

AMBIVALENCE IN THE REGULATION OF INDIGENOUS PEOPLES' RIGHTS IN INDONESIA'S LEGAL HIERARCHY

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Abstract

The recognition and protection of indigenous peoples in Indonesia remain uncertain due to the absence of ratified laws specifically addressing their rights. This lack of legal instruments undermines their recognition and protection, leading to uncertainty regarding their traditional rights. This article aims to identify potential arrangements for derivative regulations to address this gap. Normative legal research, employing a legislative and conceptual approach, was utilized. The findings suggest that while legal recognition of indigenous peoples exists in various laws, regional regulations tailored to local conditions are necessary. However, there's no consensus on which regulations should serve as the basis for these regional laws. Recommendations propose that the Agrarian Law, Human Rights Law, Village Law, and Job Creation Law could inform regional regulations to recognize, protect, and fulfill the traditional rights of indigenous peoples, thereby mitigating dualism of authority.

Keywords: Ambivalence; Indigenous People; Regulations; Rights.

Abstrak

Pengakuan dan perlindungan masyarakat adat di Indonesia masih belum pasti karena tidak adanya undang-undang yang diratifikasi yang secara khusus menangani hak-hak mereka. Kurangnya instrumen hukum ini merusak pengakuan dan perlindungan mereka, yang menyebabkan ketidakpastian mengenai hak-hak tradisional mereka. Artikel ini bertujuan untuk mengidentifikasi pengaturan potensial untuk peraturan turunan untuk mengatasi kesenjangan ini. Penelitian hukum normatif, menggunakan pendekatan legislatif dan konseptual, digunakan. Temuan ini menunjukkan bahwa meskipun pengakuan hukum terhadap masyarakat adat ada dalam berbagai undang-undang, peraturan daerah yang disesuaikan dengan kondisi setempat diperlukan. Namun, tidak ada konsensus tentang peraturan mana yang harus menjadi dasar undang-undang daerah ini. Rekomendasi mengusulkan agar UU Agraria, UU HAM, UU Desa, dan UU Cipta Kerja dapat menginformasikan peraturan daerah untuk mengakui, melindungi, dan memenuhi hak adat masyarakat adat, sehingga mengurangi dualisme kewenangan.

Kata Kunci: Ambivalen; Masyarakat adat; Regulasi; Hak.

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INTRODUCTION

Article 1313 of the Civil Code states that an agreement is an act by which one or more people bind themselves to one or more other people. In general, an agreement is an agreement between the parties regarding something that gives rise to a legal agreement/relationship, giving rise to rights and obligations, if it is not carried out as agreed it will give rise to sanctions. The existence of an agreement will create an agreement for the parties. An agreement is a legal relationship between two people or two parties based on which one party has the right to demand something from another party and the other party is obliged to fulfill that demand." With the existence of an agreement it is hoped that the parties involved in it can carry out their rights and obligations. each of them is in accordance with the agreed agreements. In this way the aim of making the agreement can be achieved, namely the creation of justice, order and legal certainty.

One of the discourses in the implementation of Indonesian state administration is the protection of indigenous peoples, this is reflected in various previous studies that focus on the protection of indigenous peoples. However, until now there has been no research that focuses on examining the ambivalence of the regulation of indigenous peoples due to the variety of interpretations, so that there is no legal certainty, specifically regarding the basis for the formation of Regional Regulations to provide fulfillment of the rights of indigenous peoples.

Some previous studies that focused on examining indigenous peoples, Jawahir Thontowi studied Indigenous Peoples based on the perspective of the regulation and implementation of their traditional rights concluded that the protection of indigenous peoples stipulated in the constitution as well as several regulations across the Indonesian legal sector could not be implemented properly because they needed operational regulations. This is an implication of the conditions when the amendment of the Constitution of the Republic of Indonesia 1945 was carried out, which was full of political interests, so that the words development in Article 18B paragraph (2) experienced a deviation in meaning. On the one hand, the state recognizes and respects the rights of indigenous peoples, but on the other hand it is also demanded by various requirements in realizing the rights of indigenous peoples¹.

