

PROTECTION OF INDIGENOUS PEOPLES IN THE PERSPECTIVE OF HUMAN RIGHTS IN INDONESIA: REALITIES, PROBLEMS AND SOLUTIONS

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Abstract

The 1945 Constitution upholds the human rights of every citizen without exception, but in practice this constitutional mandate is not implemented properly and even tends to marginalize indigenous peoples. For this reason, it is necessary to seek a constitutional settlement to be able to provide the rights of indigenous peoples as they should be guaranteed in the constitution. This paper is a sociolegal research. The conclusion of our study is that there are still many violations of the constitutional rights of indigenous peoples from a human rights perspective that the government should not do. The recommendation of our study is that the government immediately ratify the Draft Law on Indigenous Peoples as a concrete step in upholding the constitutional rights of indigenous peoples.

Keywords: Human Rights, Indigenous Peoples, Bill of Indigenous Peoples.

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INTRODUCTION

One of the ideas about human rights arises from a theory of natural rights (natural rights theory) which is rooted in natural law theory, because basically human rights are owned by humans solely because they are human. The existence of these human rights is not granted to him because of positive law or from other societies, in other words, even though a human is born with different skin color, gender, culture, religion, ethnicity, he still has human rights. Another opinion argues that all individuals are endowed by nature with inherent rights to life, freedom and property, which are basically their own and cannot be revoked by anyone including the state (Rhona, 2008). Through a social contract, the protection of these inalienable rights is delegated to the state. But that does not mean the state can ignore the social contract. According to John Locke, when this happens, the people are free to take down the government and replace him with another government who is willing to maintain the social contract. However, the conception of human rights in this natural theory is no longer entirely the same. The substance contained therein is no longer limited to natural rights such as civil and political rights, but also includes other rights such as economic, social and cultural rights.

Based on the description above, we can understand that in essence these human rights are not limited to who the person is, this right is inherent in him/her as an human being, as well as the expansion of the meaning of rights which is no longer fixated on civil and

political rights but extends to economic, social and economic rights also culture. Frederic Megret in Human Dignity: A Special Focus on Vulnerable Groups argues that basically all rights have the same value or degree, and that is the right of each person which in general is an area where a person's dignity is at stake regardless of status or type of rights and does not except for indigenous peoples.

Communities and customs are an unified entity that grows and develops in the same circle and will remain as long as their noble values are maintained. There are still many indigenous communities scattered throughout the archipelago who continue to hold on to their noble values. They have for generations shown their existence in an area (*de facto*) which they have always made the area a place to live and carry out their noble values. However, based on *de jure* their existence is often the subject of debate which is then followed by conflict or dispute. In fact, it is clear in the constitution that indigenous peoples are an integral part of the Republic of Indonesia (Constitution).

The absence of a clear framework of legal norms regarding indigenous peoples often causes the state to abuse of power to revoke their rights which should be protected by the state. This discriminatory treatment can be seen from government policies that do not uphold the fulfillment of the rights of indigenous peoples. The problem arises when the government often argues for the reason that the implementation of development efforts in remote areas is only based on policies and unilateral decisions from the government without including indigenous peoples who will be affected by the government's "development". This has resulted in the exclusion of the rights of indigenous peoples being deprived of in order to achieve the goal of "development" (Frichy, 2018).

This policy that is considered "sharp" towards indigenous peoples is our common concern to pay more attention to, protect and fulfill the rights of indigenous peoples which are often ignored by many parties. The real steps are needed by the government in the form of policies that can become a milestone in the protection and fulfillment of the rights of indigenous peoples in Indonesia and these norms can restore the damage that has occurred before.

Based on the description of the problems in the background above, the author hereby wants to raise the issue of indigenous peoples and their rights, the realities and problems related to indigenous peoples in Indonesia and the urgency of the Bill on Indigenous Peoples as a solution to the above problems.

MATERIALS AND METHODS

The approach used in this article is socio-legal where this research method uses concrete events that occur in society that are associated with applicable legal provisions. The technique used in collecting data in this article is done through a literature study of secondary data which is related legislation, and other sources on the internet, such as journals, research results, books, and news articles.

RESULTS AND DISCUSSION

1. Definitions and Rights of Indigenous Peoples in International and National Law

Before going further into discussing what rights are owned by indigenous peoples, of course we must first understand what indigenous peoples are. Indigenous peoples themselves have been born and existed before this country (Indonesia) was born. In fact, it is a bit difficult to define the definition of indigenous peoples themselves, especially after the development and dynamics of the times and governance that affect legal politics in Indonesia unites the views of who can be called indigenous peoples. However, we can examine this perspective from experts and legal norms in Indonesia. Basically, the indigenous peoples

themselves have been certain historically to have occupied an area where then the state emerged. Another example is in USA, before the arrival of the colonists to establish civilization on the plains of America (not yet in the form of a state), indigenous peoples had been there first.

