



THE URGENCY OF RATIFYING THE DRAFT LAW ON INDIGENOUS COMMUNITIES AS LEGAL PROTECTION FOR INDIGENOUS COMMUNITIES IN INDONESIA

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Indigenous Communities; Regulatory Ambiguity; Legal Protection. This research is conducted to obtain recognition and protection of the rights of indigenous communities by striving for the ratification of the Draft Law on Indigenous Communities. This research employs a normative juridical approach based on secondary data, including primary and secondary legal data obtained through literature review. The research approach used is statutory and conceptual approach to the problem discussed. The research findings indicate that the impact of the non-ratification of the Draft Law on Indigenous Communities could lead to legal uncertainty for indigenous communities, particularly regarding customary land which is often contested by parties with economic or developmental interests. Regulatory ambiguity frequently results in conflicts between customary law and positive law or modern regulations enforced by the government. Therefore, the enactment of the Draft Law on Indigenous Communities could serve as a legal umbrella providing certainty and legal protection for indigenous communities, thereby contributing to the implementation of one of Indonesia's national goals.

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A. Introduction

Indigenous peoples are a group of people who have social, cultural and political identities that are different from the majority of other communities. Indigenous peoples have their own system of rules, norms and values that govern the lives of local indigenous peoples. The Indigenous Peoples Alliance of the Archipelago (AMAN) estimates that there are around 70 million or around 20% of the total indigenous peoples in Indonesia (Sri Nurhayati Qodriyun, 2015). Indigenous peoples are recognized in Article 18 B paragraph (2) and Article 28 I paragraph (3) of the 1945 Constitution (FX. Sumarja, 2018). However, in Indonesia, indigenous peoples have long sought to be recognized and protected for their rights.

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Indigenous peoples are trying to push for the passage of the Indigenous Peoples Bill as one of their measures. This bill started in 1999 and has gone through various discussion processes in the DPR. Furthermore, the indigenous peoples bill has been discussed again since the 2014-2019 period. However, this bill was never passed during the DPR plenary meeting. Meanwhile, this bill is very significant for the diversity of cultures and customs of tribes in Indonesia. It seems that opponents of the bill are concerned that the indigenous peoples law will hinder investment and development and may interfere with the implementation of the Job Creation Law (Fathiyah Wardah, 2021).

The central government has in principle provided juridical guarantees in the implementation of a prosperous government system, steps taken by fighting for the fulfillment of constitutional and traditional rights (Ade Bagus Saswoyo et al., 2023). Through the ratification of the bill, indigenous peoples are guaranteed respect and protection. However, in the development of natural resource-based industries run by the government, indigenous peoples feel excluded and lose their rights to their natural resources. This can be seen from the oil palm plantation companies that are displacing forests in the territory of local indigenous peoples in order to carry out the development of monoculture plantations, where these forests are the source of livelihood for indigenous peoples. This has resulted in indigenous peoples losing food and living space. The yet-to-be-passed indigenous peoples bill further increases opportunities for conflict, discrimination, criminalization, dispossession of customary territories, and acts of violence against indigenous peoples in various parts of Indonesia (Nurdiyansah Dalidjo, 2021).

Rules recognizing and protecting the rights of indigenous peoples aim to ensure a safe, thriving and prosperous life for their communities, and to protect them from discrimination. They also ensure that indigenous peoples will receive their rights, including recognition of customary land rights. The recognition and protection of these rights can serve as a foundation for the government when implementing development programs. The government and local governments can seek to empower through the identification, verification and legalization of indigenous peoples, and also assess the impact of the implementation of the Indigenous Peoples Bill. The purpose of this process is to provide a foundation and legal certainty to protect, recognize, and empower indigenous peoples (Muhammad Satriyo Mandiri, 2023). The indigenous peoples bill is a comprehensive solution to resolve problems that arise in indigenous peoples in Indonesia. It is hoped that the ratification of the indigenous peoples bill can provide equality and justice, and can contribute to the preservation of the Indonesian cultural environment.

B. Method

This research uses normative juridical approach based on secondary data, including primary and secondary legal data obtained through literature review. The approach used in this study is a sculpture approach that became the main foundation of

this study. This research approach is literature research, which shows that the author reads, understands, and draws conclusions from laws, books, journals, news, and articles relevant to the topic. Other research approaches used are statutory and conceptual approaches to the problems discussed.