Zayanti Mandasari in her study focuses on examining the traditional rights of indigenous peoples based on several decisions of the Constitutional Court related to Coastal Waters Management Rights. Concluding that the Constitutional Court through its decisions strengthened the recognition of the existence of indigenous peoples in Indonesia, this is illustrated through the interpretation of the four basic constitutional requirements of indigenous peoples, the Court firmly affirmed that "customary forests are not state forests, the Court also emphasized that "Forest tenure by the state is still obliged to protect, respect and fulfill the rights of indigenous peoples, as long as in reality they still exist and are recognized for their existence, community rights granted based on statutory provisions, and are not contrary to national interests", the Constitutional Court Recognizes the customary rights area of a customary law community is a consequence of recognition of customary law as living law. The Constitutional Court also emphasized Article 18B of the 1945 Constitution, that indigenous peoples in

¹ Jawahir Thontowi, "Pengaturan Masyarakat Hukum Adat Dan Implementasi Perlindungan Hak-Hak Tradisionalnya," *Pandecta: Research Law Journal* 10, no. 1 (2015): 1–13, <https://doi.org/10.15294/pandecta.v10i1.4190>.

the control of customary rights are traditional rights that cannot be limited by legislation because the traditional rights of indigenous peoples should be enjoyed from generation to generation²

Muhammad Dahlan through his study concluded that until now, both in the basic norms of the 1945 Constitution of the Republic of Indonesia and other laws and regulations, there are no regulations that fully and in detail provide recognition and protection of the rights of indigenous peoples. The lack of regulatory instruments for the recognition and protection of the rights of indigenous peoples in the Indonesian legal system has resulted in the state having the freedom to use its power to ignore the hereditary rights of indigenous peoples on the grounds that it is in the interests of the state. Interpretation of articles in every legislation that recognizes and provides protection to the rights of indigenous peoples has led to restrictions and derogation of the traditional rights of indigenous peoples that continue to occur³.

Furthermore, research conducted by Bayo focuses on exploring the meaning of the recognition of indigenous peoples in Indonesia, concluding that there are several sectoral laws that guarantee the rights of indigenous peoples, including Law Number 5 of 1960 concerning Basic Agrarian Principles (UUPA), from the above provisions in Law Number 32 of 2009 concerning Environmental Protection and Management in Article 63 regulates the duties and authorities of the Government and local governments in environmental protection and management related to indigenous peoples in several parts, as follows, the Government, establishes policies regarding procedures for recognizing the existence of indigenous peoples, local wisdom, and the rights of indigenous peoples related to environmental protection and management⁴. Referring to previous research, it appears that there is no research that focuses on examining regulations related to the granting of authority to Regional Governments to form regional regulations that focus on the fulfillment of the rights of indigenous peoples.⁵

Based on the *stufenbau* theory initiated by Hans Kelsen, it basically postulates that the formation of laws and regulations must have legitimacy in higher regulations as a basic affirmation of the formation of lower norms, including the formation of Regional Regulations⁶. Therefore, the current blurring of norms related to the basis for the formation of Regional Regulations for the fulfillment of indigenous peoples correlated with *Stufenbau* Theory shows the urgency of analyzing and understanding the basis for the formation of regional regulations. This is also closely correlated with the responsive law proposed by Nonet and Selznick, which basically requires that the law must be able to respond to developments that occur in society⁷.

² Zayanti Mandasari, "Politik Hukum Pengaturan Masyarakat Hukum Adat (Studi Putusan Mahkamah Konstitusi)," *Jurnal Hukum IUS QUIA IUSTUM* 21, no. 2 SE-Articles (April 25, 2016): 227–50, <https://doi.org/10.20885/iustum.vol21.iss2.art4>

³ Muhammad Dahlan, "Rekognisi Hak Masyarakat Hukum Adat Dalam Konstitusi," *Undang: Jurnal Hukum* 1, no. 2 (2019): 187–217, <https://doi.org/10.22437/ujh.1.2.187-217>

⁴ Relexi Bayo, Andy Usmina Wijaya, and Fikri Hadi, "Pengakuan Masyarakat Adat Dalam Peraturan Perundang-Undangan Di Indonesia," *Jurnal Ilmu Hukum Wijaya Putra* 1, no. 1 (April 12, 2023): 1–11, <http://jurnal.uwp.ac.id/fh/index.php/jurnalilmuhukum/article/view/87>.

