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JURIDICAL STUDIES RECOGNITION OF INDIGENOUS PEOPLES' RIGHTS POLITICAL LEGAL PERSPECTIVE

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Abstract

The purpose of this study is to analyze: 1) How are indigenous peoples' rights a politically legal perspective? 2) How is the recognition of indigenous peoples' rights a politically legal perspective?. The research method used is normative juridical with a statutory approach, concept approach, and case studies. The results showed that: 1) The system of laws and regulations in Indonesia, regulation of indigenous peoples' rights is carried out sectorally. This indicates that indigenous peoples are placed as objects of sectoral interest in the administration of the State. As a result, each sectoral law lists arrangements regarding indigenous peoples according to their importance. This is where conflicts between indigenous peoples and third parties have always been the estuary. Law No. 41 of 1999, Law No. 11 of 1967 concerning Mining, Law No. 18 of 2004 concerning Plantations, Law on Management of Coastal Areas and Small Islands, Law No. 32 of 2009 concerning the Environment, Law No. 41 of 1999 concerning Forestry and Basic Agrarian Law are a number of laws that list the regulation of indigenous peoples in marginal positions. 2) Recognition of customary law peoples' rights to land is not only limited to the form of recognition in State law, but because factually Indonesian society is plural. Then recognition can also be obtained through the law that lives in the community, namely customary law.

Keywords: Study, Juridical, Recognition, Rights, People, Customary, Perspective, Political, Legal.

INTRODUCTION

Background

Indigenous peoples in the Indonesian context have various definitions, this is because at the regulatory level there are various kinds of arrangements regarding indigenous peoples, which are adapted to existing legislation products. In terms of terms, for example, there are regulations that use the terms remote indigenous communities, indigenous peoples, customary law communities, unity of customary law communities, and the term traditional communities.[1]

Indigenous peoples have actually gained recognition and protection in national legal instruments as well as international law. This arrangement in national and international law is an effort to promote the rights of indigenous peoples, who in recent decades have experienced marginalization due to development. One of the efforts to improve and restore the fate of indigenous peoples, as happened in Indonesia, is inseparable from the influence and pressure of the international community. The involvement of countries in the world to improve indigenous peoples is carried out through the establishment of international instruments on human rights and efforts to ratify these international instruments into national legal systems.[2]

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In many regulations and discourses that have developed, references to the constitutional rights of indigenous peoples always refer first to Article 18B paragraph (2) of the 1945 Constitution. In fact, these provisions are realized to contain normative problems in the form of a number of requirements and a tendency to see indigenous peoples as part of the local government regime. In fact, advocacy and education of indigenous peoples are more at the level of human rights which are more in accordance with the constitutional basis of Article 28I paragraph (3) of the 1945 Constitution. Similar to Article 18B paragraph (2) of the 1945 Constitution, the provisions of Article 28I paragraph (3) of the 1945 Constitution are also the result of the second amendment to the 1945 Constitution of 2000. Article 28I paragraph (3) reads:

> "The cultural identity and rights of traditional peoples are respected in harmony with the development of times and civilizations."

Substantially, the content material pattern of Article 28I paragraph (3) is almost the same as the content of Article 6 paragraph (2) of Law No. 39 of 1999 concerning Human Rights, which reads:

> "The cultural identity of indigenous peoples, including customary land rights, is protected, in line with the times."

Article 6 paragraph (2) of the Human Rights Law regulates more firmly by designating the subject of customary law communities and customary land rights. While Article 28I paragraph (3) makes a more abstract formulation by mentioning the rights of traditional communities. Traditional community rights itself is a new term that until now has not had a clear definition and boundaries. Article 28I paragraph (3) of the 1945 Constitution also requires the existence and rights of indigenous peoples as long as they are in accordance with the times.

The system of laws and regulations in Indonesia, regulation of the rights of indigenous peoples is carried out sectorally. This indicates that indigenous peoples are placed as objects of sectoral interest in the administration of the State. As a result, each sectoral law lists arrangements regarding indigenous peoples according to their importance. This is where conflicts between indigenous peoples and third parties always boil down. Law No. 41 of 1999, Law No. 11 of 1967 concerning Mining, Law No. 18 of 2004 concerning Plantations, Law on Management of Coastal Areas and Small Islands, Law No. 32 of 2009 concerning the Environment, Law No. 41 of 1999 concerning Forestry and Basic Agrarian Law are a number of laws that list the regulation of indigenous peoples in marginal positions.

