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Constitutional Rights of Indigenous Law Communities and Legal Politics as Means of Assessing Legal Alignments to Indigenous Law Communities

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Abstract

The existence of indigenous peoples existed even before Indonesia's independence. Its existence was later recognized by the Indonesian constitution, namely the 1945 Constitution. The rights granted by the 1945 Constitution are constitutional rights owned by indigenous peoples. However, the constitutional rights can be canceled only because of an opinion that the customary law community or parts of themselves are deemed irrelevant. This constitutional right can also be disturbed by the enactment of a law. Through the legal political approach, there is no visible side of legal policy towards the existence of indigenous peoples. This is indicated by the absence of an organic law that specifically regulates the existence of indigenous peoples as mandatory laws and regulations from the content of the constitution that regulates and protects the existence of indigenous peoples and the traditional rights attached to them. Indigenous and tribal peoples also do not have configurable power to influence legal policies, such as those policies that are detrimental to them.

Keywords
customary law society; constitutional rights; legal political approach

I. Introduction

Constitutional rights are the basic rights of a group of people which are legalized as content in the constitution of a country. One of the basic rights of a group of people recognized by the Indonesian constitution is the existence of customary law communities. Jimly Asshiddiqie stated that it was given by the Indonesian constitution through the provisions of the 1945 Constitution Article 18 B paragraph 2.

Unfortunately, even though they have basic rights that are owned or granted by the constitution, indigenous peoples in some cases are not protected by law. In fact, logically hierarchically, the laws and regulations should move according to the highest source governing this matter. The constitution recognizes customary law communities as an entity and because of this recognition, their existence must be protected by law.

Some events do not illustrate this. For example, what happened to the Kinipan customary law community whose customary land became a dispute until the village head of Kinipan was arrested, although now the village head has been released, the land dispute that has harmed the Kinipan customary law community has not ended. Like Kinipan, the AKUR Sunda Wiwitan community in Cigugur Kuningan, which has reached the stage where their customary land is about to be executed, until now the AKUR Sunda Wiwitan community in Cigugur Kuningan is still carrying out various kinds of protests to defend the customary land they have traditionally and handed down from generation to generation.

Apart from what happened to the Kinipan customary law community and the Sunda Wiwitan AKUR customary law community, Cigugur Kuningan is not the entire case of deprivation of constitutional rights that befell indigenous peoples. In various corners of Indonesia, indigenous peoples are marginalized and their rights are not given much thought, especially when it comes to customary land rights. Seeing this, it seems that there is a need for an article that will increase the awareness of law enforcers and the public in general that customary law communities have constitutional rights so that their existence must be maximally protected by law.

In essence, the law exists because of the human need for it. These needs arise because of human needs as social beings. Sudikno Mertokusumo said that it is impossible to live without a shared desire or a collective desire because human beings are social creatures. Like a double-edged sword the collective spirit has something as unpleasant as conflict. Socialization between humans at a certain stage allows humans to conflict with each other. Thus, there is a risk of recognizing the constitutional rights of indigenous peoples who are merged into a larger community, namely the Indonesian nation.

In fact, polemics related to culture and the existence of indigenous peoples tend to be avoided if one looks at the characteristics of customary law. This character, as conveyed by Ahmad Zazili, quoting R. Otje Salman, stated that although customary law communities maintain their traditional side, they can adapt well and can change. In fact, from these characteristics, there are characteristics that can change and can adapt well, however, these changes are of course with the approval of the indigenous people themselves, as stated by John Locke. If there is no agreement then conflict is unavoidable and in some cases conflict tends to harm indigenous peoples because of their weaker position than opponents of the conflict.

The constitution itself has various contents. Eric Barendt said the constitution could contain such fundamental rights as freedom of speech and equality before the law. The rights to freedom of opinion and to get a fair trial in the 1945 Constitution are also recognized (become content). Freedom of expression is regulated in Article 28E Paragraph (3). Regarding the right to justice, it is contained in Article 24 of the 1945 Constitution. But more importantly in the context of this paper, the rights of indigenous peoples are also fundamental rights, because as stated earlier, indigenous peoples existed even before Indonesia existed.