⁵ Philippe Nonet and Philip Selznick, *Hukum Responsif*, ed. Nurainun Mangunsong, V (Bandung: Nusa Media, 2018), <https://opac.perpusnas.go.id/DetailOpac.aspx?id=1155990>. Hlm, 21

⁶ Muhammad Fikri Hanafi and Sunny Ummul Firdaus, "Implementasi Teori Hans Kelsen Dalam Peraturan Perundang-Undangan Di Indonesia," *Sovereignty* 1, no. 1 SE-Articles (July 4, 2022): 79–83, <https://doi.org/10.13057/sovereignty.v1i1.192>. Hlm, 82

⁷ Junaidi Junaidi, "Sinergi Hukum Dan Kekuasaan Dalam Mewujudkan Keadilan Sosial," *Supremasi Hukum : Jurnal Penelitian Hukum* 30, no. 1 SE-Articles (January 30, 2021): 17–27, <https://doi.org/10.33369/jsh.30.1.17-27>. Hlm, 24

Referring to these arguments, this article focuses on examining various regulations relating to the recognition and protection of indigenous peoples, but cannot yet be used as a basis for consideration in making derivative regulations that are more specifically related to indigenous peoples. Thus, the discussion section will outline various laws and regulations that can be the basis for the formation of Regional Regulations to provide protection and fulfillment of the rights of indigenous peoples.

METHOD

This type of research uses qualitative research with a type of normative legal research that uses statutory and conceptual approaches. The type of normative legal research is legal research conducted by examining library materials that use the object of writing studies in the form of existing libraries, both in the form of journals, books, relevant articles and laws and regulations that have a correlation to the discussion of the problem. The types and sources of legal materials used in the research consist of: The legal material collection technique used in this research is by reading, analyzing, recording, reviewing library materials, as well as searching through other media relevant to the focus of the research. The analysis used in this research is prescriptive analytical, which is based on the author's thinking reasoning which is correlated with the data and then provides a solutive problem solving solution.

RESULT AND DISCUSSION

In the administration of Indonesian state administration, one of the things that has become a consensus is the procedure for organizing local government, in the basic norms of the 1945 Constitution of the Republic of Indonesia mandated that the Indonesian state consists of the central government and local governments⁸. The existence of local governments based on decentralization, which essentially gives the regions the right to regulate and manage their own households, is reflected in the granting of authority to local governments to form local regulations, by the legislators concretized through Law Number 9 of 2015 concerning the Second Amendment to Law Number 23 of 2014 concerning Regional Government. It is widely understood that the formation of laws and regulations, including the formation of regional regulations, in order to have binding power and enforceability must be based on higher regulations, as taught by Hans Nawiasky. Therefore, the Regional Government to provide protection and fulfillment of the rights of indigenous peoples through the formation of regional regulations, must have a source of authority, but with regard to the formation of regional regulations for the fulfillment of the rights of indigenous peoples, there is no clear regulation or norm ambiguity. The following laws are relevant and can be a consideration for the formation of Regional Regulations to fulfill the rights of indigenous peoples.

1. Legal Basis for Cosmetics Distribution in Indonesia

The distribution permit is defined based on the Regulation of the Head of the Food and Drug Supervisory Agency of the Republic of Indonesia Number Hk.00.05.1.23.3516 concerning the Distribution Permit for Medicinal Products, Traditional Medicines, Cosmetics, Food Supplements, and Foods Sourced, Containing, From Certain Ingredients And / Or Containing Alcohol. This is a form of

⁸ “Undang-Undang Dasar Republik Indonesia” (1945), art. 18 ayat (1).

registration approval granted by the Food and Drug Administration of the Republic of Indonesia for drugs, traditional medicines, cosmetics, dietary supplements, and food products. This approval is required so that the product can legally circulate within Indonesia. Therefore, cosmetics without a distribution permit can be defined as cosmetic products that have not received registration approval from BPOM and are therefore not allowed to be legally circulated in Indonesia.

