

The Legal Politics of Regulating Indigenous Peoples

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ABSTRACT

Background. This research raises the issue of the existence of customary law communities in Indonesia, as well as the dynamics of customary law communities seen from the decision of the Constitutional Court.

Purpose. This research is focused on analyzing two things, namely: First, what is the existence of indigenous peoples in Indonesia? Second, how is the legal politics of indigenous peoples through the decision of the Constitutional Court? This research uses a statute approach.

Method. his research uses a statute approach. In addition, a case approach is also used to find out the ratio decidendi used by the Constitutional Court judges in deciding cases of judicial review of laws related to indigenous peoples.

Results. The results of the study concluded: first, the existence of indigenous peoples in Indonesia has been accommodated in various spheres of legislation, both in the 1945 Constitution, Laws, Regional Regulations, Governor Decrees, and Regent Decrees. Second, the legal politics of indigenous peoples through the decision of the Constitutional Court strengthens the existence of indigenous peoples in Indonesia by providing various interpretations or explanations.

Conclusion. this study are that the Panel of Judges in cases of criminal acts of narcotics abuse should minimize criminal disparities to prevent the development of a negative perspective of society towards the criminal system in judicial institutions.

KEYWORDS

Legal, Politics, Regulating

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INTRODUCTION

Customary law communities are part of Indonesian society. It should be remembered that before the formation of the archipelago (Indonesia) (Kampf dkk., 2020), as a Unitary State of the Republic of Indonesia, customary law communities were born and grew. Sujoro Wignjodipuro said that customary law communities before independence had coexisted with the Dutch East Indies, at which time the Dutch East Indies government recognized and regulated customary law communities in its autonomy and medebewind governments (Cheng dkk., 2020). After independence, customary law communities were even recognized with the inclusion in the explanation of the



1945 Constitution (before the amendment) in the explanation stating that (Zhou dkk., 2019): "In the territory of the State of Indonesia there are approximately 250 zelfbesturende landschappen and volk gemeenschappen, such as villages in Java and Bali, nagari in Minangkabau, hamlets and clans in Palembang and so on".

These regions have an original structure and therefore can be considered as special regions. After the amendment of the 1945 Constitution, customary law communities are accommodated in Article 18B paragraph (2) which states (Walsh dkk., 2020): "The State recognizes and respects the unity 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 by law (Z. Wang dkk., 2019)." The inclusion of customary law communities in the 1945 Constitution is a form of state recognition of the existence of customary law communities (Ali dkk., 2019). In addition, Indonesia has also ratified Law No. 11/2005 on the Ratification of the Covenant on Economic and Cultural Rights (G. Wang dkk., 2020). Therefore, the state has an obligation in order to respect, to protect and to fulfill these rights in this case is to respect, protect and fulfill the rights of indigenous peoples. One of the tangible forms of the rights of indigenous peoples is the right to ownership of customary land or what is often referred to as 'ulayat rights.

Ulayat rights are the rights of indigenous peoples as institutions of common life and are managed for the common benefit of members of indigenous peoples (Communal Bezitrecht) (Norris & Inglehart, 2019). Customary rights are one form of recognition of the existence of indigenous peoples in Indonesia, because in various places in Indonesia, the interaction between indigenous peoples and forests is reflected in the management models of indigenous peoples over forests which are generally based on customary law (Parisi dkk., 2019). The existence of recognition of customary rights, instead of making indigenous peoples able to live in peace in interacting with their environment, but often indigenous peoples are actually "expelled" from their own land, this can be seen from the data recorded by the Association for Community-Based and Ecological Law Reform (Huma), which states that 91,968 people from 315 indigenous communities in Indonesia are victims of natural resource and land conflicts (Lurie dkk., 2020). Conflicts occurred in 98 cities/districts in 22 provinces with the number of conflicts reaching 232 cases. This can be attributed to the increasingly free market economy situation, so that the 'state' alignment is precisely on the owners of capital, this is what causes the neutrality of legislation, thus 'mortgaging' the guarantee of legal certainty for indigenous peoples.

The above, of course, is very contrary to the recognition and respect for indigenous peoples in Indonesia. The various treatments that tend to be 'bad' towards indigenous peoples have long occurred and continue to recur. In 1993, a group calling itself the Indigenous Peoples Rights Defense Network (JAPHAMA) emerged, and in 1999 (Phillips dkk., 2020), a community movement called the Alliance of the Archipelago Peoples (AMAN), the first national organization of indigenous peoples in Indonesia, emerged in an effort to influence government policy (Carleo dkk., 2019). Even at that time, AMAN explicitly said "if the state does not recognize us, we will not recognize the state", which eventually became AMAN's provocative slogan echoed in the first Indigenous Peoples of the Archipelago Congress in 1999.