Sectoralism places indigenous peoples as objects of exploitation rather than as subjects who must be fulfilled their rights as part of the nation. This situation is actually not in accordance with the principles in Pancasila and the 1945 Constitution, which affirm that the State of Indonesia protects the entire nation and all Indonesian bloodshed. Even from the simplest logic, if the situation is not immediately corrected, it can be said that the Government of the Republic of Indonesia is only busy taking care of Indonesia's bloodshed land for the benefit of sectoral development (development from the understanding of unilateral interpretation of government officials) and ignores the aspect of "protecting the entire Indonesian nation."

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Examples of legal consequences that occur "there is no requirement for the authority of the regional head to issue plantation business licenses in customary forests, there is no regulation regarding the release of forest areas to customary forests used for plantation business land and the juridical consequences of any plantation business licenses issued not based on the Constitutional Court decision No. 35/PUU-X/2012 are null and void

Problem Statement

1) What is the perspective of indigenous peoples' rights in legal politics?

2) How is the recognition of indigenous peoples' rights a politically legal perspective?

Theoretical Framework

1. Theory of Legal Protection

Based on Satjipto Rahardjo's thinking, legal protection is to provide protection for human rights that are harmed by others and that protection is given to the community in order to enjoy all the rights provided by law. Philipus M. Hadjon gave the idea that legal protection for the people as a preventive and repressive government action. Preventive legal protection aims to prevent disputes from occurring, which directs the government to be cautious in making decisions based on discretion, while repressive protection aims at dispute resolution, including handling it in the judiciary[3] M. Isnaeni argues that basically the issue of legal protection in terms of its source can be divided into two, namely:

a. Internal legal protection

Internal legal protection is legal protection created by the parties themselves when making an agreement, where when negotiating on clauses in the agreement the parties expect their interests to be fulfilled on the basis of agreement. In this intellectual legal protection, all types of risks are sought to be prevented by agreement on the clauses made by the parties.[4]

b. External Legal Protection

External legal protection is a legal product made by the government through written regulatory regulations to meet the legal needs of the community or weak parties, in accordance with the nature of laws and regulations that cannot be biased and impartial, proportionally must also be given balanced legal protection as early as possible to other parties.[5]

2. Theory of Justice

The term justice (*iustitia*) comes from the word "just" which means: impartial, impartial, siding with the right, deserved, not arbitrary.[6] Justice is essentially treating a person or other party in accordance with his rights and obligations. What is the right of everyone is to be recognized and treated in accordance with his equal dignity and dignity, which is equal in rights and obligations, regardless of ethnicity, degree, descent, property, education or religion.[7]

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Aristotle in his work entitled The Ethics of Nichomachea explains the thinking of his thoughts on justice. For Aristotle, the virtue, that is, obedience to the law (the law of the polis at that time, written and unwritten) was justice. In other words, justice is a virtue and it is general. Theo Huijbers explains justice according to Aristotle in addition to general virtues, also justice as a special moral virtue, which relates to human attitudes in certain areas, namely determining good relations between people, and balance between two parties.[8] The measure of this equilibrium is numerical and proportional similarity. This is because Aristotle understood justice in terms of equality. In numerical similarity, every human being is equated in one unit. For example, everyone is equal before the law. Then proportional equality is to give to each person what is rightfully his, according to his abilities and achievements.[9].

Research Methodology

This research uses a type of normative juridical research, namely legal research that puts the law as a norm system building. The norm system that is built is about principles, norms, rules of laws and regulations, court decisions, presentations, and doctrines / teachings. More about normative legal research, namely research that has the object of study of rules or legal rules. Normative legal research examines legal rules or regulations as a system building related to a legal event. This research was conducted with the intention of providing legal argumentation as a basis for determining whether an event has been true or false according to law.[10]

The type of research that the author uses in the preparation of this writing is normative legal research or literature, namely legal research carried out by examining library materials or secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. Normative legal research or literature includes; Research on legal principles, Research on legal systematics.[11]

RESEARCH RESULTS

Indigenous Peoples' Rights Political Legal Perspectives

Indigenous peoples in the Indonesian context have various definitions, this is because at the regulatory level there are various kinds of arrangements regarding indigenous peoples, which are adapted to existing legislation products. In terms of terms, for example, there are regulations that use the terms remote indigenous communities, indigenous peoples, customary law communities, unity of customary law communities, and traditional community terms. Meanwhile, in terms of definition, here are some important definitions put forward in this short. This raises indications that the existence of indigenous peoples is related to the construct of *Political Will* in the regulations made by the government.

