

## LAW AND POLICY RECOGNITION AND PROTECTION OF INDIGENOUS PEOPLES RIGHT IN INDONESIA

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### ABSTRACT

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This article will describe Indigenous People's as legal subjects whose existence has been recognized by the constitution of the Republic of Indonesia in Article 18 B paragraph (2) of the 1945 Constitution, which clearly states that "The State recognizes and respects the units of Indigenous Law Communities and their rights." traditional as long as it is still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in the Law"; Apart from that, recognition and protection for Indigenous People's and their traditional rights should be realized. This is also clearly regulated in Article 28 I of the 1945 Constitution. Even though the existence of culture has always been shown, Indigenous Peoples are still struggling to pass legislation which specifically regulates the recognition and protection of the rights of indigenous peoples through the draft act of indigenous people's right have not yet fulfilled in Indonesia.

## INTRODUCTION

### 1.1. Background

The struggle of indigenous peoples in Indonesia to gain recognition and protection of their rights is still facing a winding road, since 2010 indigenous people's have proposed the formation of a law that specifically regulates the rights of indigenous people's but this has not yet been ratified and stipulated by the Indonesian Government. The debate about the definition of indigenous communities is an obstacle they face, apart from that, they also have to fight to defend their traditional territories from damage due to the massive activities of companies working in the plantation, mining and national strategic project sectors.

In fact, referring to the 2022 annual report of the *Aliansi Masyarakat Adat Nusantara* (AMAN), one of the organizations for indigenous people's movement, there have been 161 regional legal products and 105 customary forest designations granted by the government with a total area of 148,488 hectares. the number of traditional communities that have become members of AMAN, there has been confiscation of customary territories through the national land program with social forestry schemes (HKM, Village Forest, HTR, Partnership) amounting to 2,400 hectares, which means that there are still 2.71 million hectares of customary territories that have not been has regional legal products and the determination of customary forests by both regional governments and the Ministry of Environment and Forestry (*Kementerian Lingkungan Hidup dan Kehutanan Republik Indonesia - KLHK*).<sup>1</sup>

According to David Joel Steinberg in 1987 statement described the condition of Southeast Asia at that time that.

*“Long ago, as now, Southeast Asia may have been home to many different non-state ethnic groups than in other parts of the world and is described as follows: both on the mainland (Asia) and on the archipelago (Nusantara), hundreds of small tribes it differs in many fundamental ways from the society of nearby dominant nations. There are many more such non-state societies, but in many cases their populations are much smaller than those of state societies. They did not have a very steep ladder of social ranks from slave to sacred king as in state society; most only have Village Heads and Elders, while some also have higher social class chiefs”.*<sup>2</sup>

Referring to Steinberg's statement above, Indonesia is one of the countries in Southeast Asia which has the second largest area in the world after Brazil. Apart

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<sup>1</sup> Aliansi Masyarakat Adat Nusantara, *Catatan Tahun 2022 Aliansi Masyarakat Adat Nusantara: Melawan Penundukan*, (Jakarta: Aliansi Masyarakat Adat Nusantara, 2022), p. 5.

<sup>2</sup> Bima Satria Putra, *Dayak Mardaheka: Sejarah Tanpa Negara di Pedalaman Kalimantan*, (Salatiga: Pustaka catut, 2021), p. 8.

from that, Indonesia has also been named the country with the largest agricultural landmass and has the number of islands based on data from the Ministry of Maritime Affairs and Islands. There are 17,508 Small Islands based on act number 6 of 1996 concerning Indonesian Waters. However, the vast geographical location of the Republic of Indonesia and the diversity of ethnicities, races, religions and the wealth of its natural resources do not necessarily show a good image for the fulfillment of the rights of indigenous peoples as a unit of its citizens.

Jeff. J Corn Tassel in a book about a collection of writings on the concept of indigenous peoples states that the best answer to the question of who are indigenous peoples is "best answered by indigenous communities themselves, as testament to this, self-identification, policies for indigenous people's has increasingly become an accepted international legal practices beginning in 1977.<sup>3</sup>

The existence of Indigenous Peoples is not only regulated in the constitution of the Republic of Indonesia, but also in an international instrument, namely the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which was declared on September 23 2007 and Indonesia is one of the countries that participated in signing the declaration. As stated by Mina Susana Setra Deputy IV Secretary General of AMAN for Social and Cultural Affairs at the 14th anniversary of UNDRIP, stating that the birth of this declaration was a big victory for Indigenous Peoples even though the process had to go through long struggles and debates, the aim of the international declaration was to "recognize one a very complete collection of Indigenous Peoples' rights, starting from affairs of customary areas, social, political, cultural, traditional institutions, education, health, etc.<sup>4</sup>

Based on the description that has been put forward in the background section of the problem above, the focus of this research problem is, what is legal policy of recognition and protection of indigenous peoples in Indonesia?