Then the question arises whether with the two provisions of the article the rights of indigenous peoples can also be protected. These provisions are able to become the basis for fighting for the culture of indigenous peoples if the culture is contrary to a certain policy. In relation to the analysis in this paper, the author will use the concept of legal politics. Mahfud MD argues that legal politics has two meanings. The first definition, legal politics is legal policy or popular among legal scholars as *legal policy*. The second understanding looks at how politics affect the law by looking at the configuration of the forming power of the law itself.

Referring to Mahfud MD's opinion, it can be seen how the arrangements related to the existence of customary law communities in Indonesia's positive law can be seen. Armed with these constitutional rights, it can be seen what efforts can be made by indigenous peoples in order to form a political force so that they can influence laws or policies considering that the existence of indigenous peoples does not benefit in some events, even the law seems to be not in favor of them.description that the author conveys in this background becomes the basis for the compiler to analyze and write related to "**Constitutional Rights of Indigenous Law Communities and Legal Politics as a Means of Assessing Legal Alignments in Indigenous Law Communities**".

II. Review of Literature

The existence of the law makes humans inevitably have to submit to a certain rule. This is actually contrary to *nature* which is widely believed to be born in a free state, but humans can submit themselves and let their freedom be bound. As John Locke said that humans are naturally all free, equal and independent, for those things no one can take them away without the consent of the owner of that freedom. In the context of Indonesia's customary law community, its existence also existed before Indonesia declared a form of state. The dissolution of the customary law community is because the customary law community is considered to agree (at least they do not rebel when they are merged into the Indonesian government), but this will result in the recognition of all rights of the customary law community as outlined in the Indonesian constitution.

When Indonesia was talking about independence, there was also a discussion about the recognition of this customary law community. At least this is documented in Yudi Latif's writing which states that starting in the 1930s, a public debate (polemic) arose regarding what culture would be built on whether Indonesia would become independent later, whether the old culture (the culture adopted by the indigenous people of the archipelago at that time) it) will be replaced with a new Indonesian culture formed from the meeting of eastern and western cultures. This shows that the inclusion of customary law communities is not without careful consideration and debate, now after the constitution was amended the existence of indigenous peoples is still recognized even though it must coincide with the new Indonesian culture that is changing back and forth.

III. Results and Discussion

3.1 Constitutional Rights of Indigenous Peoples

The Constitution is important to be discussed in relation to constitutional rights. It relates to how the constitution binds a person and how the constitution can protect a person. Protection from the constitution must also come to the conclusion of providing a strong legal basis or not to each person or group as is the case in the context of customary law communities.

The norms protecting the norms, according to the author, are one of the reasons for indigenous peoples to submit to all the norms contained in the constitution. Even so, there are positives and negatives from the norm event protecting the norm. On the positive side, customary law communities merge themselves into a larger society in quantity and because of that they will be more protected because their existence is recognized by the constitutional norms of the larger society. The negative side of this is that indigenous peoples must also comply with other norms regulated in the constitution as a consequence of the merger. This is reflected in John Locke's statement that after electing political bodies, the voters will submit to the will of the majority under the auspices of these political bodies. The political bodies referred to by John Lock are bodies formed by the formation of the constitution, as in Eric Barendt's term, are institutions of power.

Each constitution has differences depending on each country that forms the constitution itself. As Cass R. Sunstein pointed out, the constitution has many different functions, the constitution can be liberal, it can also be illiberal, different constitutions have different things that are regulated and different interests protected by the constitution. The content of the constitution as conveyed by Eric Berendt is in the form of regulations regarding the branches of power, namely the legislature (*parliament*), executive (*government*), judiciary (*courts*) and other institutions needed by a country, of course not

only that part that can be contained in the constitution. Eric Berendt also argues that the constitution can also contain what are fundamental rights for every citizen, such as freedom of expression and getting justice before a court.

