

# Indigenous Peoples in Indonesia's Constitutionalism Context

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Abstract: Focus of this research is examine the position of indigenous peoples in the context of Indonesian constitutionalism. This research is theoretical using literature review method based on literature and combined with bibliographic research that focuses on the ideas contained in the theory. This study shows normatively Indonesia still recognises the existence of Indonesian indigenous peoples as evidenced by the wording of the Indonesian 1945 Constitution Article 18B (2) and 28i (3). The arrangement of indigenous peoples to date has also spread in various laws and regulations. Characteristics of existing legislation are sectoral, contestation. From a number of legislation on indigenous peoples, it can be seen that the situation of irregularity that raises many interpretations about the position of indigenous peoples and their social units. The conclusions of this study indicate that understanding indigenous peoples in the context of Indonesian constitutionalism is not limited to understanding the articles of the constitution, but rather placing on the dynamics of legal politics, namely how the law (product of the constitution to operational rules) and its control (development function, law enforcement) and the system it must not completely suppress the rights of indigenous peoples. So the entrance of indigenous peoples in the context of Indonesian constitutionalism is against all forms of oppression and rights of indigenous peoples.

## 1 INTRODUCTION

The question of who is indigenous and the recognition of the existence of indigenous peoples is one of the key issues in the discourse on adat and indigeneity in Indonesia in the past few decades. Customary issues have risen in contemporary Indonesian society and even occur everywhere. This shows that the indigenous community movement is not a straight line of historical development, but an iterative process that uses past history as a form of contemporary identity. Therefore, an understanding of the subjectivity of indigenous peoples, in this case the legal position of indigenous peoples in the Indonesian legal system from the constitution to its operational regulations becomes very important.

## 2 THE PROBLEM

How the position of indigenous peoples in the context of Indonesian constitutionalism? Based on the formulation of the problem, focus of this research is examine the position of indigenous peoples in the context of Indonesian constitutionalism.

## 3 METHOD

This research is theoretical with type of library research based on literature or based on library<sup>1</sup>, focusing on reading and analysis of the primary and secondary materials and combined with bibliographic research that focuses on ideas contained in the theory. This research used a statutory approach (statute approach) and concept approach.<sup>2</sup> The legislative approach is carried out to examine various laws and regulations ranging from the constitution to various legislative regulations governing indigenous peoples.

## 4 WHO ARE INDIGENOUS PEOPLES

The term indigenous people has been widely known and has been mentioned in a number of international

<sup>1</sup> *Library based, focusing on reading and analysis of the primary and secondary materials.* See Jhony Ibrahim. 2006. *Teori dan Metodologi Penelitian Hukum Normatif*, Malang : Bayu Media Publishing, page. 46.

<sup>2</sup> Abdulkadir Muhammad. 2004. *Hukum dan Penelitian Hukum.Bandung* : PT.Citra Adiyta Bakti, page. 113.

agreements, namely: Convention of International Labor Organization Concerning Indigenous and Tribal People in Independent Countries (1989), Declaration of Cari-Oca on the Rights of Indigenous Peoples (1992), Declaration of the Earth Rio de Janeiro (1992), Declaration on the Right of Asian Indigenous Tribal People Chianmai (1993), De Vienna Declaration and Program Action formulated by the United Nations World Conference on Human Rights (1993). Now the term indigenous people is increasingly officially using it with the birth of the United Nations Declaration on the Rights of Indigenous People in 2007.

In terms of terminology, many experts are trying to define who is indigenous. Maria Rita Ruwastuti, for example, stated that the community is a community group whose ancestors were beginners in that place, whose relationship with agrarian sources was regulated by local customary law.<sup>3</sup> F.D. Hollenmann in Husen Alting, constructs 4 (four) general characteristics of indigenous peoples, namely religious, communal, concrete and cash.<sup>4</sup>

The debate about the terms and definitions of indigenous peoples still continues to this day both at the international level and at the national level of Indonesia. At the Indonesian national level, there have been many laws and regulations governing indigenous peoples quantitatively, although until now there has been no specific law on indigenous peoples. Starting from constitutional norms, laws, ministerial regulations and even local regulations that have regulated many indigenous peoples and their traditional rights, but among the various laws and regulations have not been aligned with one another.