Indigenous peoples are intended as groups of people who have ancestral origins [ihereditary] in a certain geographical area and have their own value system, ideology, politics, economy, culture, social, and territory. This definition is in accordance with the International Labour Organization Convention ILOJ Number 169 of 1969 Article X 0.b) which contains the following, "Tribal Peoples are those who live in countries where social, cultural and economic conditions distinguish them from other societies in the country.[12]

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The history of the struggle of indigenous peoples of Indonesia cannot be separated from the contributions of customary law experts, especially Cornelis Van Vollenhoven, professor at Leiden University since 1901 and father of the *"Leiden School"* who studied customary law *(adatrecht)*. They highlighted issues regarding the contribution of indigenous to the development of local culture in Indonesia. Local traditions in Indonesia are always related to natural resources and forests as sacred areas. Land and access to land is something that every agrarian community automatically thinks about, while priorities based on historical origins and local authenticity as criteria characterize status and rights in traditional cultures throughout Indonesia.

The existence of indigenous peoples in Indonesia is constitutionally recognized, as stated in article 18 of the 1945 Constitution which reads, "The division of Indonesian deerah into large and small regions with the form of government structure is determined by law, by considering and remembering the basis of consultation in the state government system, and the right of origin in special areas".[13]

Matua Sirait said that regulations regarding indigenous peoples as long as the legislation governing indigenous peoples does not exist or is not clearly regulated in the Constitution, it is necessary to prepare regional regulations that can solve the problem of indigenous peoples' rights in their regions temporarily. The regional regulations that must be prepared are in the nature of recognition, justification or acceptance so that the role that has been carried out by the Ministry of Forestry must be emptied from areas where there are indigenous peoples. In many regulations and discourses that have developed, references to the constitutional rights of indigenous peoples always refer first to Article 18B paragraph (2) of the 1945 Constitution. In fact, these provisions are realized to contain normative problems in the form of a number of requirements and a tendency to see indigenous peoples as part of the local government regime. In fact, advocacy and education of indigenous peoples are more at the level of human rights which are more in accordance with the constitutional basis of Article 28I paragraph (3) of the 1945 Constitution. Similar to Article 18B paragraph (2) of the 1945 Constitution, the provisions of Article 28I paragraph (3) of the 1945 Constitution are also the result of the second amendment to the 1945 Constitution of 2000. Article 28I paragraph (3) reads:

> *"The cultural identity and rights of traditional peoples are respected in harmony with the development of times and civilizations."*

Substantially, the content material pattern of Article 28I paragraph (3) is almost the same as the content of Article 6 paragraph (2) of Law No. 39 of 1999 concerning Human Rights, which reads:

> *"The cultural identity of indigenous peoples, including customary land rights, is protected, in line with the times."*[14]

In addition to the two provisions above, another provision in the constitution that can be related to the existence and rights of indigenous peoples is Article 32 paragraphs (1) and (2) of the 1945 Constitution. These two provisions are not directly related to indigenous peoples over natural resources. However, in the daily life of indigenous peoples, traditional natural resource

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management patterns have become their own culture that is different from the patterns developed by industrial communities. These patterns of natural resource management later became one of the local wisdom or traditional wisdom of the community in the management of natural resources and the environment. This provision is the constitutional basis for viewing society from the cultural dimension. The rights stipulated in this provision are the right to develop regional cultural and linguistic values. It is undeniable that the cultural approach in looking at the customs of indigenous peoples is the safest approach for the government because the risks of this approach are not greater than other approaches.[15]

The conditionality of the juridical status and rights of Indigenous Peoples causes the existence of Indigenous Peoples to be dependent on the political will of the government. This happens because of the presence of a 'stipulated law' clause in the limitation on Indigenous Peoples.The clause puts Indigenous Peoples in a difficult position because it is required by:

1) As long as the customary law community still exists;
2) In accordance with the times;
3) In accordance with the principles of the Unitary State of the Republic of Indonesia;
4) Regulated by Law.[16]