Law No. 5 of 1960 on basic Agrarian regulations has juridically regulated customary law communities. Article 2(1) stipulates that the earth, water and airspace, including the natural resources contained therein, at the highest level become the property of the State which is intended to increase the prosperity of the people, based on Article 33(3) of the 1945 Constitution and the definition contained in Article 1. Paragraph (4) of the article then confirms that the right to control by the State can be authorized to autonomous regions and customary law communities, provided that it is necessary and not contrary to the national interest. In this context, Masyarakat Hukum Adat only acts as the recipient of the power of attorney "if needed" in managing the earth, water and space in its territory, and the regulation will be regulated through other laws and regulations⁹.

Furthermore, article (3) of the Basic Agrarian Law (UUPA) explains that, by considering the provisions in articles 1 and 2, the implementation of ulayat rights and similar rights of customary law communities, as long as they still exist according to reality, must be carried out seriously so that it is in accordance with national interests and the principle of national unity. This implementation must not conflict with other laws and regulations that have a higher hierarchy. In the General Elucidation (TLN No.2043), it is stated that the existence of hak ulayat and similar rights of customary law communities is related to the relationship between the nation and the earth, water, and natural resources contained therein, as well as with the power of the State as mentioned in article 1 and article 2. Article 3 is therefore designed to regulate the ulayat rights of the legal community units, with the aim of placing such rights in their proper place¹⁰

The basic principles in this regulation focus on the recognition of customary rights. In some judicial decisions, customary rights have not been formally recognized in the implementation of agrarian regulations. During the Dutch East Indies administration, customary rights were often ignored. With the mention of ulayat rights in the Basic Agrarian Law, which is actually a recognition of such rights, in principle, recognition of ulayat rights must be considered as long as such rights still exist according to the reality in the customary law community concerned. For example, in the granting of land rights (Article 16 of the UUPA), the indigenous people concerned will previously be consulted and will be given recognition to accept the ulayat rights¹¹.

The elucidation in the UUPA illustrates that the existence of customary rights is closely related to the existence of customary law communities and their traditional rights. Although hak ulayat is not absolute, it is an important indicator of the recognition and protection of indigenous peoples. For indigenous peoples, the absence of recognition of customary rights can be interpreted as the absence of recognition and protection as a whole. The existence of customary rights in the context of indigenous peoples is highly dependent on the legitimacy given by the government to the practice of customary

⁹ Abdurrahman Abdurrahman, "Draft Laporan Pengkajian Hukum Tentang Mekanisme Pengakuan Masyarakat Hukum Adat" (Jakarta, 2015). Hlm 52

¹⁰ Abdurrahman. Hlm. 53

¹¹ Abdurrahman.Hal, 53



law carried out by the indigenous peoples concerned. Therefore, Article 5 of the UUPA states: "The Agrarian Law applicable to the earth, water, and airspace is customary law, insofar as it does not conflict with national and State interests, which are based on national unity, with Indonesian socialism as well as with the regulations contained in this Law and with other laws and regulations, all with due regard to the elements that rely on religious law."¹²

2. *Implementation of Standard Agreements to Create justice for the parties*

This regulation also normatively juridically recognizes the rights of indigenous peoples, including their customary law rights. Article 6 paragraph (2) of Law No. 39/1999 on Human Rights, which states; "The identity of customary law communities, including rights to customary land (rights over customary territories) is protected, in line with the development of the times."¹³

The regulation in the Article in principle provides recognition and protection, but in another perspective. There is also ambivalence because it again contains the phrase "in harmony with the times". According to the author, this phrase contains provisions that are difficult to measure indicators of harmony. In fact, customary law communities are an integral part and an important element in the development of the national legal system¹⁴.

There are several important points regarding the concept of protection of indigenous peoples in this human rights law, which the author expands upon:

- a. Recognition and respect: The law recognizes and respects the existence, rights, culture, customs and values of indigenous peoples. This includes the right of indigenous peoples to maintain and develop their customs, beliefs and institutions.
- b. Protection arrangements: Law No. 39/1999 provides a legal basis for the government to protect and promote indigenous peoples. The government is required to respect, protect, promote, and value the rights of indigenous peoples.
- c. Participation of indigenous peoples: The law also emphasizes the importance of indigenous peoples' active participation in decision-making that relates to their lives. This includes in the planning and management of natural resources in their territories.
- d. Rights to land and natural resources: Law No. 39/1999 provides protection for the rights of indigenous peoples to the land and natural resources they traditionally use and manage. The government is required to recognize, respect and protect these rights.
- e. Dispute resolution: The law also provides a mechanism for resolving disputes involving indigenous peoples. The aim is to ensure that disputes involving indigenous peoples are resolved in a manner that is fair and in accordance with their cultural values and customs.
- f. Local autonomy: The law recognizes local autonomy and the rights of indigenous peoples to regulate and manage their territories. This means that local governments are required to involve indigenous peoples in decision-making processes related to the management of territories and natural resources in their areas.
- g. Strengthening cultural identity: Law No. 39/1999 also emphasizes the importance of strengthening the cultural identity of indigenous peoples. The government is expected to support