Grammatically, "society" itself can be interpreted as a number of humans in the broadest sense and bound by a value or culture that they consider the same (Indonesia Dictionary, 2020). Meanwhile, custom can mean a habit or behavior of the community that is continuously carried out within a community that inhabits a certain area. As for some of the main characteristics that we can find in indigenous peoples, they are a group of people who have their own wealth apart from individual wealth, inhabit an area with certain territorial boundaries and have certain authorities. Broadly speaking, these indigenous peoples can be categorized into two types, namely territorial indigenous peoples who base their laws on the local environment, a person's alliance, depending on where they live. Then a group of people who are bound by a noble/cultural values which are passed down from generation to generation within a certain area. Apart from that, there are many definitions contained in the legislation and not all of them are uniform, for example "customary law community unit", remote indigenous communities", "traditional communities", and so on.

After we know who indigenous peoples are, the next step is to discuss what their rights actually are based on several provisions contained in national and international legal norms.. In simple terms, Article 2 of United Nation Declaration on the Rights of Indigenous Peoples / UNDRIP declares that indigenous peoples actually have an equal position with other people in general, they are entitled to basic rights such as the right to life and to be free from discrimination. Even so, UNDRIP is not the only pioneer in upholding human rights in the case of indigenous peoples, as for the International Labor Organization (ILO) Convention 169 of 1989 which stipulates that the government of a country must respect the culture and noble values of indigenous peoples who are upheld in their relationship with the territory they occupy. Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

This is further interpreted when these rights are exercised when they do something based on their origin or original identity. Moreover, Articles 4, 19, and 20 of UNDRIP also regulate the rights of indigenous peoples to be able to fully participate (1) in the political, economic, social and cultural life of the country; (2) in the state decision-making process; and (3) in making laws and regulations (Burman, 2003). This rule is morally binding on any country, including Indonesia, to recognize, respect, and fulfill the rights of indigenous peoples who occupy Indonesian territory.

Furthermore, in national law, apart from human rights in general, the regulation regarding the rights of indigenous peoples in particular is also regulated in several provisions in the constitution and several other legal norms. The constitution has explicitly mandated the recognition and respect of the state for indigenous peoples's rights and their cultural identity. Besides that, the state also guarantees the freedom of the people to maintain and develop the values that exist in their culture. The explanation above defines that the traditional rights of indigenous peoples as constitutional rights as well as human rights. The granting of rights to indigenous peoples is then given specifically in several other legal norms apart from the constitution. For example, regarding customary rights as regulated in Article 3 of Law no. 5 of 1960 concerning Agrarian Principles and Article 9 paragraph (2) of Law no. 18 of 2004 concerning Plantations. Then the right to manage natural resources as in Article 6 of Law no. 31 of 2004 jo. No. 45 of 2009 concerning Fisheries, in which the management and cultivation of fish must take into account customary law and existing local wisdom and also pay attention to community participation. So that we can take some rights that are specifically

given to indigenous peoples including, customary rights over areas that historically they have occupied for a long time, then the right to cultivate natural resources in their customary lands, as well as other general rights in terms of civil politics, communally, socially and culturally.

2. The Reality of Indigenous Peoples and Their Problems in Indonesia

The existence of indigenous peoples in Indonesia is something that needs to be considered based on the massive number and occupation of them spread throughout Indonesia. At least, there are around 70 million people (about 20% of the total population of Indonesia) belonging to indigenous groups scattered throughout the archipelago, and the reality is that most of them still depend on the resources available on their customary lands (*Komnas HAM* National Inquiry, 2015). However, basically, their lives are self-sufficient, considering that indigenous peoples highly uphold noble values which are usually very positive in the context of natural resource conservation. So that in their daily lives they can rely on natural wealth while preserving it. Although there is a rather dilemmatic view considering that such life is classified as an ancient civilization which is actually very contradictory to the economic, social and educational levels of modern times. But in fact it is not a problem considering the noble values that they uphold are sometimes more human than the principles of modern human life.

The problem arises when legal regulations and their enforcement are not commensurate with the complexity of the problems in the field, and so often in practice there is a neglect of the rights of indigenous peoples. Concerns due to the lack of protection of indigenous peoples in Indonesia have made indigenous peoples through the Alliance of Indigenous Peoples of *Nusantara* (*AMAN*) express anxiety them with the sentence "If the state does not want to recognize us, then we do not want to recognize the state". This can threaten the unity and integrity of the Republic of Indonesia in the future. In this regard, it can be seen that there are two problems that cause the neglect of the rights of indigenous peoples, namely in terms of the norms that regulate and the form of the absence of legal certainty for indigenous peoples in the field which often leads to agrarian conflicts, confiscation, violence, criminalization, and violations of human rights that occur to indigenous peoples in Indonesia.

