating the life of the state must originate from and not conflict with the values of the Indonesian nation while maintaining unity and unity while respecting the diversity of religions, cultures, ethnicities, languages, traditions, and customs. Which exists. Thus laws and regulations must recognize and guarantee the values of local wisdom, traditions, and culture of the archipelago, which are diverse;
 4. Populist values are led by wisdom in deliberations/representation, meaning that the law which is used as the basis for regulating the life of the state must originate from and not conflict with the interests and aspirations of the people, which are determined through deliberations on a representative basis based on common sense (wisdom) and 'good faith and wisdom (wisdom). With laws and regulations, it must be democratic both substantially and procedurally;
 5. The values of social justice for all Indonesian people mean that the law that is used as the basis for regulating the life of the state must be a law that can truly create social welfare in a fair and equitable manner for all Indonesian people. Thus laws and regulations must be able to guarantee the realization of justice and welfare for all people without exception.”¹³

Specifically related to customary law communities, there is legal certainty in the constitution regarding the recognition of the identity of the customary law community itself, namely in Article 18 B of the 1945 Constitution of the Republic of Indonesia, which states that the State recognizes and respects customary law community units and their rights -their traditional rights as long as they are still alive and in accordance with the development of the nation, society and the principles of the Unitary State of the Republic of Indonesia which are regulated by law. Respect and recognition of the existence of customary rights as human rights are implicitly regulated in Article 28I paragraph (3) of the 1945 Constitution of the Republic of Indonesia (the result of the second amendment to the 1945 Constitution of the Republic of Indonesia, which was stipulated on August 18, 2000).

However, currently, many customary areas, including customary forests, “are claimed by forestry unilaterally as forest areas and then raise overlapping claims which result in conflicts including with landowners around customary forest areas.”¹⁴ herefore, the State needs to manage the progress of society so that it

¹³ Haposan Siallagan, “Penerapan Prinsip Negara Hukum Di Indonesia,” *Sosiohumaniora* 18, no. 2 (2016): 122–28, <https://doi.org/10.24198/sosiohumaniora.v18i2.9947>.

¹⁴ Rahmat Djunaidi. 2018. “Perlindungan Hukum Terhadap Kawasan Hutan Adat di Kalimantan Tengah (Kesiapan Kabupaten/ Kota Dalam Menyusun Peraturan Daerah Tentang Kawasan Hutan Adat”. Jaringan Dokumentasi dan Informasi Hukum Provinsi Kalimantan Tengah. <https://jdih.kalteng.go.id/berita/baca/perlindungan-hukum-terhadap-kawasan-hutan-adat-di->

becomes a potential in development, causing conflict. “The facts about the occurrence of conflicts are caused by the government's lack of professionalism in managing legal norms, which has led to conflicts in the management of natural resources in several regions in Indonesia.”¹⁵ Legal certainty is a challenge for the government to provide legal certainty for all Indonesian people, including for customary law communities. With regard to customary law communities that are recognized in Article 18B of the 1945 Constitution of the Republic of Indonesia, what is of concern is how the State guarantees their rights, especially with regard to rights over customary land forests.

In connection with the above explanation, according to Fence M. Wantu, “Law without the value of legal certainty will lose meaning because it can no longer be used as a guideline for behavior for everyone.”¹⁶ Fence M. Wantu further emphasized that “Legal certainty must contain aspects of stability, namely being able to provide a sense of order and a sense of security in society.”¹⁷

2. Method

This type of research in this writing is a normative juridical research method whose other name is doctrinal legal research which is “also referred to as library research or document study because this research is carried out or aimed only at written regulations or other legal materials.”¹⁸ The approaches used by researchers in preparing this study are, among others: “the statutory approach and the case approach.”¹⁹ Data collection is carried out through the study of literature, meaning the technique of collecting data and information from several books and readings, and legislation related to the issue under study. This study was conducted in the library. Legal materials used in this study were obtained from the search through the study of literature, which collects a variety of legal materials, both in the form of legislation, literature, scientific papers, results of previous research, documents, opinions of Legal Practitioners, journals, as well as various relevant books related to this thesis.