The aim of these groups is to defend and uplift the 'nobility' of indigenous peoples in Indonesia and to prevent and protect indigenous peoples from state arbitrariness or in other words to realize justice for indigenous peoples (Abuhassna dkk., 2020). Therefore, the group actively becomes a 'facilitator' for indigenous peoples in defending their constitutional rights that are clearly regulated in the 1945 Constitution (Glare dkk., 2019). One way is to submit a judicial review of

laws that contain content that is detrimental to indigenous peoples and even contradicts the 1945 Constitution to the Constitutional Court as the guardian of the constitution. In order to realize real justice for indigenous peoples, it does not stop at the written norms in the 1945 Constitution or other laws and regulations.

RESEARCH METHODOLOGY

This research uses primary legal materials consisting of: Law No. 5 of 1960 concerning Basic Agrarian Regulations, Law No. 41 of 1999 concerning Forestry (Lisio dkk., 2019), Law No. 1 of 2004 concerning Water Resources, Law No. 18 of 2004 concerning Plantations, Law No. 24 of 2003 concerning the Constitutional Court, and various other laws and regulations relating to the object of this research, as well as decisions of the Constitutional Court related to the existence of indigenous peoples, namely Constitutional Court Decision Number. 31/PUU-V/2007; Constitutional Court Decision Number. 47-81/PHPU.A/VII/2009; Constitutional Court Decision Number. 3/PUU-VII/2010; Constitutional Court Decision Number. 45/PUU-IX/2011; Constitutional Court Decision Number. 35/PUU-X/2012.

Meanwhile, secondary legal materials used consist of books on indigenous peoples, research results and scientific journals. This research uses a statute approach because it examines laws and regulations related to the object of research, namely indigenous peoples in Indonesia. In addition, a case approach is also used to find out the ratio decidendi, namely the legal reason used by the judge (Constitutional Court),⁸ in deciding the petition for testing a number of laws related to indigenous peoples.

RESULT AND DISCUSSION

Existence of customary law communities in Indonesia

Law No. 5 of 1960 on the Basic Regulation of Agrarian Principles (UUPA) has regulated the existence of customary law communities, especially in the field of customary rights. Article 2 paragraph (4) states (Yatabe dkk., 2019): "The right to control from the state above can be exercised by the regional self-government and customary law communities, as needed and not contrary to national interests, according to the provisions of government regulations".

The term indigenous peoples in the UUPA also became widespread among non-governmental organizations and other parties (Yatabe dkk., 2019). This term was also agreed upon as the equivalent of the term indigenous peoples rather than various terms that discredited indigenous peoples, such as remote communities, shifting cultivators, traditional communities and others that were widely used in the New Order era.

The term indigenous peoples continues to be used today in official state documents, such as laws and regulations. In the text of the 1945 Constitution before the amendment can be found the use of the terms *Zelfbesturendelandschappen* and *Volksgemeenschappen*, the first can be translated as *swapraja* areas, namely kingdoms that have their own government while the second is self-governing communities such as villages in Java, *nagari* in Sumatra and others (Zong dkk., 2019). Finally, *rechtsgemeenschappen* are known as 'customary law communities'.

Recognition of the existence of customary law communities has a special place in the 1945 Constitution, namely in Article 18B paragraph (2) and Article 28I paragraph (3), which is the constitutional basis most often referred to when discussing the existence and rights of indigenous peoples. Article 18B paragraph (2) of the 1945 Constitution states (Van Trotsenburg dkk., 2021): "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 principles of community

development and the principles of the Unitary State of the Republic of Indonesia, which are regulated by law (Johdi & Sukor, 2020)." Meanwhile, Article 28I paragraph (3) of the 1945 Constitution states: "the cultural identity and rights of traditional communities are respected in line with the development of the times and civilization.

The distinctiveness of customary law communities as legal subjects is because they are units/groups that make customary values and similarity of traditional rights including over certain areas a condition of their existence (Zemek dkk., 2019).¹⁵ Customary law communities have also been accommodated in various regulations within the regional scope. Kampar Regency, Riau, for example, has accommodated the indigenous people and customary law of Kenegrian Kuntu in the Kampar Regency Regional Regulation No. 12/1999 on Customary Land Rights (Perda). The regulation explains that the Kenegrian Kuntu indigenous community is a customary law community (Adegbeye dkk., 2020). Lebak Regional Regulation No. 32 Year 2001 on the Protection of Customary Rights of Baduy Community.