## 1.2. Research Methods

The research method used in this journal is a literature review method (desktop study) and uses a normative juridical and qualitative approach. This literature research method is used to examine the political protection of the formation of laws and regulations for Indigenous People's by exploring concepts, regulations and implementation through relevant materials. A normative juridical approach is used to analyze legal aspect, while a qualitative approach is used to analyze the views and perceptions regarding the recognition and protection of

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<sup>3</sup> Jeff J. Corn tassel, Who is Indigenous: Peoplehood and Ethnonationalist Approach to Rearticulating Indigenous Identity, *Nationalism and Ethnic Politics*, Vol. 9, No. 1, (2003), p. 81.

<sup>4</sup> Nurdiansah Dalidjo, *Merayakan 14 Tahun UNDRIP*, aman.or.id/news/read/celebrating, accessed April 6, 2024.

indigenous people's rights in Indonesia.

## RESULT AND DISCUSSION

### 2.1. Who are Indigenous Peoples

The existence of customary law communities is regulated in the 1945 Constitution Article 18 B paragraph (2):<sup>5</sup>

*"The State recognizes and respects the units of Customary Law Communities and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in Law".*

Furthermore Article 28 I of the 1945 Constitution Paragraph (3):<sup>6</sup>

*"Cultural identity and the rights of traditional communities are respected in line with developments over time and civilization" and paragraph (4): "Protection, Promotion, Enforcement and Fulfillment of Human Rights, is the responsibility of the state, especially the government".*

Article 1 of Law Number 32 of 2009 concerning Environmental Protection and Management also includes a definition of customary law communities:<sup>7</sup>

*"Groups of people who have lived for generations in certain geographical areas because of ties to ancestral origins, a strong connection with their environment, and the existence of a value system that determines economic, political, social and legal institutions".*

Apart from being regulated in the constitution of the Republic of Indonesia, indigenous peoples as legal subjects are also discussed in the paper written by Prof. Achmad Sodiki, who at that time was a judge at the Constitutional Court (*Mahkamah Konstitusi - MK*) and one of the judges who decided on MK Decision No. 35/PUU-X/2012 "Concerning the Land Rights of Customary Law Communities". The paper describes the concept of legal subjects from a legal perspective, namely:<sup>8</sup>

<sup>5</sup> Article 18B, Undang-undang Dasar Negara Republik Indonesia Tahun 1945.

<sup>6</sup> Article 28I, Undang-undang Dasar Negara Republik Indonesia Tahun 1945.

<sup>7</sup> Article 1, Undang-undang No. 32 Tahun 2009 About Protection and management of the environment.

<sup>8</sup> Rikardo Simarmata & Bernadus Steni, *Masyarakat Hukum Adat Sebagai Subyek Hukum: Kecakapan Hukum Masyarakat Hukum Adat dalam Lapangan Hukum Privat dan Publik*, (Jakarta: Samdhana Institute, 2017), p. 60.

*"Even though the existence of customary law communities is recognized with the conditions stated in Article 18B paragraph (2) of the 1945 Constitution, changes cannot be avoided as a result of the community's relationship with the outside world. The implication raises the question, whether the legal relationship between the legal subjects of the customary law community and parties outside the customary law community over a land object is regulated separately, or whether they choose the governing law from one of the parties, or do they follow the law that regulate the legal object (land for example)..."*

Which means from the description above, Achmad Sodiki places customary law communities as legal subjects that cannot be separated from legal objects, namely everything contained in their customary territory. Therefore, indigenous peoples in Indonesia have legally received recognition and protection through specially formed laws and regulation.

## **2.2. How is the Legal Politics of Indigenous Communities in Indonesia**

Although the regulation of indigenous people's law has been regulated in several sectoral laws, various problems arise related to the weak recognition of Indigenous Law Communities as legal subjects who have special and special rights. Then there were widespread violations of the rights of Indigenous Peoples by the state, especially customary rights.