[kalimantan-tengah-kesiapan-kabupatenkota-dalam-menyusun-peraturan-daerah-tentang-kawasan-hutan-adat](#)

¹⁵ Husen Alting, *Legal Dynamics in Recognition and Protection of Indigenous Peoples' Rights to Land (Past, Present and Future)*, (Yogyakarta: LaksBang PRESSindo, 2010). Pg. 7

¹⁶ Husen Alting, *Dinamika hukum dalam pengakuan dan perlindungan hak masyarakat hukum adat atas tanah: masa lalu, kini, dan masa mendatang* (Yogyakarta: LaksBang Pressindo bekerjasama dengan Lembaga Penerbitan Universitas Khairun ..., 2011). Pg. 7

¹⁷ Fence M Wantu, “Mewujudkan Kepastian Hukum, Keadilan Dan Kemanfaatan Dalam Putusan Hakim Di Peradilan Perdata,” *Jurnal Dinamika Hukum* 12, no. 3 (2012), <http://dinamikahukum.fh.unsoed.ac.id/index.php/JDH/article/view/121/68>.

¹⁸ Soekanto Soerjono, *Faktor-faktor yang mempengaruhi Penegakan Hukum*, Revisi VI (Jakarta: Raja Grafindo Persada, 2019). Pg. 14.

¹⁹ Yayuk Rizki Hulukati, Dian Ekawaty Ismail, dan Novendri Nggilu, “Penyalahgunaan Narkotika Oleh Pegawai Negeri Sipil Dilihat Dari Perspektif Kajian Kriminologi,” *JURNAL LEGALITAS* 13, no. 01 (2020): 16–30, <https://doi.org/10.33756/jelta.v13i01.7303>.

3. Analysis or Discussion

3.1. The concept of Ulayat Land

It has been stated before that Indonesia is a country with various cultures and customs. Indonesia is indeed very well-known for its customs which are still very thick to this day; “in fact, there are still indigenous peoples who are still solid in defending and preserving customary law.”²⁰ The customary law community is a community with a communal form. “Communal society is a society where all areas of life are covered by togetherness.”²¹ Indigenous peoples show a close relationship in interpersonal relations, and the process of social interaction that occurs between humans gives rise to certain patterns which are called “a uniform of the custom of behaving within a social group).”²²

The concept of indigenous peoples in Indonesia was introduced by Cornelius Van Vollenhoven, who studied more deeply about indigenous peoples. Ter Haar, a student of van Vollenhoven, gave the notion of indigenous peoples as groups of people who are organized, live in a certain area, have their own power, and have their own wealth in the form of visible and invisible objects in which the members of each unit experience life. In society, “as a natural thing according to the nature of nature, no one among the members has the thought of a tendency to dissolve the bond that has grown or leave it in the sense of breaking free from that bond forever.”²³

In customary law or any law, society has a very important meaning as a deposit of social reality. Because of this, Soerjono Soekanto said that society is a form of shared life whose citizens live together for a long period of time, resulting in a culture. Society is a social system that is a container of patterns of social interaction or interpersonal relationships as well as relationships between social groups. For this reason, “in customary law, it can be concluded that a customary law community can occur in a regional frame that we know with the territorial principle and based on heredity (genealogical principle) or a combination of territorial and genealogical.”²⁴

In the life of indigenous peoples, the land is understood as a geographical and social entity that has been inhabited, controlled, and managed by indigenous peoples for generations as a sign of social identity inherited from their ancestors. “It is this cultural and territorial identity which is the source of collective rights for indigenous and tribal peoples, and these rights are constitutional rights stated in the 1945 Constitution of the Republic of Indonesia and its amendments.”²⁵ The existence of customary law as a component of national law is still inferior to state

²⁰ Dian Cahyaningrum, “Hak Pengelolaan Tanah Ulayat Masyarakat Hukum Adat untuk Kepentingan Investasi (Management Rights of Customary Law Communities Ulayat Land for investment purposes),” *Negara Hukum: Membangun Hukum untuk Keadilan dan Kesejahteraan* 13, no. 1 (27 Juli 2022): 41–59, <https://doi.org/10.22212/jnh.v13i1.2970>.

²¹ Boedi Harsono, *Loc.cit*

²² Theodorson dalam Soerjono Soekanto, *Loc.cit*

²³ Titin Fatimah dan Hengki Andora, “Pola penyelesaian sengketa tanah ulayat di Sumatera Barat (sengketa antara masyarakat dengan investor),” *Jurnal Ilmu Hukum* 5, no. 1 (2010): 11–28.