From a normative point of view, as previously discussed, Indonesia through its constitution as a social contract and the rule of law of the nation has recognized and mandated the government to protect the sustainability of indigenous people's rights. However, the implementation of these provisions still encounters various obstacles, considering that there are no derivative regulations for the implementation of existing legal norms. So, actually indirectly the state respects and recognizes the existence of indigenous peoples and their traditional rights. However, on the other hand, it is undeniable that these indigenous peoples are actually burdened with heavy requirements and their application must be cumulative not to mention the provisions regarding the protection of the rights of indigenous peoples under one roof (Thontowi, 2015). These provisions are spread out in several laws and regulations, both at the statutory level, the decision of the Constitutional Court, and local regulations. Legal uncertainty when there is a legal problem becomes a gap for any party to use legal loopholes from the regulations governing the rights of indigenous peoples.

Although it has been regulated in various laws and regulations, the provisions that discuss indigenous peoples or their rights are only discussed in one article, and even then, it is not accompanied by a complete explanation of these provisions. Not to mention, when almost every non-specific regulation continues to be included in other regulations so that each rule does not refer to a definition but each regulation interprets the same provisions with different meanings and provisions. Apart from the uncertainty in the area, the applicable legal norms and explain more specifically regarding a right of indigenous peoples (Constitutional

Court Decision Number 35/PUU-X/2012 on Law No. 41 of 1999 on Forestry) which is actually very crucial, namely regarding customary forests has not yet been implemented properly. The Constitutional Court's decision basically affirms that customary forests are not state-owned forests, so that whatever the purpose and intent of using customary forests in customary lands by the state is a violation of the constitutional rights of indigenous peoples which have been confirmed by the Constitutional Court's decision. It is proven that since the issuance of the decision, customary forest has still been taken for the sake of "development" (Maulidi, 2017). Whereas the decision of the Constitutional Court has final and binding force. From the explanation above, it is clear that the problem from a normative point of view lies in the absence of a legal basis that accommodates all the recognition and protection of indigenous peoples and their traditional rights.

The next problem relates to the absence of clear laws and regulations in protecting the rights of indigenous peoples. In simple terms, the main right that is most needed for indigenous peoples is the *ulayat* right to their customary land. However, on the other hand, this is also the main problem that often occurs between the government and indigenous peoples. We can see various examples in cases that occurred in our homeland, for example the women of *Dusun Lame Banding Agung Semende* in Sumatra whose houses were burned, their plantation products were confiscated, could not gain access to public services and development programs, this happened because of the absence of community elements customary law in the development of the *Bukit Barisan Selatan* National Park by the government which actually ate some of their customary land. Then another example is the struggle for *ulayat* (forest) rights of the *Tana Ai* community in Sikka, Flores, NTT, which has been gradually stripped of the rights to manage their own customary lands by coconut companies (AMAN, 2010). Until finally, the latest is the *Besipae* indigenous people in NTT who were evicted from their own customary land due to land acquisition by the local government (BBC, 2020). This illustrates how weak our legal system is in protecting the rights of indigenous peoples. Moreover, most of the conflicts that have been mentioned involve local governments who should have a better understanding of the situation and needs of indigenous peoples in their area.

If we draw a rational line to the consequences of the losses of customary rights of indigenous peoples, then we can see the deprivation of other rights of indigenous peoples. Indigenous land is where they live as indigenous peoples, namely carrying out their noble values. Activities ranging from their spiritual activities, farming activities to utilize natural resources, preserving their customary forest as a symbol of their noble values and others automatically cannot be carried out again. This is a domino effect of the confiscation of customary rights from indigenous peoples. They lose their constitutional rights such as carrying out their religious rituals, their right to be protected from discriminatory actions, as well as their other traditional rights. Such an event is the result of the loss of customary land which has basically been given to indigenous peoples and protected by the state for them to live their lives. Not to mention that the act of taking over land often uses repressive powers from the apparatus which will certainly injure their constitutional rights more. Looking from all perspectives of clear causes for inauthentic purposes, of course, indigenous peoples can always be intensively exploited, marginalized and become victims of the deprivation of their life support system resources. They become vulnerable to the intentional or unintentional process of ethnocides displayed by the dominant political and social elites in the name of development and modernization that is not authentic.

