Indigenous People, Their Rights, And Existences: Ambiguity in Acknowledgment

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Abstract

"Indonesia is among the most diverse countries of the world, with 1,128 different ethnic groups with at least 538 registered indigenous and tribal communities. Recognition of customary law communities has been explicitly stated in paragraph 2 of Article 18B and paragraph 3 of Article 28I of the 1945 Constitution of the Republic of Indonesia." Although there is an identification of the rights of indigenous peoples in the 1945 Constitution. However, legal products are specifically intended to protect the rights of indigenous peoples." The condition is different from those stated in the two articles mentioned above. For example, in areas where local laws or regulations regarding indigenous peoples had been created, conflicts that exclude their rights to natural resources commonly happen. Hence, it is clear that there is still a denial of the rights of indigenous peoples, the denial of their identity and existence. In this case, the defining and interpreting of indigenous peoples often mean a limitation on them, to the point where the violence and deprivation of indigenous peoples' rights threaten their existence, which to some extent resulting in a systemic violation of human rights."

Keywords: indigenous people, traditional rights, Existence.

Introduction

Indonesia is one of the world's most culturally diverse nations, with 1,128 ethnic groups and at least 538 registered indigenous people communities. Although indigenous peoples and their traditional rights are constitutionally recognized and protected, discrimination and marginalization of indigenous peoples in managing natural resources still occur. Indigenous and tribal peoples still face problems fulfilling their rights, especially regarding land and natural resource management.

"Based on the Second Amendment to the Constitution of the Republic of Indonesia paragraph 2 article 18B, several sectoral regulations regarding the protection of indigenous and tribal peoples in Indonesia have been made, the various laws and regulations include: a. Human Rights Law, b. Basic Law on Forestry, c. Law on Coastal Zone and Small Islands, d. Spatial Planning Law, e. Village Law".

Even though the rights of indigenous peoples have been regulated, recognized, and acknowledged by various sectoral laws, there have not been many changes in the conditions of indigenous peoples, who are still very unfortunate compared to the other communities. In fact, they are not just living with a long historical burden of discrimination, but are also deprived of access to their land with all its natural wealth and resources. They also become alienated from their cultural, economic, and religious lives. Politically, they do not have a strong bargaining position. Economically, their life is not guaranteed. Various divisive offers have eroded the cohesiveness and the feelings of the member of a society originating from the same root. Their integrity and independence as human beings and community members are also threatened.

Problem Statement

Although there are significant changes in the political and legal policies regarding the development of indigenous people communities, their condition has yet to undergo noticeable improvement. First, the recognition and acknowledgment of indigenous people communities as stipulated in paragraph 2 of Article 18B and paragraph 3 of Article 28I of the Constitution of 1945 cannot yet be implemented. Hence, indigenous people communities have not yet obtained tangible benefits.

Secondly, the obscurity of their legal standing makes it hard for them to obtain equality and justice. Even though it is clear, as citizens, they have constitutional rights that states, like any ordinary citizen, should guarantee should be. Their state in education, culture, health services, and the socio-economic field is generally undeveloped. This condition was exacerbated when they were powerless to face foreign parties in

the name of national economic policies, which possess their customary lands right. Although they have tried to fight for their constitutional rights that have been violated, people would often regard them as a nuisance. Hence no aid was given to them.

The injustice is proven, when disputes regarding national development policies of many regions occur, whether due to coal, gas, oil, and other mineral resources being mined within their traditional territories or due to overlapping regulations between customary lands and forestry. It is almost certain that the indigenous community will be the losing party, even though the identity and respect for traditional law communities are textually regulated in several sectoral laws. This condition can be seen from the total 1400 land disputes in the West Sumatra Court, where none of the indigenous peoples were in the winning party. Similarly, the same situation can be seen when the Ministry of Forestry takes over the ownership of over 100ha of layout land rights. Inequality also caused Sambas Tribe in West Kalimantan to not claim their Tembawang ulayat right since the government stated that the land is in a protected forest.