²⁴ Theodorson dan Soekanto, *Op.Cit.* Pg. 91.

²⁵ TO Ihromi, *Legal Anthropology An Anthology*, (Jakarta: Indonesian Obor Foundation, 2001).
Pg. 210

law. "This is evident in the recognition of customary lands of customary law communities."²⁶ In fact, the existence of indigenous peoples and their traditional rights, as well as other human rights, are rights that are inherent in indigenous peoples. "Traditional rights of indigenous peoples are rights that are autochthonous or original rights which are a marker of the existence of an indigenous community."²⁷

R. Rustandi Ardiwilaga, said:

"Ulayat rights are the rights of customary law to be used freely on lands that are still undergrowth forests both within their territory for the benefit of members of the community, outsiders who will use the land but must have prior permission and pay recognition. , in the meantime, the alliance continues to intervene violently, also over land that is being cultivated or has been cultivated by people who are located within the environment of their territory."²⁸

The occurrence of land rights above customary rights is explained by Muchsin, as follows:

"In the past, people cleared land starting by giving mobile signs, namely signs that they were going to open land in the form of crosses or arches consisting of rattan or bamboo mounted on trees or in the form of wooden branches tied with rattan or palm fiber ropes which were erected on dry land. By giving these signs, the right arises to cultivate a plot of land which is commonly referred to as the right to open land. If in the future a person continues to clear/work it and use it as agricultural land to plant crops and so on, then the status of the land increases to become a usufructuary right or right to cultivate the land. But if the land is not continued to be cultivated while the sign is still affixed on the tree, then there are only rights over the tree, no rights over land. To increase the status of the land to property rights, the land must be managed continuously. If the land is left or abandoned until it becomes shrubs or forest again, then the status of the land ownership rights over the land is lost, and what remains is the main right (*voorkeursrecht*) to work on it again as property rights. This main right will also be lost if the land is neglected so that it is forested as before; automatically, the status of the land returns to customary rights."²⁹

"Theoretically, property rights and control rights are different. The owner of the property right to an object must be the owner of the object, while the holder of the right to control is not necessarily the owner of the object. When associated with customary rights, customary rights are included in the

²⁶ Boedi Harsono, *Op. cit.*, Pg. 185

²⁷ Fitrah Akbar Citrawan, "Konsep Kepemilikan Tanah Ulayat Masyarakat Adat Minangkabau" 50, no. 3 (2020), <https://doi.org/10.21143/jhp.vol50.no3.2583>.

²⁸ Nova Yarsina, "Perlindungan Hukum Terhadap Tanah Ulayat Yang Telah Bersertifikat Di Kota Bukittinggi," *JCH (Jurnal Cendekia Hukum)* 3, no. 2 (2018): 166-77, <https://doi.org/10.33760/jch.v3i2.25>.

²⁹ Bernhard Limbong, *Pengadaan tanah untuk pembangunan: regulasi, kompensasi, penegakan hukum* (Jakarta: Margaretha Pustaka, 2011). Pg. 94

category of control rights. Because customary rights belong to the customary law community where the ruler is led by a customary ruler.”³⁰

In an extensive sense, customary land rights basically function as a guarantee for mutual welfare, a source of tactical needs, and then a source of funds for holding customary celebrations (custom demands). Thus, “the definition of customary rights according to the conception of customary law is a right owned by a clan/relative of an indigenous community within a customary law unit.”³¹

Slightly similar to the concept of play at land, ulayat forest, or what is sometimes referred to as customary forest, is a forest that is within the territory of customary law communities. In order to be designated as customary forest, local customary law communities can submit an application to the Minister of Environment and Forestry. The word can mean that there is no obligation because the Minister, together with the Regional Government, is active in determining this customary forest. The law that also regulates the existence of customary forests is Law Number 41 of 1999 concerning Forestry, which in Article 1 Paragraph (5) stipulates that customary forests are State forests located within the territory of customary law communities. From this definition, “a customary forest is a State forest where the customary forest is a forest that is not encumbered with rights.”³²

