

Fulfillment of Indigenous Community Rights through the Formulation of Regional Regulation

Annurdi Annurdi and Budimansyah Budimansyah

*Faculty of Law, Universitas Panca Bhakti
budimansyahmh@gmail.com*

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Abstract: The Constitution recognizes the existence of indigenous people as long as it is alive and accordance with the principle of the Unitary State of the Indonesia Republic which is the regulated in law. The existence of indigenous people can not be separated by traditional rights which are hereditary inherent in everyday live which sees that their life and life can not be separated from the values of relegio-magical. The indigenous people's right in practice are not all accommodated in legislation so that indigenous peoples can not got the full fulfilment of their right, even explicitly recognized in the constitution but without further regulation, these rights will be difficult to obtain. This study is a normative juridical research, where the data used in this study is secondary data in the form of books, legislation, documents and other writings relating to the problems under investigation. Based on the research, it is found that the presence of local regulations in the fulfilment of the rights of indigenous peoples is very important considering that these rights can be obtained if the regions have made arrangements in the form of local regulations that recognize and protect the existence of customary law communities and their rights.

1 INTRODUCTION

The existence of customary law community within the framework of the Unitary State of the Republic of Indonesia (NKRI) is a necessity. Long before the existence and the enactment of the law of the state (the law), the customary law is compatible with the existence of customary law communities in various regions in Indonesia. This empirical reality then confirms that Indonesia is an archipelagic country as well as a country rich in tradition and culture and then forming its laws with different characteristics.

Indonesia as an archipelagic country in which there are various ethnics in each of the islands and even in various islands in an archipelago there are still many ethnicities and then in one ethnic sometimes there are differences in tradition because it is influenced by the geographical background of the region and its origin. This fact confirms that Indonesia is established with diversity not uniformity and the existence of indigenous and tribal peoples and their traditional rights can not be ignored by the State.

In its development the Portuguese first came to Malacca in 1509 there had been conflicts and evictions against indigenous and tribal peoples who were poured in the form of colonial and political

policy of sheep fighting. This can be seen from the history of the Padri War in West Sumatra and the contradiction between customs with one another and the contradiction between customary law and religious law as well as customary law and religious law are two sides of the poles that are impossible to meet and will not apply harmoniously.

The eviction of customary law values including traditional rights was followed by Christian Snouck Hurgronje's theory with Receipt theory which did not want the presence of customary law and Islamic law in the Dutch East Indies. Customary law and Islamic law would only be applicable if it were not contrary to the laws of the then state (law) and customary law and Islamic law as if it were a second class law that was rearranged by the Dutch East Indies government. Customary law in various regions which is the original law of the Indonesian nation must be defeated by Dutch colonial law because it is considered to give birth to disintegration, legal pluralism so that the birth of legal uncertainty here and there or even feared will raise awareness of the law of the people so that indigenous people will collectively reject the legal presence Dutch colonial.

Post of the independence of Indonesia, the existence of indigenous peoples must return to lose because of the enforcement of colonial law is

reinforced by the laws that were born by the Indonesian nation itself. It can be proven that the application of the Criminal Code, Civil Code, KUHD and some other legislation that in fact comes from the Dutch colonial government. The enactment of the 1945 Constitution of the State of the Republic of Indonesia (the 1945 Constitution of the Republic of Indonesia) on August 18, 1945 has provided a place for the recognition of indigenous and tribal peoples but in its development until the amendment of the 1945 Constitution of the Republic of Indonesia of 1945 recognition of society customary law and traditional rights are still abstract, that is, it is only existed without any derivative regulations in various regions in the form of local regulations (Perda) which acknowledge more concretely to indigenous and tribal peoples, especially with regard to the law. The enactment of Emergency Law Number 1 Year 1951 on Temporary Measures to Organize Unity The Power and Event Arrangements of Civil Courts are also half-hearted to be applied because in reality the recognition is still of an abstract nature and the customary courts have not been implemented properly.

The search for where the customary law community enter the new phase that is since the birth of Decision of the Constitutional Court Number: Number 35 / PUU-X / 2012 where the Alliance of Indigenous Peoples of Nusantara (AMAN), Unity of Customary Law Community of Kenegerian Kuntu, Unity of Customary Law Society Kasepuhan Cilaku tested several the norm in Law Number 41 Year 199 regarding Forestry and in the Decision of the Constitutional Court Number: Number 35 / PUU-X / 2012 recognizes customary law not State law. Acknowledgment of indigenous and tribal peoples and their traditional rights is almost acquired but must again be hampered because the Constitutional Court's ruling is still abstract so that it does not have concrete values of how the mechanism of recognition of customary forests and so on while the legal regulation is still missing and on the other hand customary forests are factually everywhere even in various regions of Indonesia still recognize and recognize customary forest and customary law.

