THE BURDEN OF INDIGENOUS PEOPLE IN DEALING WITH STATE REGULATION

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Abstract

The most common type of conflict involving indigenous people is the dispute on the ownership of economic resources and cultural sites which are convicted and guaranteed as traditional indigenous rights. In this regard, indigenous people stand vis a vis with investors' interest which is usually safeguarded by state legal instruments. Indigenous people are shaky in this kind of conflict and in the factual cases, the process to weaken and destroy indigenous community has been made through regulations, policies, as well as real actions made by the government.

Keywords: *Burden of Indigenous People, the Ideology of Legal Centralism, State Regulation*

Introduction

Since the beginning, the founding fathers of the Republic of Indonesia have realized that the nation of Indonesia is a pluralistic nation. The slogan of *Bhineka Tunggal Ika* (Different but One) is a form of respect and appreciation on the philosophy of the Indonesian nation for the plurality that it belongs[1]. The plurality meant here can be seen in the reality in various groups of indigenous community[2] which at this present are included in the integral part of Indonesian nation that consists of various ethnics, groups of native speakers, and embracers of various religions and beliefs. The plurality of the Indonesian nation finally comes to an interactive adaptation difference of a community to its surroundings. In fact, this has born indigenous communities that own more environment wisdoms and different mode of production from one another.

According to the congress of Masyarakat Adat Nusantara (Nusantara Indigenous Communities) (1 March 1999), Indigenous Communities are formulated as community group whose ancestors' origins (generation to generation) is in a certain geographical area with its own value system, ideology, economy, politics, culture, social, and constituency. Ter Haar Bzn in his book *Asas-Asas dan Susunan Hukum Adat (The Principles and the Structure of Indigenous law)* states that in whole Indonesian Archipelago, in the level of ordinary people, there is social life in the classes that act as a

[1] In 1995, according to the Central Body of Statistics, there were about 100 ethnics, 300 indigenous languages, and 5 major religions. There were 900 inhabited islands from about 17.008 islands existing in Indonesia. See, Men and Women in Number. Central Body of Statistics, 1995;

[2] In 1920, Van Hollenhoven reported 19 indigenous community neighborhoods with their own indigenous law. There were many names for the groups such as exiled community, isolated ethnic, native people, nomadic farmers, and ethnic community. In other countries there are some other terms such as first nation (in US and Canada); indigenous cultural communities (Philippines), indigenous people (United Nations)

unity with outer world life mentally and physically. Those classes have a permanent and everlasting order of arrangement and they have properties and valuables of worldly and spiritually in the form of legal allies.[3]

Soerjono Soekanto illustrates the indigenous community as desa (village) in Java, *marga* (district) in South Sumatra, *nagari* (village) in Minangkabau, *kuria* in Tapanuli, *wanua* in South Sulawesi, banjar in Bali that have their own apparatus to be independent and stand by themselves with their unity of law and unity of autocrat and environment according to the common right to the land and water for all of their members. Their lives are communal where *gotong royong (*mutual assistance), one feeling, and one sense of embarrassment play significant role.[4]

If we do a flashback, we can see that the indigenous communities have existed before the birth of Republic of Indonesia in 17 August 1945. They lived with their own indigenous law as the support. Some were called *village (in Java), Lembur (in Sunda), banjar (in Bali), nagari (in Minangkabau), ….. (in Kalimantan), Nggolok (in Rote), Kuan (in Timor), Wanua (in Sulawesi), Huria (in Mandailing), Huta (in Batak), dusun (in Palembang), Gampong dan maunasah (in Aceh),* and so on. Those communities had existed and conducted their social activities in all over the Nusantara for hundreds years or even more. In the time journey, the social interaction patterns between the citizens who are the member of the indigenous communities and the interaction patterns with their physical environment have in somehow institutionalized as an independent or autonomous unity that have job distribution, set of values system, and their own indigenous law. Those communities were independent in terms of they are able to fulfill their own needs in the function of politics, economy, law and the function to maintain their communities' existence through socialization of value and tradition conducted from generation to generation.