3.2. Protection of Indigenous Peoples in Ulayat Forest Land

The Unitary State of the Republic of Indonesia is a constitutional state in accordance with the state principles contained in the 1945 Constitution; in a constitutional state, basically, there are clear laws and regulations to regulate the life of its people in order to obtain legal certainty. “Law is a norm that invites people to achieve certain ideals and circumstances, but without ignoring the real world and therefore classified into cultural norms.”³³ as the rule of law and in order to maintain its image as a rule of law country itself, Indonesia is obliged to provide legal certainty regarding the protection or guarantee of the rights of all Indonesian people without exception including legal certainty for indigenous and tribal peoples. According to Fence M. Wantu, “Law without the value of legal certainty will lose meaning because it can no longer be used as a guideline for everyone's behavior.”³⁴ Fence M. Wantu further emphasized that “Legal certainty must contain aspects of stability, namely being able to provide a sense of order and a sense of security in society.”³⁵

“The development of civil society (civil society) is a way of life for a society that adheres to legal values.”³⁶ The law is not a goal but a means or tool to achieve goals that are non-juridical in nature and develop due to stimuli from outside the law. “It

³⁰ Bachtiar Effendie, *Komentaris Undang-Undang Pokok Agraria* (Bandung: Mandar Maju, 2003). Pg. 51

³¹ Hilman Hadikusuma, *Hukum perekonomian adat Indonesia* (Bandung: Citra Aditya Bakti, 2001). Pg. 20

³² Safrin Salam, “Perlindungan Hukum Masyarakat Hukum Adat Atas Hutan Adat,” *Jurnal Hukum Novelty* 7, no. 2 (2016): 209–24, <https://doi.org/10.26555/novelty.v7i2.a5468>.

³³ Satjipto Rahardjo, Loc. cit

³⁴ Fence M. Wantu, “Antinomi Dalam Penegakan Hukum Oleh Hakim,” *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 19, no. 3 (2007), <https://doi.org/10.22146/jmh.19070>.

³⁵ Fence M. Wantu, “Mewujudkan Kepastian Hukum, Keadilan Dan Kemanfaatan Dalam Putusan Hakim Di Peradilan Perdata.” *Jurnal Dinamika Hukum*, 12 No. 3 (2012). Pg. 479-489.

³⁶ Moeljatno, *Asas-asas Hukum Pidana*. (Rineka Cipta: Jakarta, 2002). Pg. 87

is the factors outside the law that make the law dynamic.”³⁷ With the existence of laws that can regulate social life, of course, it will provide a sense of justice in the community itself, talking about justice in the development of justice also transforms in a new direction in accordance with the development of law in the eyes of society.

In general, it can be interpreted that a rule of law or the *rechtsstaat* rule of law is a state whose composition is properly regulated in statutory regulations (laws) so that all powers of its governmental instruments are based on law. Similarly, people cannot act as they wish, which is against the law. The rule of law is a state ruled not by people but by law. In a constitutional state, the rights of the people are fully guaranteed by the state, and conversely, the obligations of the people towards the state must be carried out in full by submitting to and obeying all state laws and regulations. Thus, the meaning of a rule of law state is always associated with internal organizations or state structures that must be regulated according to law. Every action of the ruler, and also the people.

According to Joeniarso, the rule of law principle implies that in administering the state, the actions of the rulers must be based on law, not based on the power or will of the rulers merely with the intention of limiting the powers of the rulers and protecting the interests of society, namely protecting the human rights of members of the community from arbitrary actions. Likewise, according to Sudargo Gautama, in a legal state, there are restrictions on state power over individuals. The state is not omnipotent and does not act arbitrarily. The actions of the state towards its citizens are limited by law. Thus, “a country can be categorized as a rule of law if the actions of the authorities, authorities, or government clearly have a legal basis as the basis for the actions of the authorities.”³⁸

In the understanding of the rule of law, it is the law that holds the highest command in the administration of the state. What actually leads to the administration of the state is the law itself in accordance with the principle of the rule of law and not of man, which is in line with the notion of democracy, namely, power is exercised by law. The rule of law, in the material sense, aims to protect citizens against arbitrary actions from authorities so as to enable humans to gain their dignity as human beings. Therefore, the essence of the rule of law in the material sense is that there is a guarantee for members of the community to obtain social justice, namely “a condition where members of the community feel reasonable respect from other groups; while each group does not feel disadvantaged by the activities of other groups.”³⁹

In an effort to understand the context of legal protection for indigenous peoples, it is necessary to examine how the Indonesian constitution actually regulates the recognition and guarantee of indigenous peoples' rights. This is closely related to the modern state, the constitution, and the protection of indigenous peoples. The modern state emerged along with the notions of democracy, human rights, and constitutionalism. In a modern state, the constitution is a document that contains agreements on all components within the state to achieve common goals that outline the ideals, rights that must be fulfilled, and the government's obligation

³⁷ Mertokusumo, *Mengenal hukum*. (Yogyakarta: Liberty, 1999). Pg. 40.

