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Indigenous Community Existence in Indonesia's Constitution

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Abstract

Law enforcers in their thoughts and behavior in enforcing the law improve the existence of indigenous peoples and their traditional rights. This can be proven by the process of law enforcement starting from the police, prosecutor's office to the court that gave bad decisions. This conceptual study aims so that everyone can understand the meaning of indigenous peoples, the existence of indigenous peoples in the Indonesian constitution, and recognize and respect the existence of indigenous peoples so that justice can be upheld for indigenous peoples. Based on the study it can be concluded that indigenous peoples are people who have territory, the government, law and citizens are independent and have existed since the Indonesian state was not yet formed and the existence of indigenous peoples in the Indonesian constitution has been recognized since Indonesia's independence until now whose regulations have been clearer than previous constitutions.

INTRODUCTION

Society is human nature. Humans are born naturally have social relations, at least with their parents. The root or basis of society is the family and the roots of the family are individuals. Before the nation state was formed as it is today, or known as the modern state, creatures called humans were already in society. Already have social relations.

Society is not a creation of the modern state, but society is a natural thing. Without a state, humans remain in society. The slogans of earlier thinkers such as Aristotle, have discussed this in ancient Greece. Even if you go back to the history of the first humans, you will still find society.

Over time, terms related to society have also developed. There are so-called local communities, which are people who first lived in an area. There is a so-called immigrant community, which means new people come to a certain area and settle down. There are also immigrant communities but their migration is not to stay in an indefinite time, but only for a certain time.

Local communities and immigrant communities who become local communities, of course, do not have the same value as immigrant communities, which are only temporary. The state should give appreciation to local people who have had descendants for generations in an area. People in the local category, and of course, have had a long time in society, necessitating the existence of a common rule. It aims to maintain balance in society.

Recently, in the enforcement of environmental criminal law, plantation criminal law and forestry criminal law, local communities are the perpetrators. Particularly in Riau, attracting public attention in several cases, three burnings of land and one felling of trees, as follows:

1. *Perkara No. Reg: PDM-97/Pekan/10/2019 Terdakwa: Syafrudin als Si Syaf bin Muhammad Ani*
2. *Perkara No. Reg: 311/Pid.B/LH/2019/PN.Prp Terdakwa: Irwan als Iwan bin Zainal*
3. *Perkara No: 187/Pid.B/2020/PN.Bls, Terdakwa: RUSTAM Bin. Alm. KARTAWIRYA*
4. *Perkara No 89/Pid.B/LH/2020/PN Bls, Terdakwa: Bongku Bin Jelodan (Alm)*

Enforcement of criminal law, whether environmental crime, plantation crime and forestry crime, mostly ignores the existence of indigenous peoples. Of the four cases above, one was acquitted and three remained guilty. Syafrudin, who was acquitted, remains unsolved, because the Public Prosecutor (JPU) has filed an appeal to the Supreme Court (MA) and until now (1/2021), the Supreme Court's decision on the cassation of Syafrudin's case has not been determined.

One of the mass actions carried out by students was to ask the Head of the Riau Regional Police (POLDA Riau) in February 2020. The purpose of the action is that law enforcement related to land burning is carried out fairly. The action was welcomed by the Riau Police Special Criminal Investigation Directorate.

At the discussion stage with the Investigation Department, the police denied the existence of local communities known as indigenous peoples and in Law Number 39 of 2009 concerning Environmental Protection and Management in Article 69 paragraph (2) referred to as "local wisdom". Article 69 paragraph (2) reads as follows: "The provisions referred to in paragraph (1) letter h pay serious attention to local wisdom in their respective regions". The reason for the rejection of the existence of indigenous peoples is due to the absence of further arrangements in the form of Regional Regulations.

Law enforcement at the Attorney General's Office can also be concluded in part, the same understanding as law enforcement in the Police. Judging from the four cases above, the Prosecutor continues the legal process to the Court. The same thing happened among the judges. This fact can be seen from the various judges' decisions relating to the four cases above.

Law enforcement is a state tool to fulfill the rights of citizens to get justice. Law enforcement is good and right, it will give birth to justice. Bad and wrong law enforcement will give birth to injustice. As a result of tyranny, the welfare which is the goal of the state will not be fulfilled, so that citizens will not get happiness.

The state was formed to protect and provide guarantees for the rights of citizens. Far from that, the state must also guarantee human rights, because how is it possible that citizens' rights are fulfilled if human rights are violated. Indonesia to guarantee and provide protection for the rights of citizens and human rights, formulated a state basis, namely Pancasila and the 1945 Constitution of the Republic of Indonesia as the main reference for running the country (UUD 1945).