¹² Abdurrahman.Hal, 54

¹³ Kabar Latuharhary, "Masyarakat Hukum Adat, Konservasi, Dan Hak Asasi Manusia - Komnas HAM," Komnasham Republik Indonesia, 2020, <https://www.komnasham.go.id/index.php/news/2020/6/25/1455/masyarakat-hukum-adat-konservasi-dan-hak-asasi-manusia.html>.

¹⁴ Verlia Kristiani, "Hukum Yang Berkeadilan Bagi Hak Ulayat Masyarakat Hukum Adat (Kajian Dan Implementasi)," *ADIL: Jurnal Hukum* 11, no. 1 (2020): 143–63, <https://doi.org/10.33476/ajl.v11i1.1449>. Hlm, 152



efforts to preserve and develop the culture and customs of indigenous peoples so that they remain alive and thriving.

- h. Social and economic rights: The law recognizes that indigenous peoples also have social and economic rights that must be respected and protected. This includes their rights in relation to education, health, housing, employment and general well-being.
- i. The role of customary institutions: The concept of protection of indigenous peoples in the Law recognizes customary institutions as having an important role in maintaining and protecting the continuity of the culture, customs, and values of indigenous peoples. Customary institutions are recognized as partners in decision-making that affects the lives of indigenous peoples¹⁵
- j. Harmonization with national law: Law No. 39/1999 also directs the need for harmonization between customary law and national law. The government is expected to encourage dialog and cooperation between customary law communities and the national legal system to achieve a good balance between the two systems¹⁶.

According to the author, the important points above are a regulatory concept for the recognition and protection of indigenous peoples. However, the concept should be implemented in a tangible form, in order to provide the fulfillment of recognition and protection along with the traditional rights of indigenous peoples. The concept contained in this Law can also be used as a basis for consideration in preparing and stipulating derivative regulations in this case (regional regulations) as a form of legal certainty in fulfilling the recognition and protection of indigenous peoples in each region in the archipelago.

CONCLUSION

Agreements made in the context of standard agreements must still prioritize the principle of freedom of contract. Although not all of them can be accommodated, at a minimum the provisions regulated in the Civil Code which regulates agreements, especially the provisions of Article 1320, must be absolutely fulfilled in the substance of the standard agreement. If, after reading and examining the clauses in the agreement, it turns out to be detrimental to one of the parties, the party who feels disadvantaged must firmly reject or not agree to the agreement. This is necessary because any agreement, including a standard agreement, must still meet the requirements for the validity of the agreement as regulated in the Civil Code. In this way, the standard agreement that has been signed does not have the potential to become a conflict between the parties and is not null and void by law. In practice, standard agreements are currently covered by one-sided interests, especially those of the

¹⁵ Sirtatul Laili, "Praktik Adat Tentang Ketidakbolehan Menikah Pada Bulan Ramadhan Dan Syawal(Nyawok) Didesa Sokong Lombok (Traditional Practice Concerning Inequality of Marriage in Ramadan and Syawal Months (Nyowok) in The Sokong District of Tanjung District North Lombo," *Jurnal HAM* 11, no. 1 (2020): 122, <https://doi.org/10.30641/ham.2020.11.117-129>. Hlm, 119

¹⁶ Yahya Ahmad Zein and Dewi Nurvianti, "Konsepsi Hak Masyarakat Hukum Adat Sebagai Hak Asasi Manusia Dalam Peraturan Perundang-Undangan Di Indonesia," *Veritas et Justitia* 3, no. 2 (2017): 414–36, <https://doi.org/10.25123/vej.2689>. Hlm, 422

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