³⁸ Sidharta, “Kajian Kefilsafatan tentang Negara Hukum.” *Jurnal Hukum, “Rule of Law”, edisi 3* (2004).

³⁹ Lisnawaty W Badu dan Ahmad Ahmad, *Loc.Cit.*

to fulfill these rights. "The constitution is present as a reflection of social relations among its citizens. Therefore the constitution can also be referred to as a monument."⁴⁰

Since constitutionalism wants the politicization of human rights into constitutional norms as a form of the social contract, then at the same time, the rights of developing indigenous peoples are frozen into constitutional texts. The rights of indigenous peoples are natural rights that are born from social processes and are passed down from generation to generation. When indigenous peoples are protected by a state, then the challenge is the need to positivize these rights into a written constitution.

Thus, the existence of indigenous peoples and their traditional rights becomes a dilemma. On the one hand, because it requires politicization, the existence, and traditional rights will only be recognized if they are regulated in a written law made by state institutions. On the contrary, it can be said that if it is not legally recognized, then the existence of indigenous peoples is considered to have disappeared or not existed. In fact, the existence of indigenous peoples and their traditional rights, as well as other human rights, are rights that are inherent in indigenous peoples. Traditional rights of indigenous peoples are rights that are autochthonous or original rights which are a marker of the existence of an indigenous community. The traditional rights of indigenous peoples are not given rights, so without being written down in the constitution or in other forms of written law made by the state.

In the life of indigenous peoples, the land is understood as a geographical and social entity that has been inhabited, controlled, and managed by indigenous peoples for generations as a sign of social identity inherited from their ancestors. "It is this cultural and territorial identity which is the source of collective rights for indigenous and tribal peoples, and these rights are constitutional rights stated in the 1945 Constitution of the Republic of Indonesia and its amendments."⁴¹ The existence of customary law as a component of national law is still inferior to state law. "This is evident in the recognition of customary lands of customary law communities."⁴² In fact, the existence of indigenous peoples and their traditional rights, as well as other human rights, are rights that are inherent in indigenous peoples. "Traditional rights of indigenous peoples are rights that are autochthonous or original rights which are a marker of the existence of an indigenous community."⁴³

In addition to land, there is something that is also crucial for legal certainty to be guaranteed by the state relating to the rights of indigenous and tribal peoples, namely legal certainty regarding customary forest land rights or what is sometimes referred to as customary forest. A customary forest is a forest that is in the territory of customary law communities. In order to be designated as customary forest, local customary law communities can submit an application to the Minister of Environment and Forestry. The word can mean that there is no obligation because

⁴⁰ Satjipto Raharjo, *Hukum Adat dalam Negara Kesatuan Republik Indonesia (Perspektif Sosiologi Hukum) dalam Hilmi Rosyida dan Bisariyadi* (Jakarta: Komnas HAM, Mahkamah Konstitusi RI, dan Departemen Dalam Negeri, 2005).

⁴¹ T.O Ihromi, *Antropologi Hukum Sebuah Bunga Rampai*, (Jakarta: Yayasan Obor Indonesia, 2001). Pg. 210

⁴² Boedi Harsono, Op. cit. Pg. 185

⁴³ Citrawan, Fitrah Akbar. "Konsep Kepemilikan Tanah Ulayat Masyarakat Adat Minangkabau." *Jurnal Hukum & Pembangunan* 50.3 (2020). Pg. 586-602.

the Minister, together with the Regional Government, is active in determining this customary forest.

If detailed based on Article 16 paragraph (1) junction Article 53 paragraph (1) Law, Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA), land rights consist of property rights, usufructuary rights, building usufructuary rights, lease rights, land clearing rights, rights to collect forest products and other rights that are not included in these temporary rights, namely lien rights, profit sharing business rights, boarding rights and agricultural land lease rights. Each of these rights has been determined. Besides that, there are also other land rights that are regulated by Law Number 20 of 2011 concerning Flats, namely ownership rights to flats units.