Every regulation that is formed, including the Law (UU) must not conflict with Pancasila and the 1945 Constitution. Pancasila and the 1945 Constitution are manifestations of the Indonesian nation. The problems above make the writer need to conduct a study on "the existence of indigenous peoples in the Indonesian constitution".

Based on the above background, in this article three discussions are formulated that can bring the writer and reader to a bright spot on the Existence of Indigenous Peoples in the Indonesian constitution, as follows: First, the definition of indigenous peoples. Second, the existence of indigenous peoples before the amendment to the 1945 Constitution. Third, the existence of the community after the amendment of the 1945 Constitution.

The objectives of this article are as follows: first, so that everyone can understand and understand the meaning of indigenous peoples and understand the existence of indigenous peoples. Second, so that everyone can understand, acknowledge and respect the existence of indigenous peoples in the Indonesian constitution from time to time. Second, that by understanding, acknowledging and respecting indigenous peoples, it is hoped that justice can be served for indigenous peoples.

DEFINITION OF INDIGENOUS PEOPLE

Experts put forward several definitions of indigenous peoples. Between one expert and another, some use different terms. There are those who refer to indigenous peoples and some use the term customary law communities (translation from *rechtsgemeenschappen*¹).

Safrin Salam² quotes Hazairin and Ade Saptomo on the notion of indigenous peoples. Hazairin uses the term “customary law community” in referring to “customary community”. Customary law communities are community units that have the tools to be able to stand on their own, which have a legal unit, a unitary authority, and a unitary environment based on shared rights to land and water for all its members

Ade Saptomo does not use the term customary law community. Ade uses the term indigenous peoples. Ade stated that indigenous peoples are an autonomous community unit, that is, they regulate their life systems (law, politics, economy, etc.). Indigenous peoples are born from and develop together, and are maintained by the community itself.

Different from the two views above. Ida Bagus Putu Eka Suadnyana and Wayan Titra Gunawijaya³ equating traditional villages with customary law communities. Traditional Village is defined as a unit of customary law community in the Province of Level I Bali which has a unified tradition and manners of social life of the Hindu community from generation to generation in the ties of Kahyangan Tiga, which has a certain area and its own assets and has the right to take care of its own household. This definition is quoted from the Regional Regulation of the Province of Bali Number 3 of 2003. The Traditional Village was later changed to Pakraman Village. According to Ida and Wayan, as a customary law community unit, it means that the Traditional Village is bound by customs or customary law that grows and develops within the local community. In Bali, customary law is better known as "Awig-awig" which is the basic guideline of the Traditional Village in its government.

¹ Lalu Sabardi, “Konstruksi Makna Yuridis Masyarakat Hukum Adat Dalam Pasal 18b UUD NRI Tahun 1945 untuk Identifikasi Adanya Masyarakat hukum Adat”, *Jurnal Hukum dan Pembangunan* 43, no.2 (April-Juni 2013): 1.

² Safrin Salam, Perlindungan Hukum Masyarakat Hukum Adat Atas Hutan Adat, *Jurnal Hukum Novelty* 7, no.2 (Agustus 2016): 210.

³ Ida Bagus Putu Eka Suadnyana dan Wayan Titra Gunawijaya, “Akibat Hukum terhadap Hak Masyarakat Adat Dalam peralihan Agama Di Desa Adat Dalung”, *Prakarsa: Jurnal Hukum Agama Hindu* 3, no. 1 (2019): 84.

Jawahir Thontowi⁴ use the term customary law community. Jawahir explained the Indigenous Law Community in several criteria, as follows:

1. A group of residents have a common ancestor (geneology),
2. Live somewhere (geographical),
3. Have a common purpose in life to maintain and preserve values and norms,
4. A customary law system is enforced which is adhered to and binding
5. Led by traditional leaders
6. Availability of a place where the administration of power can be coordinated
7. Availability of dispute resolution institutions, both between indigenous and tribal communities of different nationalities and ethnic groups.

So Jawahir concluded that the Customary Law Community is a group of people who are bound by their customary law order as joint citizens of a legal alliance because of the similarity of residence or on the basis of descent.