C. Result & Discussion

1. Problems with Customary Law as a Result of Uncertainty in Indonesian Regulations

Indigenous communities in Indonesia have historically been recognized and protected by the constitution in Article 18B paragraph 2 of the 1945 Constitution. Essentially, this article states that the existence of indigenous communities is acknowledged as long as they exist, meaning as long as there are communities practicing customary law as long as it does not conflict with the prevailing laws. However, the implementation of recognition and protection of customary law is often hindered by various factors, including regulatory ambiguity (Kurniasih et al., 2022).

Customary law in Indonesia is not just a cultural heritage but an integral part of local community life that has formed and evolved over the years. Nevertheless, despite its significant value and importance to indigenous communities, customary law often faces serious challenges due to the ambiguity of regulations governing its recognition and protection. This ambiguity creates legal uncertainty for indigenous communities, especially regarding customary land ownership (Aziz et al., 2019).

One of the main issues faced by customary law is the ambiguity of legal recognition by the government. Despite being constitutionally recognized, in practice, the government often fails to provide adequate legal recognition of customary law. This leads to legal uncertainty for indigenous communities, particularly concerning customary land, which is often contested by parties with economic or developmental interests. Land that has been managed by indigenous communities for centuries can easily be seized or controlled by other parties with greater political or economic power due to weaknesses in legal recognition of customary land ownership (Julranda et al., 2022).

Furthermore, regulatory ambiguity often leads to conflicts between customary law and positive law or modern regulations imposed by the government. One example is in determining land use for various purposes such as agriculture, plantations, or environmental conservation (Husni et al., 2022). When government policies contradict the traditions or customs of indigenous communities, it can trigger prolonged conflicts, harming both parties and disrupting social stability in the area. Moreover, regulatory ambiguity also results in imbalanced access to justice for indigenous communities. Indigenous communities often face difficulties accessing the formal justice system due to various reasons such as high costs, long distances, and a lack of understanding of the legal process (Putri et al., 2017). As a result, many

cases of violations of indigenous rights are never fairly adjudicated, and they often do not receive the legal protection they need.

Protection of human rights is also a serious issue related to customary law. There is a possibility that internationally recognized human rights standards may conflict with customary legal practices. For example, some customary traditions may violate the rights of women or minorities, such as rights to property, education, or freedom of expression. Lack of clear regulations and effective oversight can exacerbate this situation, leading to human rights violations against indigenous communities. Lastly, lack of knowledge and capacity is also a crucial factor affecting the effectiveness of customary law. Both at the government level and within indigenous communities themselves, there is often a lack of knowledge and capacity to understand and manage customary law effectively (Tryatmoko et al., 2014). This deficiency can hinder efforts to develop and implement effective customary legal mechanisms, as well as complicating conflict resolution processes and protection of indigenous rights.

To address these complex issues, comprehensive efforts are needed from the government, indigenous communities, and other relevant stakeholders. The government needs to enhance legal recognition of customary law and develop clearer regulations to protect the rights of indigenous communities. Additionally, education and training are needed to strengthen the capacity of indigenous communities in managing customary law effectively. Moreover, dialogue and cooperation among various stakeholders are crucial to achieving consensus and sustainable solutions in addressing customary law issues in Indonesia. Social and agrarian conflicts in indigenous areas necessitate measures that acknowledge, protect, and empower indigenous legal communities and traditional communities. This can be regulated and unified in a single law governing indigenous communities, in line with various existing regulations.

2. The Urgency of Ratifying the Draft Law on Indigenous Peoples

Indeed, the traditional rights of customary law communities have been recognised in Article 18B paragraph (2) of the 1945 Constitution. In addition, Article 28I paragraph (3) of the 1945 Constitution also guarantees respect for the rights of traditional communities. Furthermore, the traditional rights of indigenous peoples are also recognised in various written regulations, most of which are related to the management of natural resources by indigenous peoples. Some of these written regulations include Law No. 5 of 1960 on Basic Agrarian Regulations, Law No. 41 of 1999 on Forestry, Law No. 27 of 2007 on the Management of Coastal Areas and Small Islands, then Law No. 32 of 2009 on Environmental Protection and Management, Law No. 39 of 2014 on Plantations, and other sectoral laws.