Here there is no customary right as a land right. However, Article 3 of the UUPA states that bearing in mind the provisions in Articles 1 and 2, the implementation of customary rights and similar rights of customary law communities, as long as in reality they still exist, must be in such a way as to comply with national and state interests, based on national unity and must not conflict with laws and other higher regulations. Even though it is not a land right, "customary rights are a right that is owned by customary law communities over customary land, which is recognized by the state as belonging to customary law communities."⁴⁴

The provisions that apply to all matters related to customary rights are the customary law rules of the local customary law community. Such as plants, buildings, farm animals, and forests. As stipulated by Article 18B paragraph (2) of the 1945 Constitution that the state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with community development and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law. Like other customary objects, customary forests can be controlled by cultivating and utilizing the results. This is, of course, permissible as long as it does not conflict with statutory provisions or higher regulations, as referred to in Article 3 of the UUPA. For example, when one or several members of the customary law community visit their customary forest with the aim of harvesting or taking the product, by first obtain permission from the customary head. This is legal to do, but if it is done without obtaining permission from the customary head and then it is carried out in ways that can damage the forest, such as illegal logging, then this is contrary to laws and other higher regulations, so invalid.

Henna Kurniasih and Tundjung Herning Sitabuana once conducted research related to Indigenous Forests, which was later enshrined in a research journal entitled "Legal Protection of Indigenous Forests in View of the Rights of Indigenous Peoples." In this research, they concluded that the existence of customary law communities along with their customary rights is actually still respected, respected, and recognized as long as they are still alive and in accordance with community development, national interests, and the principles of the Unitary State of the Republic of Indonesia. This is stated in various laws and regulations such as Article; 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, UUPA, Human Rights Law, and so on. However, this acknowledgment is still weak because

⁴⁴ Steny, Bernadinus. Steny, "Politik Pengakuan Masyarakat Adat: Dari Warisan Kolonial Hingga Negara Merdeka". *Jurnal Jentera Edisi Lingkungan* Vol. 30 No. 3 (2009): 101, <https://jurnal.ugm.ac.id/jmh/article/view/38241>

there are no further operational regulations governing it, so customary law communities will find it difficult to optimize what is their right to occupy their position as customary law communities. So their rights have been undermined by the government unconsciously through the absence of clear legal protection. “The government's efforts to protect the rights of indigenous peoples already exist, but the implementation and several problematic articles can, of course hinder indigenous peoples from using or claiming their rights.”⁴⁵

Therefore, it is clear how crucial customary forests are before Indonesian law; customary forests are protected, as is the legal protection of customary lands. This legal protection is a form of real action from the state in implementing the mandate of the constitution of the 1945 Constitution of the Republic of Indonesia contained in Article 18B. Moreover, in this case, the government has issued a Decree of the Minister of Environment and Forestry to determine customary forest areas as well as rights and obligations owned by customary law communities; “an example is the Decree of the Minister of Environment and Forestry of the Republic of Indonesia 6746 of 2016 concerning Determination Ammatoa Kajang Customary Forest in Kajang District, Bulukumba Regency, South Sulawesi Province.”⁴⁶

4. Conclusion

A customary forest or sometimes referred to as customary forest is a forest that is within the territory of the customary law community. To be designated as customary Forest, local customary law communities can apply to the Minister of Environment and Forestry. The word can mean no obligation because the Minister, together with the Local Government, is active in the determination of this customary forest. Customary Forests, before Indonesian law is, protected as the legal protection of customary land. This legal protection is a form of concrete action from the state in implementing the mandate of the Constitution of the Republic of Indonesia Constitution of 1945 contained in Article 18b. Moreover, in this case, the Government has issued a decree of the Minister of Environment and Forestry to establish customary forest areas and rights and obligations owned by indigenous peoples; for example, the decree of the Minister of Environment and Forestry of the Republic of Indonesia 6746 of 2016 on the determination of Ammatoa Kajang customary Forest in Kajang District, Bulukumba regency, South Sulawesi province.

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⁴⁵ Henna Kurniasih dan Tundjung Hering Sitabuana, “Perlindungan Hukum Hutan Adat Ditinjau dari Hak Masyarakat Hukum Adat”, *Seri Seminar Ke-IV* (2022): 770, <https://journal.untar.ac.id/index.php/PSERINA/article/view/19801/12130>

⁴⁶ Surat Keputusan Menteri Lingkungan Hidup dan Kehutanan Republik Indonesia 6746 tahun 2016

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