Asmah uses the term indigenous peoples. Asmah defines indigenous peoples as an autonomous community unit. meaning that they regulate their life system (law, politics, economy.) Indigenous peoples are born and grow together, and are guarded by the community itself.⁵

Indigenous peoples are communities that live based on ancestral origins from generation to generation on a customary territory. They have sovereignty over land, natural wealth, and socio-cultural life regulated by customary law and customary institutions.⁶

In Europe, especially Germany, the term indigenous peoples is not popular, because the language is different from Indonesian. Different words do not mean different meanings. Frederiech von Savigny stated that "law is a reflection of the soul of the people". Savigny argues that "laws are not made, but grow and develop with society". This means that the law is made by the community itself according to its needs. G. Puchta calls it *Volgeis*, namely the law grows and strong together with the growth of the people and from the power of the people and in the end it dies if the nation loses its nationality⁷. The explanation of Savigny and Puchta makes it

⁴ Jawahir Thontowi, "Pengaturan Masyarakat Hukum Adat dan Implementasi Perlindungan Hak-Hak Tradisional", *Pandecta* 10, no. 1 (Juni 2015): 3-4.

⁵ Asmah, *Hukum Adat Indonesia (Suatu Pengantar)*, Cetakan Pertama, (Makassar: Fahmis Pustaka, 2017), 44.

⁶ Sefa Martinesya, "Tanggung Jawab Pemerintah Terhadap Pemenuhan Hak Masyarakat Adat", *Jurnal: Nurani Hukum* 3, no.1 (Juni 2020): 1.

⁷ Zainuddin Ali, *Filsafat Hukum*, Cetakan Ketiga, (Jakarta: Sinar Grafika, 2009), 60.

clear that there are laws that live in society which are original from the society itself. In Indonesia, people call it the term customary law community or indigenous peoples.

Currently, indigenous peoples are described in the form of an organization called a traditional village. In Law No. 6 of 2014 concerning Villages (UU Desa), it is contained in Article 1 Paragraph 1, namely "A village is a traditional village or what is called another name, hereinafter referred to as a village is a legal community unit that has territorial boundaries that are authorized to regulate and manage government affairs in the interests of the local community based on community initiatives, origin rights and or traditional rights that are recognized and respected in the government system of the unitary State of the Republic of Indonesia.

Indigenous peoples or customary law communities are two different terms but the meaning is the same. The explanation above provides knowledge that customary law communities or indigenous peoples are people who already have a territory, law, government and people. It can be said that before the existence of a modern state, indigenous peoples were an independent and sovereign state. Soehino⁸ explains that the elements of a state in Dutch constitutional law are territory, citizens and a sovereign government. As Soehino argued, indigenous peoples have fulfilled the elements of the formation of a state..

Indigenous people are the forerunner of the Indonesian nation. A society that existed before the Indonesian state was formed. In accordance with the theory of state formation, that one of the elements is the people. Indigenous peoples are elements of the people in the formation of the Indonesian state. The problem is, when the state has been formed, can indigenous peoples still exist as before the Republic of Indonesia was formed?

THE EXISTENCE OF INDIGENOUS PEOPLES BEFORE THE AMENDMENT TO THE 1945 CONSTITUTION OF THE REPUBLIC OF INDONESIA

Indonesia's first constitution was the 1945 Constitution of the Republic of Indonesia (UUD 1945). with regard to indigenous peoples is regulated in Chapter VI concerning Regional Government, Article 18 which reads, "The division of Indonesia's regions into large and small regions, with the form of government structure determined by law, taking into account and

⁸ Soehino, *Hukum Tata Negara: Sejarah Ketatanegaraan Indonesia*, Cetakan Pertama, Edisi Pertama, (Jakarta: Liberty, 1984), 1.

remembering the basis of deliberation in the state government system, and rights of origin in special areas.

The explanation of Article 18 is as follows:

"I. Because the State of Indonesia is an "eenheidsstaat", then Indonesia will not have an area within its environment that is "Staat" as well.

The territory of Indonesia will be divided into provinces, and the provinces will also be divided into smaller regions. These regions are autonomous (streek - and locale rechtsgemeenschappen or merely administrative in nature, all according to rules that will be stipulated by law. In autonomous regions, regional representative bodies will be held because even in regions the government will jointly be based on deliberation.

II, In the territory of the State of Indonesia there are ±250 "Zelfbesturende landschappen" and Volksgemeenschappen, such as villages in Java and Bali, the state in Minangkabau, hamlets and clans in Palembang and so on. These areas have an original arrangement, and therefore can be considered as a special area.

The State of the Republic of Indonesia respects the position of these special regions and all state regulations concerning the area will remember the rights of the origin of the area."