The fundamental rights mentioned in this paper can be said to be constitutional rights. In the 1945 Constitution the basis of constitutional rights for every citizen is the provision of Article 1 Paragraph (2) which states that sovereignty is in the hands of the people. This means that the origin of all power in Indonesia, including the power possessed by state institutions, is power that comes from the people and essentially still belongs to the people. Each of the fundamental rights referred to in this paper as constitutional rights must be considered important in law enforcement, including respect for the existence of indigenous peoples and everything attached to them. This is due to the position of the constitution itself in the legal system of a country. As stated by Hans Kelsen, the constitution is the highest law applicable in a country. Thus, if the fundamental rights of citizens are regulated in the content of the constitution, it is sufficient that this becomes a strong legal basis to maintain the existence of themselves and their groups. This is because legal norms that are under higher legal norms cannot conceptually conflict.

3.2 Constitutional Rights Inherent in Indigenous Law Communities

Satya Arinanto revealed that national integration is an important thing to do in Indonesia considering the geographical shape and cultural diversity that exists in Indonesian society. This diversity is true, so it is, one of the factors is the geographical factor of Indonesia which is an archipelagic country, so it is possible for each island to have a different culture.

Regarding the second factor, which was conveyed by Satya Arinanto, namely the diversity of society, Yudi Latif had mentioned. Yudi Latif quoted Sukarno's statement that "The tribe in Javanese means *sikil*, feet. So the Indonesian people have many legs...there are Javanese feet, Sundanese feet, Sumatran feet, Irian feet, Dayak feet, Balinese feet, Sumba feet, Chinese peranakan feet…"

Sukarno in his presentation only mentioned a few tribes and some of them grouped Sukarno using the name of the island as an example of the number of tribes in Indonesia. Indonesia has more ethnic groups than Sukarno suggested. The Kompas website quoted data from the Central Bureau of Statistics as follows: "The 2010 Population Census states that there are 1,331 ethnic groups in Indonesia. The category is a code for the name of a tribe, another name/alias of a tribe, the name of a sub-tribe, even the name of a sub of a sub-tribe." Although the Kompas website cites 2010 data, it can still illustrate that Indonesia has various ethnic groups. If the number of ethnic groups in Indonesia is reduced from that number, it is impossible to drop drastically from that number because the rapid disappearance of a tribe can only occur if there is a genocide of that tribe.

The description of these tribes is important because it is related to their existence. If indeed there is no existence in Indonesia, of course, indigenous peoples (tribes) are not something that is bound by law, then they certainly do not have constitutional rights. The number of tribes mentioned certainly cannot be concluded that all these tribes are customary law communities. There are several criteria so that a certain tribe/group can be said to be a customary law community. The criteria, as mentioned by Soerjono Soekanto, quoting Ter Harr Bzn, stated that a society has a permanent and eternal structure and every member of the community considers it a natural thing.

The principle of independence in the *Preambule is* actually interpreted as doing an omission of customary law which is contrary to the principles of national law and is certainly contrary to the function of legal theory. As stated by RMW Dias, that basically a

legal community consists of heterogeneous laws, so with legal theory the diversity of laws is arranged to be more harmonious. So that in this condition something will be created that is tentative. Sometimes state law relents and respects the law of indigenous peoples, but customary law communities must also be able to be relevant to the law that is currently in effect.

In the end, a country will have a single legal entity, but with this understanding, it does not mean that it has to impose its will on the customary law community because in fact the customary law community is even recognized textually in the provisions of Article 18 Paragraph (2) as the 1945 Constitution. Strictly speaking the constitution uses the phrase "the State recognizes" customary law communities, it also implicitly recognizes the many types of customary law communities with the term "units" and also not only recognizes their existence, the constitution recognizes traditional rights owned by indigenous peoples. Of course, the constitution also limits this with the implementation of these rights which must be in accordance with the development of society and the prevailing laws and regulations. Development is a change towards improvement (Shah et al, 2020). With such a construction, the constitution actually still leaves a gaping room for legal confiscation of the traditional rights of indigenous and tribal peoples. Legal confiscation as stated by Fedric Bastiat is by establishing a law but is aimed at usurping the rights of others. Of course, this acknowledgment under such conditions can be said to be strong but has gaps.