The existence of indigenous and tribal peoples still has to be fought through the formation of concrete rules that not only acknowledge in general but do not provide technical guidance on how the recognition is made. Acknowledgment and granting of customary community rights can not be fulfilled only by regulation at the law level only or the laws and regulations of Government Regulation, Presidential Regulation and Ministerial Regulation

because the regulation is still general and applicable to all Indonesian people while existence indigenous and tribal peoples are characteristic of their distinct regional and cultural characteristics in each region so that it is not possible to be formed only by general rules. Departing from the above reality, the authors are interested to conduct further research on the fulfilment of customary law community rights through the formation of local regulations.

1.1 Problem Formulation

The problem in this research is "How is the fulfillment of Indigenous People's Rights that performed through the formulation of Local Regulation?"

2 METHOD

This study aims to reveal the urgency of fulfilling the indigenous people's rights through the formulation of local regulations. This research is normative law research, data source used in this research is in the form of secondary data that is book, journal, legislation, documents and other writings related to the problem under study.

As for the laws and regulations that are used as secondary data in this study, among others, the Constitution of the Republic of Indonesia, Law Number 12 on 2011 about The Establishment of Legislation Regulation, Law Number 23 on 2014 about Regional Government, and other regulations related to this research.

3 RESULTS AND DISCUSSION

Indonesia is a unitary state in the form of a republic (NKRI) as contained in the constitution. In the implementation of the Republic of Indonesia in the form of the republic embraced decentralization system is not centralized. Syarif Hidayat and Bhenyamin states that as a concept, decentralization grows and evolves with the demands and demands of democracy for a long time (Huda, 2013). The concept of decentralization has been much debated, especially in developing countries in the 1950s. In this period it can be said that the first "wave" of the concept of decentralization has received special attention, and has been articulated as the most relevant concept for strengthening and empowering local governance. The second wave of the decentralization movement,

particularly in developing countries, was in the late 1970s. Furthermore, Harry Friedman explains that decentralization is the principle of governance that is opposed to centralization. Decentralization produces local governance, where it occurs "...a" superior "government one encompassing a large jurisdiction-assigns responsibility, authority, or function to 'lower' government unit-one encompassing a smaller jurisdiction-that is assumed to have some degree of autonomy".

Local regulation is a regulation established by the local government that is Governor, Regent, Mayor together with DPRD. The implementation of regional government is carried out with the principle of autonomy as far as possible, but within the framework of NKRI there are some authorities that should not be taken by local government that is as contained in Article 10 of Law Number 23 on 2014 about Regional Government namely foreign policy, defence, yustisi, monetary and fiscal national and religion.

In the formulation of local regulations can come from the order of legislation that is above it then called with delegate authority and the formation of local regulations derived from regional initiation because it is a requirement of each region. The authority of the regional government in forming a regional regulation with the authority of attribution can not be separated from the juridical basis of the authority given by the legislation so that it can not be contradictory vertically and horizontally with other laws and regulations. In the formation of a good law, it must follow the governance of the formation of good legislation that is in terms of principle, aspect, authority and material content. Jazim Hamidi said that the establishment of good legislation should meet the following requirements (Hamidi, 2011):

1) Philosophical Foundation (Philosofische Grondslag)

A formulation of legislation should have an acceptable justification (*rechtvaardiging*) if examined philosophically. The justification must be in accordance with the ideals of truth (*idee der waarheid*), and the ideals of justice (*idee der gerechtigheid*), and the ideals of decency (*idee der zederlijkheid*).

2) Sociological Foundation (Sociologische Grondslag)

A legislation must be in accordance with public belief or legal awareness. Therefore, the law established must be in accordance with living law in the community.

3) Juridical Foundation (Rechtsgrond)

A statutory ordinance must have a legal basis or legal basis or legality contained in other higher

provisions. The juridical foundation can be divided into the following two (i). The formal juridical basis of formal aspect is the provision which grants the authority (*bevoegheid*) to an institution to establish it, and (ii) the judicial basis of which material aspect is in the form of a matter or issue to be regulated.

4) Political, Ecological, Medical, Economical, and Other

Platforms conform to the types or objects governed by the laws and regulations. There is another consideration that needs to be considered by legislators that basically a legislation is created must be supported by an accurate research order Isering called the making of research-based legislation).