However, several times the Draft Bill on Indigenous Peoples has been stipulated in the National Legislation Program (*Prolegnas*), including the following:<sup>9</sup>

- a. Prolegnas for the 2005-2009 Period, with the title "Bill on the Rights of Indigenous People's", with serial number 101; Bill concerning Recognition and Respect for Indigenous People's and Their Traditions, with serial number 273, based on the Decree of the House of Representatives of the Republic of Indonesia Number: 01/DPR-RI/III/2004-2005 concerning Approval of the Determination of the National Legislation Program for 2005-2009.
- b. Prolegnas for the 2009-2014 Period, with the title "Bill concerning the Recognition and Protection of Indigenous People's" with serial number 161.
- c. In 2013, the Bill on the Protection and Recognition of the Rights of Indigenous People's was designated as the 2014 Priority Prolegnas, with serial number 26. - Last April 2013, the PPHMA Bill officially became an initiative of the

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<sup>9</sup> Document of lawsuit of onrechtmatige daad of Indonesian administrative officials regarding the acceleration of the recognition and protection of the indigenous people act, accessed April 7, 2024.

DPR-RI. After previously discussing this bill at the Legislative Body (*Badan Legislasi - BALEG*). After it officially became a The House of Representatives (DPR-RI) initiative, the The House of Representatives sent it to the President. Then the President appointed the Ministry of Forestry, Ministry of Energy and Mineral Resources, Ministry of Home Affairs and Ministry of Law and Human Rights as Government representatives in discussing the Recognition and Protection of the Rights of Indigenous Peoples (*Pengakuan dan Perlindungan Hak-hak Masyarakat Adat - PPHMA*) Bill together with the The House of Representatives. Meanwhile, the The House of Representatives formed a Special Committee (*Panitia Khusus - PANSUS*) for the PPHMA Bill. - After the Special Committee was formed, there was practically no significant breakthrough in order to speed up the discussion of the PPHMA Bill. Meanwhile, the Government, coordinated by the Ministry of Forestry, is moving more quickly. This is proven by the existence of a Problem Inventory List (DIM) that has been created by the Government. - In early February 2014, the DPR-RI Special Committee invited AMAN to be heard at the Public Hearing Meeting regarding the PPHMA Bill. Unfortunately, there were only 5 (five) members of the Special Committee present at this Public Hearing Meeting (*Rapat Dengar Pendapat Umum - RDPU*). In the RDPU, AMAN provided a Problem Inventory List (*Daftar Inventaris Masalah - DIM*) containing input and proposed changes proposed by AMAN to the DPR-RI draft initiative bill. - After processing for some time in the DPR Special Committee, the bill was again not passed in 2014. Some of the reasons given were, for example, related to the government's lack of seriousness in discussing the bill in the Special Committee. It was said by Mrs. Himatul Aliyah Setyawati as Chair of the Special Committee for the PPHMA Bill that "the government is always attended by people who are not competent and have no authority to make decisions in discussing the PPHMA Bill".

- d. Prolegnas for the 2015-2019 period, with the title "Bill concerning the Protection and Recognition of the Rights of Indigenous People's", with serial number 42.
- e. In 2017, the Bill on Protection and Recognition of the Rights of Indigenous People's was designated as a Priority Prolegnas, with serial number 45.
- f. Prolegnas for the 2020-2024 period, with the title "Bill on Customary Law Communities, with serial number 160. g. In 2020, the Bill on Customary Law Communities was designated as a Priority Prolegnas, with serial number 22.

Even though there has been a Bill on Customary Law Communities several times with various name changes stipulated in the National Legislative Program and Priority Prolegnas, up to now it has not yet been formed. Even during the two decades of Indonesian President Joko Widodo's leadership, the Law on the Recognition and Protection of Indigenous People's was not passed and enacted even though it was included in Jokowi's *nawacita* during the 2014 campaign.

The efforts that have been made by indigenous peoples to fight for their rights to obtain recognition and protection have also been carried out through judicial channels, including through the Constitutional Court decision 35/PUU-X/2012 concerning customary forests, Supreme Court decision No. 61/P/HUM/2021 concerning NEK, MK decision no. 45/PUU – IX/2011, and several laws, including: 1) Law no. 39 of 1999 concerning Human Rights 2) Law no. 41 of 1999 concerning forestry 3) Law no. 22 of 2001 concerning Oil and Natural Gas 4) Law no. 20 of 2003 concerning the National Education System 5) Law no. 24 of 2003 concerning the Constitutional Court 6) Law no. 27 of 2003 concerning Geothermal Energy 7) Law no. 7 of 2004 concerning Water Resources 8) Law no. 18 of 2004 concerning Plantations 9) Law no. 31 of 2004 concerning Fisheries 10) Law no. 26 of 2007 concerning Spatial Planning 11) Law no. 27 of 2007 concerning Management of Coastal Areas and Small Islands 12) Law no. 30 of 2009 concerning Electricity 13) Law no. 32 of 2009 concerning Environmental Protection and Management 14) Law no. 18 of 2013 concerning Prevention and Eradication of Forest Destruction 15) Law no. 1 of 2014 concerning Amendments to Law no. 27 of 2007 concerning Management of Coastal Areas and Small Islands 16) Law no. 6 of 2014 concerning Villages In addition, regulations on the existence and rights of customary law communities are also contained in several special autonomy laws as follows: 1) Law no. 21 of 2001 concerning Special Autonomy for Papua Province 2) Law no. 11 of 2006 concerning Aceh Government 3) Law no. 13 of 2012 concerning the Specialties of the Special Region of Yogyakarta.<sup>10</sup>