The gaping gap is, for example, what happened in the legal formation process that was rolled out recently, namely the plan to amend the Criminal Code with the inclusion of the RKUHP into the legislation program. The belief held by indigenous peoples in one of the contents planned to be ratified in the RKUHP is the charge of blasphemy. Several community groups, both the general public and indigenous peoples themselves, consider this provision very detrimental because it does not clearly define blasphemy so that adherents of a belief system, most of whom are members of customary law communities, are prone to stumbling with this provision. If the charge is legalized, even beliefs that indigenous peoples believe have the potential to be punished if they are deemed to have insulted another religion or belief.

In practice, to maintain their existence, indigenous peoples can actually use more general constitutional rights. For example, based on the legal basis of the provisions of Article 24 Paragraph (1) of the 1945 Constitution, the text of the article is "judicial power is an independent power to administer justice to uphold law and justice." If it is felt that there are things that are detrimental to their existence, with this article, the customary law community can demand justice, one of the spaces is through the Constitutional Court. An application that is submitted to the Constitutional Court if the customary law community both in existence and the traditional rights attached to it such as trust are disturbed due to the formation of a law such as in the content event planned in the RKUHP, and if there are adverse legal provisions such as such is the case.

The existence of this Article does not necessarily guarantee that the customary law community will get justice for the existence of customary law. As mentioned by Philippe Nonet and Philip Selznick that the existence of a law does not guarantee justice is created, let alone more substantial justice. Of course, the statements of Philippe Nonet and Philip Selznick are evident in events related to indigenous and tribal peoples. It is clear that indigenous peoples have constitutional rights granted by the 1945 Constitution, however, in the field there are still many rights of indigenous peoples who are deprived of even by the law itself. In the case of the AKUR Sunda Wiwitan Kuningan customary law community, their rights to customary land were taken away through a court decision.

Customary law communities can also exercise other constitutional rights that are not specifically related to themselves. The basis of that constitutional right is the provision of Article 28E Paragraph (3), the text of the article "everyone has the right to freedom of association, assembly, and expression." In fact the word "gathering". Customary law community is a group of people who form a legal alliance based on what was conveyed by Ter Harr. Of course, this article still creates loopholes because, let alone the customary law community specifically, this article sometimes fails to protect the Indonesian people in general.

Thus, if asked whether indigenous peoples have constitutional rights? the answer is yes, have. So if asked whether the constitutional rights protect the customary law community or not? The answer is simply enough, however, it is not optimal because there are loopholes that are often used by parties who want to usurp the traditional rights of indigenous peoples.

3.3 Legal Politics of Indigenous Law Communities

The existence of constitutional rights in customary law communities but still has a gaping gap, the customary law community in maintaining its existence requires another approach. Another approach that can be used is the legal politics approach. Besides being able to be used as a means of maintaining the existence of customary law communities, the legal political approach can also help assess the alignment of state policies on indigenous peoples to what extent.

a. Legal Politics: Legal Policy in Indigenous Law Communities

Sri Soemantri quotes Padmo Wahyono's statement in defining legal politics. Legal politics is defined as a basic policy that determines the content of the law, the form and purpose of the formation of the law. Based on Padmo Wahyono's opinion, Sri Soemantri made an interpretation, one of which was about legal politics in terms of determining legal content.

Again quoting Mahfud MD's opinion regarding the definition of legal politics in the first sense , namely legal politics as *legal policy*. The opinions expressed by Sri Soemantri, Mahfud MD and Padmo Wahyono can be concluded that legal politics which means legal policy can talk about the reasons for a law being formed or can also talk about the contents of the law after the law is formed, can also look for rationality why a product the law is regulated in such a way. From here it can also be seen the alignments of the legislators.

In this discussion, we will discuss legal politics in the context of legal policy, looking at legal products in the form of laws which contain content about customary law communities. Before mentioning laws relating to the existence of existing legal communities, it is necessary to first know the hierarchy of Indonesian laws and regulations, the hierarchy is contained in Article 7 Paragraph (1) of the Law on the Establishment of Legislations, the text of the article:

Types and hierarchy of Legislations the invitation consists of:

1. the 1945 Constitution of the Republic of Indonesia;
2. Decree of the People's Consultative Assembly;
3. Laws/Government Regulations in Lieu of Laws;
4. Government regulations;
5. Presidential decree;
6. Provincial Regulations; and
7. Regency/City Regional Regulations.