In the sciens of legislation that the establishment of good legislation must meet the principles of the establishment of good state regulations. I.C. Van der Vlies as quoted by Maria Farida Indrati S., dividing the foundations in the formation of good national regulations into formal and material bases, the formal bases include (Farida, 2007):

- the principle of clear objective;
- the principle of the right organ;
- the necessity principle;
- the principle of enforceability;
- the principle of consensus.

Material basics cover:

- the principle of clear terminology and clear systematics;
- the principle of know ability;
- the legal equality principle;
- the principle of legal certainty;
- the principle of individual administration of justice.

The local government as an autonomous region granted by the central government has the authority to form a special regulation, one of which is the regulation of the fulfilment of customary community law rights. The formation of a regional regulation whose material content contains the fulfilment of customary community rights can be seen in Article 6 of Law Number 12 Year 2011 on the Establishment of Legislation Regulation, the "national principle" is further explained in the explanation that the meaning of "national principle" is that the content of legislation should reflect the pluralistic nature of the Indonesian nation (diversity) while maintaining the principle of the Unitary State of the Republic of Indonesia. "The principle of *bhineka tikaa lika*" referred to as "single *bhineka ika* principle" means the content of legislation should pay attention to the diversity of the

population, religion, tribe and class, special conditions of the region, and culture especially concerning sensitive matters in the life of society, nation and state, so the existence of a living law is clearly not contrary to this law.

Furthermore, the local government which is given the authority in organizing government in the region in terms of making a special law is a necessity because ignorance of this can result in a regulation that is far from the legal consciousness of the people. Eugen Eurlich states that a positive law will have effective force when it is in harmony with the law within society (Hamidi, 2011). Furthermore, a political organization called a state in addition to state law in the form of legislation, also apply religious law, people's law, and local regulatory mechanisms that also serve as a means of social control. Often the government ignores the phenomenon of local wisdom in establishing a legislation. The reality of legal pluralism is displaced by the ideology of legal centralism adopted by the government in the politics of legal development directed to create legal unification, codification of law, and legal uniformity with the stamp of national law as one- the only law applicable to all citizens throughout the territory of the Republic of Indonesia (Hamidi, 2011).

Furthermore, the basis of the legitimacy of the formation of local regulations in the fulfilment of the rights of indigenous and tribal people's lies hermitically in legislation in Indonesia ranging from the 1945 Constitution to the lowest level can be shown as follows:

- 1) Indonesia Constitution on 1945;

Article 18B paragraph (2) "The State recognizes and respects the unity of indigenous and tribal peoples along with their traditional rights 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".

Article 28I Paragraph (3) "The cultural identity and the rights of traditional society are respected in harmony with the times and civilizations".

Article 32 Paragraph (1) "The State promotes the national culture of Indonesia in the midst of the civilization of the world by ensuring the freedom of the people in maintaining and developing its cultural values" while in paragraph (2) "The State respects and maintains the regional language as the national cultural treasure".
- 2) TAP MPR No. IX on 2001 about Agrarian Reform;

- 3) Article 4 letter j states "Agrarian reform and management of natural resources shall be carried out in accordance with the principles of: ... j). Recognize, respect, and protect the rights of indigenous and tribal peoples' cultural diversity of agrarian / natural resources ".
- 4) Decision of the Constitutional Court Number 35 / PUU-X / 2012 stating that customary forest is no longer state forest;
- 5) Law Number 5 on 1960 about Basic Regulation of Agrarian Principles;

Article 2, paragraph 4, "the right of control of that State above its execution may be authorized to the Swantra and customary law communities, as necessary and not contrary to the national interest, in accordance with the provisions of legislation".
- 6) Law Number 39 on 1999 regarding Human Rights;

Article 5 Paragraph (3) "Every person, including a vulnerable group of people, is entitled to receive recognition and protection more with respect to its specificity".

Article 6 Paragraph (1) "in the context of the enforcement of human rights, the differences and needs of indigenous and tribal peoples shall be observed and protected by law, society and government".

Article 6 Paragraph (1) "The cultural identity of customary law communities, including customary land rights is protected in harmony with the times".
- 7) Law Number 24 on 2003 regarding the Constitutional Court

Article 51 "The applicant is a party who deems his / her constitutional rights and / or authority to be impaired by the coming into effect of the law, namely:

 - Individual Indonesian citizen;
 - Unity of customary law community as long as it is alive and in accordance with the development of society and the principle of Unitary State of the Republic of Indonesia as stipulated in law;
 - Public or private legal entity; or
 - State institutions.
- 8) Law Number 20 on 2003 regarding National Education System;

Article 5 paragraph (3) "citizens in remote or backward areas and remote indigenous peoples are entitled to special service education".