In the 1945 Constitution, indigenous peoples are not mentioned textually in Article 18. Indigenous peoples are implied in the sentence "...original rights in special areas". As explained in Article 18 in number II, that "...Zelfbesturende landschappen" and Volksgemeenschappen are like villages in Java..., These areas have original layouts,...". This explanation equates the term adat community with village or other equivalent designations. In accordance with the previous explanation, that in the current laws and regulations as explained by Ida and Wayan based on the existing regulations in Bali and the Village Law, that the village is the indigenous community itself.

To respect the existence of these indigenous peoples, the state promises to remember the rights of origin of indigenous peoples' territories which are special in forming regulations relating to indigenous peoples' territories. The explanation of the 1945 Constitution is something that cannot be separated from the 1945 Constitution. Therefore, this acknowledgment is not just writing on paper, but something that is sacred and must be obeyed by whatever exists in the Republic of Indonesia, including the country itself.

After the Republic of Indonesia changed the form of the state from unitary to federal, the 1945 Constitution was replaced with the Constitution of the United States of Indonesia (KRIS). At the time of the federal state, the term indigenous peoples was also not known textually. Regarding adat, it is regulated in KRIS in Articles 144, 145 and 146 which relate to the Court. The reason is as follows:

“Article 144 (1) Civil cases and cases of civil penalties, only enter cases that are tried by courts convened or recognized with or under the power of law, including regional judges Swapradja, customary judges and religious judges.

Article 145 (1) All interference, however, by non-judicial instruments, is prohibited, except where permitted by law. (2) This principle only applies to the Swapradja courts and customary courts, only it has been regulated by asking for consideration from a judge appointed by law.

Article 146 (1) All judicial decisions must contain the reasons and in the case of punishment must refer to the statutory rules and customary law rules which are the basis for the sentence.”

The existence of customary law shows that indigenous peoples still exist. Customary law cannot be separated from actors who can state that someone's actions are against the law or not against the law. These perpetrators are called judges, so customary law requires the existence of customary judges. Customary courts also cannot be separated from customary law and customary judges, because the judicial process requires a place.

Customary courts, customary judges and customary law as regulated in the KRIS, are evidence that the existence of indigenous peoples is still recognized during the KRIS. These three things are clearly stated in KRIS.

Not so long ago, the form of the Republic of Indonesia again changed from federal to unitary. The constitution changed again. During this period, the Provisional Constitution of 1950 (UUDS 1950) was enacted.

During the implementation of the 1950 Constitution, the regulation regarding the recognition of the existence of indigenous peoples was in Article 104 paragraph (1). The article relates to the regulation of the Court. In the 1950 Constitution, there were fewer arrangements related to the existence of indigenous peoples when compared to KRIS.

The 1950 Constitution Article 104 paragraph (1) reads, "All court decisions must contain the reasons and in sentencing cases mention the statutory rules and customary law rules that are used as the basis for the sentence." Article 104 paragraph (1) provides recognition in the form of customary law which can be used as a legal basis in a decision. This acknowledgment can of course be the basis that the 1950 Constitution still recognizes the existence of indigenous peoples.

THE EXISTENCE OF INDIGENOUS PEOPLES AFTER THE AMENDMENT OF THE 1945 CONSTITUTION OF THE REPUBLIC OF INDONESIA

After the Decree of July 5 by President Sukarno, the 1945 Constitution was reinstated to replace the 1950 Constitution. After reformation, the 1945 Constitution was amended. The

regulation regarding indigenous peoples is contained in Article 18B paragraph (2) "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 by law. "

The 1945 Constitution after the amendment clearly states the recognition of indigenous peoples with the term customary law community units. The state also recognizes the traditional rights of indigenous peoples. Not only recognize but the state also respects.

Article 18B paragraph (2) provides several criteria for recognizing and respecting indigenous peoples and their traditional rights, as follows:

1. That the traditional units and rights of the customary law community are still alive.
2. In accordance with the development of society
3. In accordance with the principles of the unitary state of the republic of Indonesia⁹
4. Regulated by law

These four criteria serve as benchmarks for the recognition and respect for indigenous peoples.

Article 18B paragraph (2) leaves the question what is meant by "...which is regulated by law"? Does the absence of a law that regulates the recognition and respect for indigenous peoples' units causes the existence of indigenous peoples to be lost or non-existent?

The explanation at the beginning of this journal already stated that everyone will have social relations. Society existed before the formation of a so-called state in the modern age. This is the implication of humans who have the nature to socialize. Society is a necessity for humans themselves.¹⁰

The formation of a state requires elements of citizens. Communities that have existed before the formation of the state, became the forerunner to fulfill the element of citizens. Currently, the people who become the forerunners of citizens are known as indigenous peoples. Indigenous peoples and their nationalities are certainly no longer separate.