Despite the recognition and protection of indigenous peoples in laws relating to indigenous peoples, disputes often arise that violate the traditional rights of indigenous peoples (Julranda et.al., 2022: 176). This happens because each law is still sectoral and does not have a similar paradigm regarding the criteria for recognising the rights of indigenous peoples. Therefore, a law is needed as a legal umbrella that

comprehensively and progressively regulates the protection of indigenous peoples so that later there will be no more laws that prioritize sectoral egos but laws that accommodate a sense of justice, benefit and certainty for indigenous peoples in Indonesia.

In addition, indigenous peoples are also highly vulnerable to forms of discrimination and criminalisation. According to data submitted by AMAN, there are 301 cases of territorial grabbing covering 8.5 million hectares and also 678 cases of criminalisation against indigenous peoples throughout Indonesia (AMAN, 2024). This data indicates the existence of territorial seizures and criminalisation of indigenous peoples in Indonesia, which in turn can lead to violations of human rights, whereas the state as a duty bearer should carry out its obligations to respect, protect and fulfill human rights, in this case indigenous peoples. The concept of respect here means that the state must not violate the rights of indigenous peoples. Then, protecting here means that the government must take steps to prevent and take action against all forms of legal acts that violate the rights of indigenous peoples by any party. Finally, the concept of fulfillment here means that the state must take progressive strategies in fulfilling the rights of indigenous peoples as well as evaluating the policies taken to fulfill these rights.

Then, from an international legal perspective, Indonesia as a party to the signing of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) has a moral obligation to recognise, respect, protect and fulfill the rights of indigenous peoples throughout Indonesia. UNDRIP is the main international instrument that recognises and upholds the rights of indigenous peoples (Sambeta, 2021: 7-8). UNDRIP's recognition of community rights includes rights to lands, geographical areas, and resources owned by them, either individually or collectively, as part of their cultural heritage and identity. It also recognises those acquired by indigenous peoples through traditional ownership and use (Sambeta, 2021: 7-8).

In this case, UNDRIP only has the legal force of soft law, which is limited to being morally binding; not legally. However, this declaration still has an important impact and can be a starting point towards the implementation of binding legal instruments in the future. Therefore, as a state that participated in the signing of the declaration, Indonesia should form a set of rules that become the legal basis for indigenous peoples in terms of recognition, respect, protection and fulfillment of their rights.

Currently, the Indigenous Peoples Bill, which was proposed in 2019 and included in the 2020-2024 National Legislation Program, is still in the harmonization stage. This bill has basically been proposed since the administration of President Susilo Bambang Yudhoyono, namely in 2009, but until now the bill has never been passed and has entered the National Legislation Programme (Prolegnas) several times. In fact, from the existing problems, the Indigenous Peoples Bill can be a solution to the problems that befall indigenous peoples. In addition, what also needs to be considered in the preparation of the Law, both formally and materially, must be

in accordance with the provisions stipulated in Law No. 12 of 2011 concerning the Formation of Legislation ("P3 Law").

The material content of the Indigenous Peoples Bill can also reflect values that are in accordance with the circumstances of indigenous peoples without excluding the rights recognised in UNDRIP because according to Satjipto Rahardjo's view, the law should be for humans, not the other way around. Therefore, the passing of the Indigenous Peoples Bill can be a legal umbrella that provides certainty as well as protection for indigenous peoples and become a form of implementing one of the goals of the Indonesian state, namely protecting all Indonesian citizens because in principle, indigenous peoples are also part of the Indonesian nation that existed before Indonesia's independence.

D. Conclusion

Indigenous communities are acknowledged in Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution. In Indonesia, however, indigenous peoples have long sought recognition and protection of their rights. They have been striving for recognition and protection of their rights by advocating for the ratification of the Draft Law on Indigenous Communities. Furthermore, this Draft Law on Indigenous Communities has been revisited since the period of 2014-2019. However, this bill has never been ratified in a plenary session of the DPR (People's Consultative Assembly). Meanwhile, this bill is crucial for preserving the cultural heritage and customs of various ethnic groups in Indonesia. This situation leads to legal uncertainty for indigenous communities, especially concerning customary land which is often contested by parties with economic or developmental interests. Regulatory ambiguity frequently results in conflicts between customary law and positive law or modern regulations enforced by the government, leading to an imbalance in access to justice for indigenous communities. Therefore, with the enactment of the Draft Law on Indigenous Communities, it can serve as a legal umbrella providing certainty and legal protection for indigenous communities, thereby contributing to the implementation of one of Indonesia's national goals, which is to protect all Indonesian citizens because fundamentally, indigenous communities are also part of the Indonesian nation that has existed before Indonesia's independence.

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