Various efforts have been made by indigenous people's with AMAN, apart from lobbying members of the Indonesian Indigenous People's Representative Council, they have also approached the relevant ministries to get support in accelerating of the regulations. In the end, Indigenous People's who defend their living areas are criminalized by the state. They are forced to follow the legal process in state court and often end up having to spend time in prison. They were defeated time and time again by an economic system that prioritized profits for capital owners. They were also defeated by a legal system that did not respect their traditions and customary laws. This is truly ironic, because economics and law are supposed to be a means of achieving justice by treating everyone equally, but instead of passing laws they perpetuate injustice.

The length of neglect in the formation of laws that recognize and protect the rights of indigenous people's, based on this, AMAN with 8 representatives of indigenous people's from North Maluku, Banyuwangi, and Manggarai filed an *onrechtmatige daad* lawsuit against the institution that has the obligation to form statutory regulations, namely the The House of Representatives (*Dewan Perwakilan Rakyat* - DPR-RI) and the President of Indonesia on October 25<sup>th</sup>

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10. Kurnia Warman, *Peta Perundang-undangan tentang Pengakuan Hak Masyarakat Hukum Adat*, [http://procurement-notices.undp.org/view\\_file.cfm?doc\\_id=39284](http://procurement-notices.undp.org/view_file.cfm?doc_id=39284), accessed April 6, 2024.

2023 to The Administrative Court in Jakarta.<sup>11</sup>

If we trace the theory of justice based on legal philosophy as presented by E Uterch:<sup>12</sup>

*"Legal philosophy provides answers to statements, such as what the law actually is, what the purpose of the law is, why we obey the law, what justice is. For many people, the answers to knowledge about these things are not satisfactory. Legal science as an empirical science only sees law as a symptom, that is, accepts law as mere "gegebenheid", while legal philosophy wants to see law as a rule in the sense of the word "ethis waardeoordeel".*

Likewise, Satjipto Rahardjo said that:<sup>13</sup>

*"Legal philosophy questions questions that are basic to law, about the basis for the binding power of law, what is the relationship between law and power, morals and justice.*

In fact, *the* whirlpool of laws and regulations regarding the rights of indigenous people's, if referring to the statement from E Uterch and Satjipto Rahardjo, is not fully able to provide justice, recognition and protection of the indigenous people's right, this is increasingly visible in the high level of criminalization and discrimination against indigenous peoples for defending traditional territory.

## CONCLUSION

The author concludes that indigenous peoples are still not fully protected by the state even though there is nomenclature in sectoral laws. The government often ignores all the efforts made by indigenous peoples and their existence is not considered if they are unable to demonstrate their existence through regulations at the regional level, and are unable to show proof of ownership of their customary territories. Based on the discussion in Chapters I and Chapter II, the situation of indigenous people's whose existence has clearly been recognized by the Constitution of the Republic of Indonesia, the Laws and Regulations established by the Indonesian government as well as the existence of the International Convention on Human Rights does not create the situation and the condition of indigenous people's improved. Several incident alleged human rights violations are not resolved, legal steps to obtain justice often collide with formal rules and laws which should be a legal umbrella for all people in Indonesia The legal paths taken by indigenous people's to obtain legal certainty and justice also often

<sup>11</sup> <https://ppman.org/ruu-masyarakat-adat-tak-kunjung-disahkan-masyarakat-adat-gugat-dpr-ri-dan-presiden/>, accessed April 7, 2024.

<sup>12</sup> Nomensen Sinamo, *Filsafat Hukum: Dilengkapi dengan Materi Etika Profesi Hukum*, (Jakarta: Permata Press, 2014), p. 11.

<sup>13</sup> Ibid, p. 12.



fail in the judiciary. Judges who are very normative and do not use a legal philosophical basis and make no effort to find new breakthroughs to provide justice to indigenous people's make them lose their ancestral domain.

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