3. The Urgency of the Law on Indigenous Peoples as a Solution to the Problem of Protecting the Rights of Indigenous Peoples

As previously discussed, regulations regarding indigenous peoples are scattered in several laws whose main content is not about indigenous peoples. For example, the criteria

for who are called indigenous peoples in the legislation are different from each other. This results in legal uncertainty regarding the recognition of the status of indigenous peoples themselves. The absence of legal certainty that regulates the matter of indigenous peoples causes debate in its application. Therefore we need a legal legitimacy that can accommodate all the needs in achieving the recognition and protection of indigenous peoples and their traditional rights. When we talk about solutions to legal problems, we can actually use progressive legal theory as a reference to fix the legal problem itself.

Because basically in the pattern of human relations with law, the law does not exist for itself, but for something wider than that. So that every time there is a problem about and within the law itself, what needs to be reviewed and corrected is the law itself, not the human being who is forced to be included in the legal scheme. So it is necessary to immediately ratify the Indigenous Peoples Bill which has not been legalized for a long time. The meaning of the word "immediately" here does not mean hastening the ratification, but rather to be looked at by our legislators so that before the emergence of new cases, at least it has become an urgency for legislators and the government to form regulations regarding the protection and recognition of indigenous peoples and their traditional rights. In view of Article 6 paragraph (1) of Law no. 39 of 1999 concerning Human Rights has mandated the law, society, and government to pay attention to and protect indigenous peoples in order to uphold human rights. It's sad, until now there has not been a single rule that is effective in carrying out this mandate.

Discussing about this bill, we can first see from the function and purpose of the norm that was formed. The function of this bill is basically to protect indigenous peoples so that they can live safely, grow and develop as indigenous peoples in general in accordance with their human dignity free from violence and discrimination indigenous peoples and provide the basis for restoring the rights of indigenous peoples to the government (*DPR*, 2020). Regarding the substance of the Indigenous Peoples Bill contained in it, it is sufficient to at least start real steps in protecting and upholding human rights in the context of indigenous peoples. Perhaps besides that, some points listed in UNDRIP can also be emphasized, especially Articles 4, 19, and 20. In Article 4 UNDRIP, which discusses with regard to indigenous peoples who have the right to determine their own destiny, have autonomous rights in matters relating to internal affairs, state and regional governments, as well as the methods and means to fund their autonomous functions, so that land use matters, especially customary forests, as stated in the Constitutional Court Decision No. 35/2012 can be more effective. Then in article 19 of the UNDRIP which requires the state to consult and cooperate in good faith with the indigenous people of the community concerned through a customary institution to obtain approval and inform indigenous peoples before adopting and implementing legislative or administrative actions that may affect them. In this case, the function of customary institutions can be more efficient and their functions clear, besides that indigenous peoples through their customary institutions have the right to participate in making laws and regulations that have the potential to have an impact on indigenous peoples themselves. This can also be used to avoid conflicts that occur previously without the knowledge of indigenous peoples. As a final reference, Article 20 UNDRIP paragraph 1, which simply means that indigenous peoples have the right to maintain and develop their political, economic and social systems so that they can enjoy their own means of subsistence and development, and to engage freely in all traditional economic activities others, and paragraph 2, which states that the deprivation of their livelihood and development is entitled to just compensation.

The Bill of Indigenous Peoples itself has been discussed since 2014 in the Indonesia Representative / *DPR*, but until now it has not been ratified for various reasons. In fact, the

urgency of this bill is very real, considering the relationship between indigenous peoples and the government which has become increasingly vulnerable and the distance is growing. This is actually not an obstacle when the orientation of the legislators and the political direction of the government both uphold human values in the process of making this law. However, with the issuance of the Omnibus Law, which clearly makes it easier for investors to open new lands which may later pose a great risk to the expropriation of customary forests which are fundamental rights for indigenous peoples. This is a concern about the possibility of state capture in law-making within our parliament. State capture is basically the existence of interest groups whose mission is to encourage laws and regulations that are formed to lead to monopolistic forms of behavior so as to benefit as much as possible and maintain market power. On the other hand, legislators expect money or other prospects for personal gain from these interest groups in return for the “services” rendered

CONCLUSION

Human rights as a natural right that is embedded in the individual must be guaranteed protection. Indigenous peoples as residents of an area that historically existed before the birth of Indonesia should receive legal recognition and protection of their traditional rights. In reality, indigenous peoples in Indonesia still continue to live in their respective areas by adhering to the noble values of their predecessors. However, on the other hand, they face serious problems concerning the guarantee of protection and fulfillment of their basic rights as human beings and as indigenous peoples. The problems they face are driven by the lack of concrete steps from the government and very weak government policies in providing protection and fulfillment of the rights of indigenous peoples in Indonesia as mandated by the constitution. For this reason, the Bill of Indigenous Peoples has an urgency to be established immediately in the context of guaranteeing, protecting and fulfilling indigenous peoples' rights in full as it should be.

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