“At this point it can be said that indigenous peoples face various challenges in the development of the contemporary world. Some of them are issues of recognition of the existence and variety of rights, environmental sustainability of indigenous peoples, natural environment, and cultural environment, such as forests, rivers, and land, which are very important for the survival of local communities.” "Another important thing is that their economic needs are increasing due to global competition that has even reached remote villages. The influence of external economic forces has put a lot of pressure on traditional communities. In the end, these various communities do not just face difficult choices and are accompanied by must bear the pressure (Bamba 2004; Abdullah, 2006).

Research Objectives

Literature Review

Recognition of indigenous People's Community Existence

The presence of indigenous people communities in Indonesia is an undeniable phenomenon. The existence of indigenous peoples must receive optimal attention, considering that there has been a degradation of the existence of these indigenous peoples in the midst of global modernization. Therefore, the state must provide guarantees and protection for the existence and rights of indigenous peoples. To this day, their acknowledgment and protection have only been partially realized through the formation of several regulations and laws in Indonesia, like the Basic Agrarian Law, Forestry and Environmental Law, Village Law, etc.

For example in Article 3 of the Basic Agrarian Law which basically regulates the rights of indigenous peoples regarding customary rights as long as they do not conflict with the interests of the state and national interests. So it is natural that there is concern from the National Law Commission, where there is agreement at the level of lawmakers who believe that customary law and its communities will vanish in the future. Then came the idea that it is necessary to modernize them

This is reflected in the spirit of the Basic Agrarian Law, which places the state and national interests above the rights of indigenous peoples. Undeniably, regional autonomy provided by the government, which is supposed to provide living space for social and cultural diversity (customary law), became an implication for the degradation of the indigenous people's rights. Therefore, the applicable national law often seems to ignore the principles of local law.”

The same conditional recognition can also be seen in

“(1) The Constitution of 1945, Article 18 B paragraph (1) and paragraph (2). Though this article is a milestone in recognition of the indigenous people's existence, it also limits that recognition and acts as a fence for the other regulations beneath the constitution.”

“(2) “More or less the same provisions are also contained in Article 6 of Law Number 39 of 1999 regarding Human Rights, which explicitly recognizes the rights of indigenous peoples. However, this kind of recognition is not enough in the discourse on protecting and maintaining the existence of customary law who live ambiguously are under the laws of the land.”
“(3)“Article 51, Law No.24 of 2003 on Constitutional Court. This article does not stipulate protection, recognition, and acknowledgment for aboriginal and tribal peoples. However, it acknowledges the aboriginal

peoples as parties who can apply for judicial review, therefore also acknowledging their legal standing.""This article also provides a chance for them to fight against regulations that violate their constitutional rights. However, this significant progress is often hampered by a formal requirement that each customary law community must fulfill to have legal standing as an applicant, namely the legality/conditional recognition of the indigenous people community, which has to be realized in the form of district regulation."

"(4) "Furthermore, in the legal statements of Article 4 paragraph 3 of 1999 Basic Forestry Law, it also explicitly recognizes the rights of indigenous peoples. However, this security is obtained if it is recognized by the government. Of course the paradox of protection terminology.

(5) "Law Number 23 of 2014 related to the Regional Government. This law guarantees the carrying out of the rules and regulations by the district regulations concerning the village and land issues." "According to this regulation, indigenous peoples must obtain legal standing from the district government, particularly if they want to submit an appeal to the Constitutional Court."

Indigenous People Rights

The discussion of the righteousness of aboriginal peoples is very complex matter. Until now, there have been several debates about whether the indigenous peoples have both constitutional rights and traditional rights or whether one of the rights is already covering the other right. Because of that, the notion of indigenous rights is often sided aside."

Though often mentioned in various regulations, the constitution of 1945 does not explain what rights the indigenous peoples have and what needs to be fulfilled and protected by the state. In the constitution, these rights are termed traditional rights of indigenous peoples. Until now, no adequate explanation has been provided for explainatiom of the categorization of the traditional righteouness of aboriginal peoples. Only the copies of the traditional rights of aboriginal people's terms throughout the existing laws and regulations are present, but no explanations were given.