In addition to being accommodated in the 1945 Constitution, Laws, and Regional Regulations, as described above, it turns out that indigenous peoples in other regions have also been accommodated in the local context, namely, Karapatan Adat Nagari, which is regulated in Governor Decree No. 15/GSB/1968 which contains the structure of the Nagari government consisting of the Nagari Wali and the Nagari People's Representative Council (Y. Wang dkk., 2020). The Kesepuhan Cisit customary law community, the basis for the recognition of the Kesepuhan Cisit customary law community is the Decree of the Regent of Lebak No. 430/ Kep.318/Disporabudpar/2010 concerning the Recognition of the Existence of the Cisit Customary Law Community, Kesepih Adat Cisit Banten Kidul Unit in Lebak Regency.

In addition, Article 67 paragraph (1) states that: "customary law communities, as long as according to reality they still exist and are recognized for their existence, are entitled to: a. collect forest products to fulfill the daily needs of the customary community concerned; b. carry out forest management activities based on applicable customary forests that do not conflict with the law; and; c. receive empowerment in order to improve their welfare." (2) the confirmation of the existence of the customary law community in Lebak Regency. Paragraph (2) the confirmation of the existence and elimination of customary law communities as referred to in paragraph (1) shall be stipulated by Regional Regulation. (3) Further provisions as referred to in paragraph (1) and paragraph (2) shall be regulated by Government Regulation.

An analysis of the Constitutional Court's decision regarding the regulation of customary law communities in Indonesia.

Politics and Law have a close relationship but have different meanings. Law and politics are indeed two things that are difficult to separate, both have a reciprocal relationship that cannot be avoided. On the one hand, the law is concerned with the results it will obtain through the regulation, and therefore it must understand the ins and outs of the problem it regulates, while on the other hand it must also realize that factors and forces outside the law will also have an influence on the law and its work process.

Politics and Law have a causal relationship, namely first, the law determines politics in the sense that political activities are regulated by and must be subject to legal rules. Second, politics determines the law, because the law is the result or crystallization of political wills that interact and compete with each other. Third, politics and law as social subsystems are in a position where the degree of determination is balanced between one another, because although the law is a product of political decisions, once the law exists, all political activities must be subject to the rules of law.

Maurice Duverger said that 'politics in its usual connotation is a concept dealing with the state'. Then Hirsch Ballin said that the politics of law is the state's policy to apply the law. While Teuku Mohammad Radhie, argues that legal politics is a statement of the will of the state authorities regarding the law that applies in its territory and regarding the direction in which the law will be developed.

The Constitutional Court is an institution established to guard and maintain that the constitution as the supreme law of the land is truly implemented or enforced in the administration of state life in accordance with the principles of the rule of law. The Constitutional Court with all its authority and position as one of the organizers of judicial power is the embodiment of the function of upholding the principles of the rule of law, the constitution, and the protection of human rights (HAM) based on the 1945 Constitution, as an interpreter of the constitution, should provide protection and justice for every citizen who feels his constitutional rights are violated by the Act, and in various decisions shows that the decision is a responsive law in realizing justice for citizens.

Hukum mempunyai tujuan besar berupa kesejahteraan dan kebahagiaan manusia, maka hukum selalu berada pada status law in the making. Hukum tidak ada untuk dirinya sendiri dan tidak bersifat final, setiap tahap dalam perjalanan hukum adalah putusan-putusan yang dibuat guna mencapai ideal hukum. Oleh karena itu, pada dasarnya pengujian konstiusional yang dilakukan oleh Mahkamah Konstitusi sebagai lembaga peradilan bertujuan untuk mereduksi adanya kerugian hak konstiusional dikemudian hari tanpa ada kerugian konstiusional yang menyeluruh yang dilekatkan kepada pemohon, yang tujuan akhirnya adalah tidak hanya memberikan keadilan dalam lingkup prosedural saja, tetapi meliputi keadilan substantif bagi setiap warga negara, dalam hal ini khususnya bagi masyarakat hukum adat yang seringkali menjadi 'objek' kesewenang-wenangan pemerintah.

CONCLUSION

The conclusion is intended to help the reader understand why your research should matter to them after they have finished reading the paper. A conclusion is not merely a summary of the main topics covered or a re-statement of your research problem, but a synthesis of key points. It is important that the conclusion does not leave the questions unanswered.

AUTHORS' CONTRIBUTION

Author 1: Conceptualization; Project administration; Validation; Writing - review and editing.

Author 2: Conceptualization; Data curation; In-vestigation.

Author 3: Data curation; Investigation; Other contribution; Resources; Visuali-zation.

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