In such indigenous community, the indigenous law[5] was embedded and applied. Indigenous law is the law that is born from the values of indigenous communities culture as a reflection of what are considered true, proper, and good in organizing their relations with their social environment and physical natural environment such as land. In organizing the social and physical relations, indigenous law sets such as kinship law, marriage law, inheritance law, delict law, land law, and so on. What is considered right, proper, and good developed continuously according to the development of the cultural system of indigenous community. The development is evolutionary according to context of need and demand of the society. Those developments among the indigenous communities were different from one to another. According to Seminar on Indigenous Law in Jogja in 1975, Indigenous law is formulated as original law of Indonesian society which is not in the form of legislation that contains the elements of religions and beliefs.[6]

Indigenous Law is different from positive law in which the former is state in the form of legislation. Indigenous law is not formed by the state, but it was born from the society tradition as the cultural statement. The binding power of indigenous law

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[3] Ter Haar Bzn, *Asas-Asas dan Susunan Hukum Adat*. Jakarta: Pradnya Paramita, 1987, pp. 30;

[4] Soerjono Soekanto and Soleman B. taneko, *Hukum Adat Indonesia,* Jakarta: PT. Rajawali, 1983, pp. 108;

[5] International Community usually use the term Indigenous Law while Dutch Government use the term Adat Recht

[6] Hilman Hadikusuma *Pengantar Ilmu Hukum Adat Indonesia,* Bandung: Mandar Maju, 1994, pp. 32

implementation is not like positive law that can be enforced by the law enforcement apparatus including police as the frontline of law enforcement. The presence of indigenous law does not consider and think about whether it will be admitted by the state authority but it is a must for it to emerge based on the need of the society. This is the proof authenticity of indigenous law because it appears from the content of the community itself autonomously. In line with the opinion from Hart (1961), indigenous law is closer to the order of "primary rules obligation" than to state law which is made intentionally (purposeful) that make it closer to the order of "second rules obligation".

Indigenous law is strongly related with local culture. The word culture here indicates a strong emotional element from the indigenous law. Indigenous law is also a law which is full of reverence on certain values. Even in certain regions in Indonesia, such as in Aceh and Bali, for the embracers, indigenous law is identical to religion law so that they accept and implement the indigenous law because they feel that they won the religion and the culture.

Recent Problems of Indigenous Community

Although the existence of indigenous community is admitted and protected by the constitution[7] and other existing legislation[8], in fact in the empirical reality recently, many problems are faced by the indigenous community in Indonesia. The problems cause various conflicts vertically (structurally) and also horizontally that happen to the indigenous community.

The vertical or structural conflict is the dispute between indigenous community that is authorized on the economic resources such as forest, river, mining resource, cattle grazing land, bush, and agricultural land against the state of Indonesia or Indonesian government (as the agent or right guarantor) and or the interest of companies or high capitals projects. The disputes that involve the indigenous community are generally about the control on economic resources and culture bases which in the daily life of the indigenous community are considered and guaranteed as their indigenous right. Some examples for this are: 1. Hunting forests for the tribe of Amungme, Kamoro, Kerom, Asmat, and Tubelo; 2. Dusun sagu (sago villages) for the tribe of Asmat, Kerom, and Ayawasi; 3. Bush land that were used for farming for the tribe of Dayak, Bunggu, Tubelo, and Tangkul; 4. The cattle grazing lands for the tribe of Amanuban, Biboki, and Sumba, 5. The hard-plants plantation for the tribe of Sumba, amarasi, Nias, Dayak, and Galela; 6. One-seasonal field for the tribe of Tobelo, Lauje, and Galela.