There are various terms used, ranging from the terms indigenous peoples, indigenous law communities, customary law community units, traditional communities, remote indigenous communities, traditional villages or other names. Of the various terms that exist, the term customary law community is most widely used. The term customary law community is used as a category of grouping of people called customary law communities (*rechtsgemeenschappen*) which is a community where all members of the community are bound as a whole based on the law used, namely customary law. The term indigenous peoples is used in the Human

Rights Law, Forestry Law, Plantation Law and Environmental Protection and Management Law. This term is a translation of the *Rechtsgemeenschappen* Customary term popularized by Ter Haar. According to Ter Harr, the indigenous community is divided into two groups: a culturally based indigenous community, which is independent from the State structure, and a legally -based indigenous community, which is politically-based and functions within the State structure. Only the second group can be recognised by the State as a legal subject and these are further divided into the subgroup of genealogic, territorial and mixture of the two.<sup>5</sup>

The term indigenous peoples is used in the Law on the Management of Coastal and Small Islands. Indigenous Peoples are defined as coastal groups that have traditionally lived in a particular geographical area due to their ties to ancestral origins, a strong relationship with coastal resources and small islands and a value system that determines economic, political, social and law.

The term community is traditionally used in Article 28I paragraph (3) of the 1945 Constitution, in the Law on the Management of Coastal Areas and Small Islands. Traditional communities are defined as traditional fisheries communities whose traditional rights are still recognized in carrying out fishing activities or other legitimate activities in certain areas that are in archipelagic waters in accordance with the rules of international sea law. Meanwhile the term indigenous remote community in Presidential Regulation No. 186 of 2014 concerning Social Empowerment of Remote Indigenous Communities, is defined as a group of people who are bound by geographical, economic and/or cultural unity, and are poor, remote, and / or socio-economic vulnerable.

The traditional village in the Village Law is defined as a customary law community unit which in addition to exercising its origin rights, also plays a role in running government administrative affairs. Various terms and definitions supported by different agencies and different approaches in looking at indigenous peoples show that when talking about indigenous people, it is actually talking about the contestation of concepts, legislation and institutions that regulate indigenous peoples.

<sup>3</sup> Maria Rita Ruwastuti, 2000, *Sesat Pikir Politik Hukum Agraria : Membongkar Alas Penguasaan Negara atas Hak – Hak Adat*, Yogyakarta: Kerjasama Insist Press, KPA dan Pustaka Pelajar, page. 177.

<sup>4</sup> Husen Alting, 2010, *Dinamika Hukum dalam Pengakuan dan Perlindungan Hak Masyarakat Hukum Adat Atas Tanah*, Yogyakarta: LaksBang PRESSindo, page.46.

<sup>5</sup> Haar, T.B, 1948, *Adat Law in Indonesia*, New York: Institute of Pacific Relations.

## 5 THE RISE OF INDIGENOUS PEOPLES IN INDONESIA

Jamie S. Davidson and David Henley at Yance Arizona said there were at least 4 (four) factors of the rise of indigenous peoples movements in Indonesia. First, the indigenous peoples' movement is a contribution to the development of discourse and encouragement from international organizations. The indigenous community movement is a continuation of the anti-imperialism movement which reflects something new from the previous "left movement" because of its intention to maintain cultural diversity. Internationally, the rise of adat is something that is real and global. Starting in 1968 in Denmark by professional anthropologists by forming the International Work Group for Indigenous Affairs (IWGIA), then the World Council of Indigenous Peoples (WCIP) in 1975. In Indonesia, the emergence of indigenous peoples organizations such as the Indigenous Peoples Alliance of the Archipelago (AMAN) is important efforts, because AMAN is not only involved in international level activities but also a place for scholars and various activists to discuss the issue of indigenous peoples. Second, pressure and oppression under the New Order. Indigenous movements in Indonesia rose from a common awareness that they were victims of development programs during the New Order regime. Third, the factor of openness after the New Order, meaning that the collapse of the New Order opened up massive spaces of mass involvement in Indonesia, including that it had been used by indigenous community activists to establish AMAN in 1979 which became an important milestone for the changes that occurred with the distinctive character of the indigenous peoples movement contemporary, namely that indigenous peoples want to be valued as part of the state, not to separate themselves from the state. Fourth, the ideological heritage of customary law thinkers in the colonial period was primarily from Cornelis Van Vollenhoven; a professor at Leiden University since 1909 and the father of "Leiden School" which gave birth to key concepts in indigenous discourse to date.<sup>6</sup>