This set of requirements has led to a lack of further clarity on Indigenous Peoples. As a result, if there is a violation of the rights of Indigenous Peoples, there is no legal basis that can be used to formulate and implement specific advocacy efforts for this group in order to protect their rights. The rights in question such as:

1) Individual Rights as Citizens, as citizens, indigenous people have the same human rights as other citizens.
2) Collective rights as Indigenous Peoples, as an anthropological community, indigenous peoples have collective rights, which they need both to develop and develop the human potential of their citizens to achieve a higher standard of living, especially customary land rights.
3) The Right to Development, the right to development, is part of the Right to Development, which follows the 1986 United Nations Declaration on the Right to Development and the 1989 ILO Convention on Minority Groups and Indigenous Peoples in Independent States.[17]

If studied in the perspective of their rights, indigenous peoples are also entities that are recognized as supporting components of nations that have a cultural identity. This is related to the recognition of the existence of customary law communities can be seen in the provisions governing Human Rights in Constitution 45 contained in Article 28 I paragraph (3), which reads: cultural identity and rights of traditional communities are respected in line with the development of times and civilization. So that based on the constitution, the rights of indigenous peoples have been guaranteed and this must be respected by all elements of the state, especially the government. This correlates directly with all implementing regulations

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under it and the formulation of policies on matters pertaining to indigenous peoples and their traditional rights including customary rights.[18]

In addition to the issue of regulatory substance, legal recognition of indigenous peoples is institutionalization. It is not yet clear which institutionalization is responsible for managing indigenous peoples who have the authority to issue legal instruments for the recognition and implementation of programs related to the fulfillment of indigenous peoples' rights. So it can be said, it is from this point that the main factors that result in regulatory conflicts regarding the recognition and protection of indigenous peoples arise.

In the systematic view of the 1945 Constitution, the institutions authorized to deal with indigenous peoples are the Ministry of Home Affairs, the Ministry of Law and Human Rights and the Ministry of Culture and Tourism. However, the distinction in the constitution if placed on the sectoral legal framework or laws and regulations will be very complex, especially those related to natural resource management. [19]

Several sectoral laws have regulated the existence and rights of indigenous peoples. The problem arises when each sectoral law has arrangements regarding indigenous peoples with different institutions according to the law. Of the many institutions, of course, they have different perspectives and interests in accordance with the interests of each institution.[20]

The system of laws and regulations in Indonesia, regulation of the rights of indigenous peoples is carried out sectorally. This indicates that indigenous peoples are placed as objects of sectoral interest in the administration of the State. As a result, each sectoral law lists arrangements regarding indigenous peoples according to their importance. This is where conflicts between indigenous peoples and third parties have always been the estuary. Law No. 41 of 1999, Law No. 11 of 1967 concerning Mining, Law No. 18 of 2004 concerning Plantations, Law on Management of Coastal Areas and Small Islands, Law No. 32 of 2009 concerning the Environment, Law No. 41 of 1999 concerning Forestry and Basic Agrarian Law are a number of laws that list the regulation of indigenous peoples in marginal positions.[21]

Recognition of Indigenous Peoples' Rights Political Legal Perspectives

Concrete actions for the recognition and protection of the unity of indigenous peoples should be formulated in various regulations that are in harmony and always put the mandate of the constitution above all else.

Recognition of customary law peoples' rights to land is not only limited to the form of recognition in State law, but because factually Indonesian society is plural. Then recognition can also be obtained through the law that lives in the community, namely customary law. This is in line with Van Vollenhoven's contention that the system of enforcing customary law is not based on regulations made by the government or other instruments of power, which are its joints and held by the Dutch power itself, but on actions that by custom and by the community are considered appropriate and binding, besides that the population has the same belief that customary rules must be maintained by traditional chiefs and other officials and have sanctions.[22]

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Recognition of the de jure existence of indigenous peoples is also recognized and ratified in the 1945 Constitution article 28 i paragraph [3] which states, that, "cultural entities and rights of traditional peoples are respected in accordance with development and civilization". Recognition of the existence of indigenous peoples does not only stop at the constitution, but more than that it is also operationalized in Law Number 39 of 1999 concerning Human Rights, especially the article which reads:

1) In order to uphold human rights, differences in and needs of indigenous peoples must be considered and protected by community and government law.
2) The cultural identity of indigenous peoples, including customary land rights, is protected, in line with the times.[23]