According to Mahyuni, traditional rights are the rights created from, by, and for the community within the scope and boundaries of the lives of the people concerned, as a legacy of their ancestors to maintain a natural and sustainable life. **The principle contained in traditional rights referred to the right to survive biologically, socially, and with cultural values and beliefs. Whereas, the Constitutional Court provides an understanding of traditional rights as specific or special rights inherited and possessed by a community for the resemblance of origins (genealogy), the resemblance of territories, and some other traditional objects, righteousness for communal land, forests, rivers, and application of the practices in their communities**.

Traditional rights, non-derogable rights granted by the constitution to indigenous law communities in the regions, have not received recognition and protection from the state because the central government does not fully grant regional authority. The following are some of the conventional rights of aboriginal and tribal groups in Indonesia, whose existence is guaranteed in several legislative rules:

1) "Forest supervision and usage rights are related to customary forest issues in the Forestry Law. It is elaborated that state forest is the kind of forest located on land that is not burdened with rights of land, which includes forests previously controlled by customary law communities.

"2) "Law No 5 of 1960 on Basic Agronomic Law recognizes the rights of aboriginal communities for the land with certain conditions."

"3) "The right to manage plantations. As maintained in 2014 in Law Number 39 concerning Plantations, the recognition of the customary rights concerning customary law communities in this law is limited, as long as it does not conflict with statutory regulations."

4) "Protection of the Environment. Where the Government has the authority to establish policies regarding procedures for recognizing the existence of indigenous peoples, local wisdom, and other rights of the indigenous peoples concerned with environmental protection and management."

5) “Then regarding the administration of coastal regions, according to Article 61 paragraph (1) of Law Number 27 of 2007 concerned with the Coastal Administration and Minor Islands, the Government identifies, respects, and secures the rights of aboriginal peoples and regional wisdom in coastal domains and islands.”

Methodology

The research method used was legal constructivism which sees reality as in the form of various mental constructs based on social experience, local and specific and dependent on the person who does it. The epistemological relationship between observer and object was single and subjective and resulted from a combination of interactions between the two parties. Therefore the main method used was hermeneutic and dialectics. The method used was socio-legal research in the form of field research with data collection instruments in the form of a literature study and in-depth interviews with selected resource persons.

Discussion and Conclusion

Conditional and Ambiguous Recognition

Although the recognition and regulation of aboriginal peoples and their conventional rights are repeatedly mentioned in several laws and regulations, The question 'Does the Indigenous People Existing Indonesia? often occurs in academic literature. On the one hand, the laws and regulations were issued by the Government that were identified the presence of Indigenous people communities.

However, they also did not formulate short and straightforward terms and procedures for the recognition of the presence of regional community rights. On the contrary, the Act only maintains the provisions that have been in force before.

When asked to acknowledge the existence of customary forests, the Ministry of Forestry always argues that the process must first be preceded by the local government's acknowledgment of the presence of aboriginal peoples. Therefore, noticing the regulatory model in legislation regarding the impacts of implementing regulations on the forestry sector, it seems clear that customary (legal) communities and their customary land rights have been castrated.

This also seems obvious when an in-depth analysis of the regulations containing indigenous peoples was carried out. One of the most obvious is in articles 3 and 5 of the BAL. “These articles show the recognition with limitations provided by the LoGA to aboriginal peoples, the validity of their traditional law, and their rights. This model of state recognition of customary rights at least provides an understanding that: “[…] in principle, traditional rights are identified as long as there is a truth that the community in question still exists, the community in question will first be heard before its rights are recognized.

However, in his further explanation it is stated: "[...] cannot be justified for the legal community concerned to prevent the granting of the right of cultivation in question if it is necessary to support wider interests." “The same thing cannot be justified for a legal community, under the pretext of their conventional rights, for example rejection of plans to clear forests to a larger range and in a sustainable manner.
In conclusion: “The interests of indigenous peoples must be subsidiary to the concerns of the nation and the wider territory […].” "From this explanation, we can clearly observe that in accordance with the various legal products, the interests of aboriginal peoples have to be subordinated to the interests of the sovereign state."