New questions arise after the presence of the state in the modern age. Does the inseparability of existence as indigenous peoples with existence as citizens eliminate their existence as indigenous peoples? It really depends on state policy.

⁹ Amrina Rosyada, Esmi Warassih, Ratna Herawati, Perlindungan Konstitusional terhadap KMHA dalam Mewujudkan Keadilan, *Kanun Jurnal Ilmu Hukum* 20, no. 1, (April, 2018): 2

¹⁰ Nur Idam Laksono, *Tasawuf Untuk Kemanusiaan (Kajian terhadap Konsep Fitrah Murtadha Muthahhari)*, *Attanwir Jurnal Kajian Keislaman dan Pendidikan* 5, no. 2, (September 2015), 23-24.

A state formed for a common purpose will not erase the existence of indigenous peoples. Culture is one of the wealth that must be maintained by the state and the existence of indigenous peoples itself is a culture that lives in a country. Indonesia currently maintains a culture related to the existence of indigenous peoples, as regulated in Article 18B paragraph (2) of the 1945 Constitution after the amendment.

Social reality also proves that indigenous peoples still exist today. Customary territory, customary government, customary law and indigenous peoples still exist. Social relations between one person and another continue to uphold their customs, even though there has been discoloration in some areas.

The traditional rights referred to in Article 18B of the 1945 Constitution after the amendment are those related to the existence of the territory¹¹ adat, adat law, adat government and adat people themselves. The absence of laws governing indigenous peoples does not make the existence of indigenous peoples blurred or missing or non-existent. Because the existence of indigenous peoples has been cultivated in everyday life, without any coercion from any party. Humans with their awareness and nature for knowledge have led them to choose life with good and right behavior.¹²

The sentence "...which is regulated by law" in Article 18B of the 1945 Constitution after the amendment does not cause the existence of indigenous peoples to be lost or blurred because there is no law that regulates them. The state should continue to recognize and respect the existence of indigenous peoples, because the reality of the existence of indigenous peoples does not depend on the state or a law-level regulation. The existence of indigenous peoples is something that is original in the culture of the Indonesian nation, not made from anywhere.

What is meant by "...what is regulated by law" is not the existence of the indigenous community itself, whether or not it exists. The regulation regulated in the law is the regulation on the implementation of the traditional rights of indigenous peoples with the laws and regulations established by the state. The implementation of the traditional rights of the surviving indigenous peoples must be in accordance with the principles of the Unitary State of the Republic of Indonesia.

¹¹ Ananda Prima Yurista, "Pengejawantahan Hak Tradisional Masyarakat Hukum Adat Dalam Pengaturan Pengelolaan Wilayah Pesisir Dan Pulau-Pulau Kecil", *Jurnal Legislasi Indonesia* 13, no. 2 (Juni 2016), 205.

¹² Kholili Hasib, "Manusia dan Kebahagiaan: Pandangan Filsafat Yunani dan Respon Syed Muhammad Naquib al-Attas", *Tasfiah: Jurnal Pemikiran Islam* 3, no. 1 (Februari 2019): 23.

Why is it the implementation that governs? Because in Article 18B paragraph (2) of the 1945 Constitution after the amendment it has been stated "...as long as it is still alive". This means that without a regulating law, these traditional rights still apply or are implemented by indigenous peoples. Therefore, so that there is no overlap between the implementation of the traditional rights of indigenous peoples and the laws and regulations that have been established by the state, rules are made to regulate them.

The principle of the state with the traditional rights of indigenous peoples is universally impossible to contradict, because the principles of the state are extracted from the traditional rights of indigenous peoples themselves. This can be proven by current social realities or historical facts relating to the determination of the state foundation at the General Body of Investigating Preparation for Indonesian Independence (BUPPKI). It should not be forgotten that the basis of the state is extracted from Indonesian culture itself.¹³

CONCLUSION

Indigenous peoples are people who have territory, government, law and citizens that are independent and have existed since the state of Indonesia was not yet formed. The existence of indigenous peoples in the Indonesian constitution has been recognized since Indonesia's independence until now. Recognition of the existence of indigenous peoples in the current Indonesian constitution, has been regulated more clearly than in previous constitutions.

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¹³ Zainul Akmal, "Relevansi Pasal 29 Konstitusi Terhadap Sila Pertama Pancasila Sebagai Dasar Negara", *Lex Renaissance* 3, no. 1, (JANUARI 2018): 130-131.

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