This recognition is also stipulated in the constitution of the State of Indonesia, namely in Article 18 B of the 1945 Law that the State recognizes and respects the unity of indigenous peoples and their traditional rights as long as they are alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia stipulated in law, and further in Article 28I paragraph (3) of the 1945 Constitution that cultural identity and traditional communities are respected in accordance with the development of times and civilization. And in the fourth amendment of the 1945 Constitution, it is also stipulated in Article 32 paragraph (1) that the State promotes Indonesian national culture in the midst of world civilization by guaranteeing the freedom of the community in maintaining and developing its cultural values.[24]

In addition to those contained in national laws and regulations, recognition of indigenous peoples' rights internationally has recently tended to increase. One of the culmination of respect for the existence of indigenous peoples in 1993 was the Year of Indigenous Peoples by the United Nations (UN), which was a follow-up to a series of world convention agreements that emphasized the importance of UN member states governments to immediately implement the empowerment of indigenous peoples.[25]

Culturally, indigenous peoples are included in the Austronesian cultural area, namely peasant culture. The 1945 Constitution has affirmed the existence of customary law communities. Recognition of the existence of customary law communities is encompassed by the recognition and protection of the rights that accompany the existence of customary law. Recognition and protection of indigenous peoples' rights is an urgent need. Indigenous peoples as a whole are included in vulnerable groups in Indonesian society. The fact shows that Indigenous Peoples are in a weak position, both economically, politically, and legally when dealing with groups that are more established and better able to protect and fulfill their own human rights.[26]

Sectoralism places indigenous peoples as objects of exploitation rather than as subjects who must be fulfilled their rights as part of the nation. This situation is actually not in accordance with the principles in Pancasila and the 1945 Constitution, which affirm that the State of Indonesia protects the entire nation and all Indonesian bloodshed. Even from the simplest logic, if the situation is not immediately corrected, it can be said that the Government of the Republic of Indonesia is only busy taking care of Indonesia's bloodshed land for the benefit of sectoral

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development (development from the understanding of unilateral interpretation of government officials) and ignores the aspect of "protecting the entire Indonesian nation."

Several sectoral laws with the ministerial regulations mentioned above, at a glance it can be seen that the signal of indigenous peoples' empowerment, especially related to natural resource management has been quite comprehensive in various aspects. There is even a trend to include substance about indigenous peoples in laws and regulations, especially laws and regulations in the field of natural resources. However, when viewed from the perspective of legal rules, some formulations of indigenous peoples' rights in the legislation are still sectoral. Its sectoral nature is an obstacle in the implementation of full recognition and protection of the existence and rights of indigenous peoples because it makes communities have to negotiate recognition and protection of their existence and rights to many state regulations and agencies. Examples of legal consequences that occur "there is no requirement for the authority of the regional head to issue plantation business permits in customary forests, there is no regulation regarding the release of forest areas to customary forests used for plantation business land and the juridical consequences of any plantation business licenses issued not based on the Constitutional Court decision No. 35/PUU-X/2012 are null and void"[27]

The formulation of sectoral and facultative legal norms in a practical context is actually only regulating. The consequences and legal consequences can be waived or if carried out only voluntarily *(Voluntary)* without coercion marked by sanctions. In fact, some formulations of legal norms tend to be rhetorical. In fact, if there is a political will from the government, this sectoral norm conflict can be minimized if the Recognition and Protection of Indigenous Peoples' Rights is not limited to local regulations, but offers other forms of law as a legitimate basis for recognition of the existence and rights of indigenous peoples. Therefore, legal forms of recognition of the existence and rights of indigenous peoples can be:

1) Presidential regulations or presidential decrees;
2) Ministerial regulations or ministerial decrees;
3) Regional regulations or decisions of regional heads at the provincial, district and city levels;
4) Permits, certificates or natural resource management rights;
5) Court rulings;
6) Agreements or agreements between indigenous peoples and the government related to the management of natural resources and the environment. [28]

CONCLUSION

The results showed that;

a) The system of laws and regulations in Indonesia, regulation of the rights of indigenous peoples is carried out sectorally. This indicates that indigenous peoples are placed as objects of sectoral interest in the administration of the State. As a result, each sectoral law lists arrangements regarding indigenous peoples according to their importance. This is

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b) Recognition of customary law peoples' rights to land is not only limited to the form of recognition in State law, but because factually Indonesian society is plural. Then recognition can also be obtained through the law that lives in the community, namely customary law.

Footnotes

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