Article 32 Paragraph (2) "Specialized education services constitute education for learners in remote or backward areas, isolated

indigenous peoples, and / or natural disasters, social calamities, and economic inadequacies".

- 9) Law Number 23 on 2014 about Regional Government;
- 10) Law Number 39 on 2014 about Plantations;
- 11) Government Regulation Number 78 on 2011 about Ratification of Convention on the Protection and Promotion of the Diversity Cultural Expressions (Kovenski on Protecting and Promoting Cultural Expression Diversity);
- 12) Regulation of the Minister of Agrarian Affairs / Head of National Land Agency Number 5 Year 1999 concerning Guidance on Completion of Problem on Customary Land Rights of Adat Law;

Article 1 "hak ulayat that is authority which, according to customary law, belongs to a certain customary law community over a certain area which is the environment of its citizens to take advantage of natural resources, including land in the territory for their survival and life, inner and outward and inherent between the people of the customary law and the territory concerned".

Article 2 "the exercise of customary rights insofar as they still exist, is committed by the indigenous peoples concerned in accordance with the provisions of local customary law. The ulayat right of customary law community is still exist if:

 - There is a group of people who still feel bound by their customary legal order as citizens with a certain legal partnership that recognizes and implements the terms of fellowship in daily life;
 - There are certain ulayat lands that are the environment of the citizens of the legal community and where they take their daily necessities; and
 - There is a customary law arrangement regarding customary land ownership, control and use of communal land and obeyed by the citizens of the law community.
- 13) Regulation of the Minister of Home Affairs Number 52 on 2007 concerning Conservation and Development of Customs and Social Values of Cultural Society;
- 14) Regulation of the Minister of Home Affairs Number 52 on 2014 concerning Guidelines for the Recognition and Protection of Indigenous Peoples.

Indigenous and tribal peoples are societies that can not be separated from society as part of society in general but have characteristic and characteristic which is distinct and different from each other. Discussion on indigenous and tribal

peoples can not be separated from the law, adat law as an integrated part of the indigenous system. Each customary law community has different legal and cultural characteristics and then different copyrights, works and initiatives. Koentjaraningrat means that the word "culture" is derived from the Sanskrit word buddhaya, i.e. the form of jama from buddhi meaning "mind" or "mind". Thus culture can be interpreted as "things with reason". More Koentjaraningrat said that the culture there are three manifestations, namely (Koentjaraningrat, 2013):

- The form of culture as a complex of ideas, ideas, values, norms, rules and so on.
- The form of culture as a complex of activity and the patterned actions of humans in society.
- Beings of culture as objects of human works.

The recognition and protection of indigenous and tribal peoples and their traditional rights is done through the establishment of legislation both at the central and regional levels. The recognition of indigenous and tribal peoples other than constitutional mandate is also a social reality that is not omitted or ignored by the state as an organization of power. Dewi Sulastris said that the social reality of Indonesian society shows that there is more than one legal system that effectively works to regulate the life of the people, in this case based on the reality of socio-cultural pluralism that is often claimed as the characteristic of this nation (Sulastris, 2015). One form of social-cultural pluralism that led to the existence of a legal system outside the formal legal system that the state is the existence of the existence of indigenous peoples with customary law system. As part of the social reality of Indonesia, the existence of these indigenous peoples clearly can not be undermined its meaning, even then the tendency that their existence must be maintained and strived to be more prominent as a result of the introduce cultural rights as part of the human rights that have become the agreement together in the association of the nations of the world to be obeyed.

The fulfilment of the rights of indigenous and tribal peoples is a form of the constitutional rights of citizens individually or collectively. Some rights of indigenous and tribal peoples are rights relating to the existence and sustainability of daily life (customary law community life), these rights consist of:

- Recognition and protection of rights in the form of music art, art, sculpture, clothing and other forms of work of indigenous and tribal peoples;
- Acknowledgment and protection of rights in the form of traditions carried out from generation to

generation such as robo 'robo' culture in Mempawah District, carbide cannon tradition in Pontianak and others;

- Recognition and protection of rights in customary law;

The recognition and protection of indigenous and tribal peoples over the law is the imposition of customary law and customary courts in various regions. Recognition of customary law as a living law in the community is accommodated not only in the formation of local regulations in each region but in the case of RKUHP Article 2 Paragraph (1) "the provisions as referred to in Article 1 paragraph (1) shall not reduce the enforcement of the living law within (2) "the enactment of a living law within the society referred to in paragraph (1) to the extent consistent with the values contained in Pancasila, the right human rights, and general legal principles recognized by the peoples of nations " (Law Number 16 on 2004 regarding Public Prosecution Service; Law Number 48 on 2009 regarding Judicial Power; Law Number 23 on 2014 regarding Regional Government).