<sup>6</sup> Yance Arizona, 2016, "Memahami Masyarakat Adat : Pendekatan Evolusionis Versus Pluralis, Makalah disampaikan dalam *Focus Group Discussion (FGD)* Perlindungan Konstitusional Masyarakat Hukum Adat yang diselenggarakan oleh Pusat P4TIK Mahkamah Konstitusi, Jakarta, 21 Juli 2016.

## 6 RESULTS AND DISCUSS

Studying constitutionalism so far has only been done to the extent that it is stated on the basis of one or two articles in the constitution, which is considered as a basis or "hook". Moreover, pursuing is limited to a word link from a particular article. Studies that limit such perspectives are so strongly embedded in the legal thinking of formalism or doctrinal perspectives that the approach used is still "old constitutionalism". Studying constitutionalism thus must be done with a new approach or perspective called "new constitutionalism".<sup>7</sup> How is this discussion related to indigenous peoples in the context of Indonesian constitutionalism?

Arrangements regarding the existence and rights of indigenous peoples in Indonesia are contained in the 1945 Constitution, laws and other legislations. This shows that the existence and rights of indigenous peoples have actually been accepted within the prevailing legal framework in Indonesia even though a number of laws and regulations regarding the existence and rights of indigenous peoples can reveal the existence of an irregular situation which gives rise to many interpretations of the position of indigenous peoples. In the end it becomes an obstacle to the fulfillment of the constitutional rights of indigenous peoples.

Apart from being referred to as any entity, indigenous people or customary law communities, traditional communities, and so on, the "entrance" of constitutionalism must be the same which is against all forms of oppression and the seizure of the rights of indigenous peoples. With this similarity in perspective, the development of constitutionalism of indigenous peoples in Indonesia should: 1) go beyond the debate about the terms used in the constitution and legislation, unless the legal and political consequences allow for oppression and deprivation of rights; 2) It is not sufficient to be based on Article 18B and 28I paragraph (3) of the 1945 Constitution. Both of these articles must be placed in a position related to the articles relating to the limitation of the authority of the state administration as well as the articles relating to guarantees of basic rights; 3) The idea of constitutionalism is thus not limited to constitution, let alone about text (written constitution and written norms). Constitutionalism is not interpreted as limited in formulation or law formation, but comprehensively questions the extent to which the process of legal formulation, institutionalization, policy making, and overseeing

<sup>7</sup> Stephen L Elkin and Karol Edward Soltan, 1993, *A New Constitutionalism: Designing Political Institutions for a Good Society*.

the implementation process and constitutional development functions are carried out simultaneously; 4) Indonesian constitutionalism must not be exclusive in protecting only one indigenous community entity, but rather focusing on how to strengthen its protection position as its position is the same as the other when indigenous peoples' rights are seized.

Law No. 1 of 2014 concerning Amendment to Law No. 27 of 2007 (UU Nomor 27 tahun 2007) on the Management of Coastal Areas and Small Islands  
 Law No. 23 of 2014 concerning Regional Government  
 Law No. 6 of 2014 concerning Village  
 Presidential Regulation No. 186 of 2014 concerning Social Empowerment of Remote Indigenous Communities

## 7 CONCLUSION

To understanding indigenous peoples in the context of Indonesian constitutionalism is not limited to understanding the articles of the constitution, but rather placing on the dynamics of legal politics, namely how the law (product of the constitution to operational rules) and its control (development function, law enforcement) and the system it must not completely suppress the rights of indigenous peoples. So the entrance of indigenous peoples in the context of Indonesian constitutionalism is against all forms of oppression and rights of indigenous peoples.

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### Legislation

- The Indonesian 1945 Constitution (After Amendments)  
 Law No. 41 of 1999 concerning Forestry  
 Law No. 39 of 1999 concerning Human Rights  
 Law No. 32 of 2009 concerning Environmental Protection and Management