The existence of such an arrangement was certainly a step forward for Indonesian democracy at that time, considering that when the law was enacted, Indonesia had not even been independent for five years. Go forward because these provisions provide space for indigenous peoples to defend one of their customary rights, defending traditional rights. In fact, at the time of the founding of Indonesia, Indonesia was considered a country that lacked experience in state practice, as stated by J. Soedjati Djiwandono.The existence of a regulation on customary rights for indigenous peoples is indeed something that the authors consider as progress. In practice, the existence of this article does not protect indigenous peoples much. Reported by CNN Indonesia that "Hundreds of thousands of people from indigenous peoples became victims of a total of 326 natural resource and agrarian conflicts throughout Indonesia throughout 2018, making them one of the most vulnerable parties in this problem."

In addition to the Basic Agrarian Law, regulations regarding customary communities are implicitly regulated in the Village Law. In Article 6 Paragraph (1) of the Law, the text is as follows "The Village consists of Villages and Traditional Villages." This provision illustrates that customary law communities are recognized through the recognition of customary villages. The provisions of a village that can be said to be a customary village are contained in Article 97 Paragraph (1), the provisions of Paragraph (2) contain a criterion so that a village can be said to be a customary law community unit, the text of the paragraph is as follows: The customary law community unit and it's the surviving traditional rights as referred to in paragraph (1) letter a must have territory and at least fulfill one or a combination of elements:

1. a community whose citizens share a feeling of belonging to a group;
2. customary government institutions;
3. assets and/or customary objects; and/or
4. customary law norms.

In the Village Law there are also 216 customary/customary words. So it can be said that the regulation of customary law communities is actually contained in the Village Law.

Indeed, the recognition of indigenous peoples is stated in the *International Covenant on Civil and Political Rights* in *Article* 27. The text of *Article* 27 is as follows:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right , in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Indonesia ratified the international agreement and then ratified the covenant with the Law of the Republic of Indonesia Number 12 of 2005 concerning Ratification of the International Covenant On Civil And Political Rights. The text of Article 1 of the law is as follows: “To ratify the International Covenant on Civil and Political Rights (International Covenant on Civil and Political Rights) with a Declaration (Statement) against Article 1.” With this ratification, Indonesia also recognizes Article 27 of the ICCPR.

The compilers still assume that the absence of regulation of customary law communities in an organic law indicates that there is no legal policy alignment with indigenous peoples. This is very unfortunate considering that there are many customary law community units scattered throughout Indonesia.

b. Legal Politics: Configuring the Strength of the Indigenous Law Community

Indonesia once lost one of its territories, namely East Timor. This incident gave rise to the assumption that other regions did not agree with the central policy to separate themselves from the territory of Indonesia. As Harold Crouch pointed out, the East Timor incident was good news for the separatist groups in Indonesia, such as those found in Papua and Aceh, Jakarta (the Indonesian government) was deemed unable to control the situation in Timor which demanded independence until it ended up being independent under the name Timor Leste.

Citing the Kompas site based on the narrative of the Papuan Police Chief when the article was released, Rudolf A Rodja's anarchic action in Wamena (West Papua) was triggered by false news regarding a teacher who said racist words at a school. The Wamena riots were one result of the racial slurs directed at Papuan students in Surabaya and Malang. Reported by the Merdeka website as follows:

As is known, riots broke out in Manokwari, West Papua, Monday, August 19, 2019. The crowd burned the Manokwari DPRD building and several public facilities. Not only in Manokwari, demonstrations also took place in Jayapura, Papua.

These two actions are believed to be the result of the anger of the Papuan people as a result of the events experienced by students from Papua in Surabaya and Malang, East Java and Semarang, Central Java some time ago.