Recognition of the existence of customary court through the formation of local regulations is also a fulfilment of the rights of indigenous and tribal peoples. It is understood that indigenous and tribal peoples can not be separated from their legal system and how to implement the legal system in the form of judgment against people who violate customary law. Customary courts are still there and strong in various regions in Indonesia, for example in Minangkabau, West Kalimantan, Papua and several other areas. Hilman Hadikusuma states that the term "judiciary" (rechtspraak) basically means the discussion of law and justice conducted by the court system (consent) to settle cases outside the court and / or in court (Hadikusuma, 2003). If the discussion is based on customary law, it is called "Customary Law Court" or "Adat Court" only. Customary Tribunals may be exercised by individual members of the community, by the family / neighbors, heads of kin or adat head (customary judges), village head (village judges) or by organizational board members, as mentioned above in the peaceful settlement of the indigenous delict to restore disturbed community balance.

The fulfilment of the rights of indigenous and tribal peoples through the existing regulation is deemed incapable of accommodating the fulfilment of the rights of indigenous and tribal peoples. This is because the regulation of the legislation (other than the Perda) only regulates general but unworkable matters, in other words can only be the juridical basis but in concrete application to provide the fulfilment

of the rights of indigenous and tribal peoples is not possible held. Such conditions require the presence of the state through local governments in formulating local regulations that provide the fulfilment of the rights of indigenous and tribal peoples such as art rights, gifts, traditions and even their laws through customary court.

The fulfilment of customary community rights and traditional rights is the mandate of the constitution which must be fulfilled by the State, the denial of the constitutional mandate is a form of denial of our state ideals as contained in the Preamble to the 1945 Constitution of the Republic of Indonesia. The form of fulfilment of the rights indigenous and tribal peoples is the formation of a regional regulation that establishes regional regulations that accommodate the rights of indigenous and tribal peoples. The arrangement is done in 2 (two) form of arrangement that is:

- 1) Fulfilment of customary community law rights in a common law

Regulation of local regulation in fulfilling the rights of indigenous and tribal peoples in a general arrangement, this is done in one heterogeneous region where the regional regulation only regulates and recognizes the existence of indigenous and tribal peoples and traditional rights but the further implementation is related to the specificity of the fulfilment of such rights shall be effected by the formation of a Bupati Regulation or a Decree of the Regent. One example can be addressed in the recognition and protection of certain regional cultures in which within the area there is acculturation and ethnic diversity so it is more appropriate if the recognition and protection in general.

- 2) Fulfilment of customary community law rights in special regulations

Regulation of local regulation in fulfilling the rights of customary law community in special arrangement, this is done in one homogeneous area so that the contents of the law mention explicitly about the recognition and protection of the rights of customary law community. One example that can be presented as in Kapuas Hulu District, West Kalimantan is the recognition and protection of some customary forests in a Kecamatan in Kapuas Hulu District, it is effective and efficient by explicitly mentioning the recognition and protection and the name of the region because there is a homogeneous ethnicity in the area.

4 CONCLUSIONS

Based on the description in the above discussion it can be concluded that the fulfilment of customary law community rights through the formation of local regulations is very important. It is based on the embryonicity of indigenous and tribal peoples existing before the existence of NKRI then must be lost due to the presence of foreign law (colonizers) with the theory, laws and policies at that time. The rights of indigenous and tribal peoples enter a new phase when Indonesia mardeka and recognized the existence of indigenous and tribal peoples in the constitution and then the birth of Decision of the Constitutional Court Number: Number 35 / PUU-X / 2012 whose ruling is to recognize customary forest is no longer state forest. Although the juridical existence of indigenous and tribal peoples has been recognized but in practice the rights of indigenous and tribal peoples can not be immediately fulfilled, this is because the existing legislation is still considered abstract and has not been able to fulfil the rights of indigenous and tribal peoples.

Considering such condition, it is necessary to formulate a law as an effort to fulfil the rights of customary law community in each region. Constitutional legislation is permissible and even delegated to regions to make local regulations to fulfil the rights of customary law communities. The formation of local regulations on the rights of indigenous and tribal peoples is done in 2 (two) ways namely first, recognition with the fulfilment of customary law community rights in general, namely the law only acknowledges but the implementation is followed up in Bupati or Bupati Decree, the rights of indigenous and tribal peoples through Perda with content material of the law which gives special rights such as recognition of customary forest and customary courts in various regions in Indonesia.

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