Another real example of the contrast between indigenous people’s structures and their customary law systems and state structures with the concept of the State of Justice in the Indonesian context can be seen in the frequent emergence of agrarian conflicts involving indigenous people on the one hand and the state or companies on the other. This is initialed by a considerable difference in legal conception (legal gap) about land between customary and Indonesian favorable laws.

Based on the provisions of Indonesia's positive law, the Constitution of 1945, Article 33 Paragraph 3, together with all its derivative legislation, it can be noted that earth, water, and space, with all things contained therein, are viewed as a mere material object ‘wealth’ that can be utilized to encourage the creation, increasing the standard of living economically in society as a whole (... for the extensive fortune of the people). Due to the existence of the country as a macro-socio-political entity that has exclusive power at the highest level of all people within its territory (as an inherent part of the concept of the State of Law), the land as material wealth

is, at the highest level, controlled by the state. On the other hand, according to customary law, the land is not a material thing but has an esoteric meaning (as a form of religious-magical pattern). The motherland or mother gives birth to everything that exists on earth, including human beings and other living things. Consequently, there is a close relationship between indigenous people and the inseparable land, like a relationship between a child and his mother.

In addition, since the Ministry of Forestry claimed that all forests in Indonesia belonged to the State, many indigenous peoples living in the forests were displaced. This situation eventually led to conflict between indigenous peoples and the government.

There are two implications for indigenous Indonesians from this kind of regulation. First, the state has the authority to grant or withhold recognition of indigenous peoples, because in various regulations in Indonesia the category of recognition of indigenous peoples is categorized as conditional recognition. "Secondly, at least the State denies the original rights of indigenous peoples."

Conclusion

The regulations on indigenous people are inadequate. Limited recognition of indigenous peoples is based on the excessive limitation on them. On the one hand, the state wants to recognize them. On the other hand, it suspects these customary rights may disrupt the so-called 'national interest,' which is sometimes interpreted as the grand opening of plantations and forests. The national interest should be interpreted as citizens interest to empower and manage their resources. Therefore, the national interest must be translated as the vision and mission of the government to develop the country beginning with the periphery, the community that had been marginalized.

"Based on the above statement, the constitution requires a change. Such change can be done through formal amendment, formal interpretation by judicial interpretation, and the implementation of legal construction in the operational and policy regulations. Formal amendments have the advantage of directly changing the constitution's text, thus avoiding the often highly biased meanings of the legal texts available today. However, this is not easy, considering the significant procedures and political impulse to change the constitution. The amendments are also necessary to provide the protection and fulfillment of human rights and, specifically, regulate the existence and rights of indigenous peoples on the land and natural resources in a cluster of arrangements with the state control over them.

In addition, restrictive regulations on the existence and rights of indigenous people need to be reviewed since they have been 'used' to discriminate and neglect the rights of indigenous people. A number of requirements existing today justify the provisions of the law to limit the existence and rights of indigenous people.

Furthermore, at the level of legislation, an integrated arrangement of the existence and rights of indigenous people is required. So far, the existence and rights of indigenous people have spread in various laws. Within these various laws, there are unlawful arrangements on terms, definitions, criteria, and rights of indigenous people, administration on existence, lack of clarity of mechanisms or recognition of pluralism, resolution of the proper mechanism, and affirmation of the concept of indigenous people's rights, and paradigms and perspectives in treating indigenous peoples as part of Indonesian citizens.

Such uncertainty or inconsistency leads to the weakening or even elimination of indigenous peoples rights and the common law that accompanies them. These integrated regulations can be made by providing a law on recognizing and protecting indigenous people. This is in line with the mandate of the 1945 Constitution of the Republic of Indonesia which requires that further regulation of the existence and rights of indigenous people be regulated in the law. The two main issues underlying the need for a special law on indigenous people, namely: to overcome the problems encountered by the community in the field (social aspect) and to overcome the problem of complicated rules on the legal customary (legal aspect), which all this time has caused uncertainty about who indigenous people are and what their rights over livelihood resources are.

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