In several riots, there have been demands for Papua to be independent from Indonesia. Harold Crouch expressed his views in 2000, when the riots occurred in 2019, turmoil in Papua (formerly Irian Jaya) still occurred although it cannot be concluded that Papua's desire for independence is a "domino effect" of the independence of East Timor or that Papua naturally wants to be independent. independence from Indonesia because they do not feel one nation with Indonesia. What is clear is that throughout Indonesia's history there have been several separatist movements. Unlike Papua, Aceh's current condition tends to be more stable. This was stated in the Coil media release.

From the incident in Aceh and Papua, the possibility of disintegration due to social and geographical factors as stated by Satya Arinanto is true. If so, then the potential for separatist efforts in other areas is very large. This possibility can also occur due to customary reasons that are not accommodated. Thus, it is necessary to look at this possibility in terms of the configuration of the power of the customary law community.

The configuration of power in question is whether or not an indigenous people can influence legal policies to maintain their existence. For example, mobilizing separatist forces such as Aceh. In the end, Aceh received special autonomy funds for compromising actions to stop separatist actions. So that the actions of GAM or some Acehnese have succeeded in influencing a legal policy that previously did not benefit them to turn into an advantage for them. Indeed, one of the reasons for the uprising of the Acehnese people was due to the assumption there, that the Aceh region was not paid attention to by Jakarta.

The Aceh separatist movement can certainly be a threat because of the large number of masses. For example, the Tempo website once reported that 2000 GAM members were trained in Libya. The large numbers and training received from foreign militias made the Aceh separatist movement scary, so the cheapest way for the Indonesian government was to compromise on special autonomy and more budget to keep the conflict from getting bigger and Aceh to remain in Indonesian territory.

Even though it is stated that there are many indigenous peoples, it seems that it is not possible to gather power like what happened in Aceh because if it is divided into each unit, the customary law community is very small. For example, Kampung Naga, a traditional village in Tasikmalaya which does not allow population growth according to its customary

demands. Reported by the Tempo website, the customary law community of Kampung Naga, both in terms of territory and the number of people who occupy the area, is determined by customary law not to increase. Such conditions make it impossible for the indigenous people of Kampung Naga to increase their population. Besides Kampung Naga, the Samin people who still maintain their customs also have a small population. It can be seen from the news reported by Beritasatu website, that the Samin tribe only has one hundred families and totals about two hundred and fifty people. Of course, if their customary rights are disturbed, this small amount does not reach the potential to mobilize massive separatist forces, as the Acehnese do.

Of course, population is not the main thing in the grip of democracy. Everyone is a precious person. However, it cannot be denied that influencing a legal policy requires a massive campaign and a massive campaign requires the involvement of many individuals. With a small number of community members, it will be very difficult for an indigenous community to influence the configuration of legal policies. The last hope is only to hope for the legal awareness of the people outside the customary community regarding the indigenous peoples whose rights are guaranteed by the constitution so that both their existence and the traditional rights attached to them must be protected. It is appropriate that with the legal awareness of the community, people other than members of the indigenous peoples can participate in fighting for the customary rights of the indigenous peoples because this is a positive Indonesian legal claim.

IV. Conclusion

a. Indigenous peoples in maintaining their existence are protected by the constitution in the Preamble, Article 18 Paragraph (2). Customary law communities can also use the provisions of Article 24 Paragraph (1) and Article 28E of the 1945 Constitution to maintain their existence. Thus, it can be concluded that indigenous peoples have constitutional rights. However, those constitutional rights tend to be intervened by an assumption that is regulated in the constitution as well. This assumption is the assumption that it is not in accordance with the times and that the existence of customary law communities and the traditional rights attached to them can be harmed by the content of a law. So it can be concluded that even though they have constitutional rights, that protection still has a gaping gap.
b. Legal politics in the sense of legal policy has not been in favor of customary law communities because it has not been specifically regulated by customary law communities in an organic law as the executor of constitutional provisions that give constitutional rights to indigenous peoples. This is the mandate of Article 18 Paragraph (2) of the 1945 Constitution. In a configuration of power it is not possible for indigenous peoples to influence legal policy if there is no legal awareness from the rest of the Indonesian community because although there are many indigenous peoples in Indonesia, they are separated by one customary law unit with another customary law unit.

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