The outer parties that involve in some disputes including: 1. The corporations that hold the Business Utilization Right (HGU) like in Arso, Palentuma, and Galela; 2. The companies that hold the Logging Concession Right (HPH) for Industrial plants like what happen in Gamlaha, West Kupang, Anakalan, Uma Talivaq, Bilu, and Lalobatan; 3. The companies that hold the Logging Concession Right (HPH) like what occur in Sawa Erma, Demta, Timika, Bintuni, and North Halmahera; 4. The companies that hold the Mining Authority Right (HKP) and Building Utilization Right (HGB) like in Tembagapura and Kuala Kencana; 5. The Agency of Forest Protection and Nature Conservation in Central

[7] See Article 18B, The Republic of Indonesia Constitution

[8] There are many acts that admit the existence of indigenous community including its indigenous rights such as Forestry Act, Agrarian Act, Local ordinance Act, and so on.

Manggarai; 6. Agency of General Fair in Kiritana, 7. Body of National Land in Tinombo, Lampung, and Galela.

From those disputes, it can be known that there are some followings facts; 1. There two different interests for one same object which are the interests of indigenous community and state/government/capitalist; 2. There two different law systems used by the conflicting parties i.e. indigenous law in one hand, and positive (state) law in the other hand; 3. In fact, there has been marginalization on the indigenous law position by the state law i.e. a systemic process that put aside the position of indigenous law which formerly considered important and valuable for the indigenous community and the process negates it to be an empty and meaningless law.

The horizontal conflict is the dispute that happens between the indigenous community from different allies. The example of such conflict are: 1. The dispute of indigenous community between the tribe of Amungme and Dani in Irian, 2. The indigenous community dispute between Dayak Bahau and Bentian in Kalimantan, 3. The indigenous community dispute between the tribe of Meto and Tetun di Timor, 4. Such conflict also occurred between the local indigenous community and non indigenous community like local indigenous community and transmigrants (Dayak and Madura in Sampit, Kalimantan) and the trader groups that inhabit the indigenous territory by the permission of the state.

Finding the Root of the Causes

The indigenous community in Indonesia actually is one of the most vulnerable community groups. They are vulnerable in terms of inability of the community to defend their sovereignty, autonomy, and identity. The vulnerability is caused by external pressures in internal weakness.

The vulnerability of indigenous community in defending their rights can be classified into some categories: 1. There is an effort to weaken and to destroy jurisdiction. This effort is an effort to negate and to eliminate the rights of indigenous community through the implementation of various nation al laws and development policies by the government. Some of the forms are: a). The implementation of acts and policy that eradicate the indigenous community *tanurial* rights for agrarian resources. The example is the articles in the Agrarian Primary Act/UUPA (no 5/1960) that regulate the right of indigenous community which that have become “the lullaby” for many parties including the indigenous community. In fact, the agrarian disputes that emerge proved that there is deceit from the UUPA to make the process take over the agrarian resources by the state easier. It is because the state admission to the indigenous tanurial rights is depended on the conditions that must match the national interest which is blur in the term of interpretation so that every individual or institution may interpret it differently and adjust it to party’s own interest. The example is the act no 5 year 1979 on Village Administration that had been implemented since 1979. The act has uniformed the smallest administration in the hierarchy of Indonesian administration to be desa (village) or kelurahan (political district administered by a chief, called lurah). Consequently, the allies form and indigenous institutions were melted and uniformed by breaking, unifying, and eliminating village. That act also has eradicated the identity of indigenous allies. It remains only in the memory of the member of the indigenous allies. Those maps were not expressed and drawn physically on a legal document such as formal written statement.

The consequence is the misuse of opportunity by other party who considers the indigenous territory as an unoccupied area. Such interpretation has enabled the state, government, and capitalists to claim indigenous territory as their rights.

The Approach and Strategy to Protect Indigenous Community

By learning from the history and experience of this nation from the former regime, the reformation has made us aware of the mistaken action of the state (government) to the indigenous community. The fact that Indonesia is a very plural country from many aspects (ethnic, race, group, religions) has brought a new paradigm in running the law and administration from centralistic to decentralistic. The change of paradigm firstly can be seen from the law politics in the amendment of 1945 The Republic of Indonesia Constitution (UUD 1945) related to the existence of indigenous community and their traditional rights. Article 18B verse (2) of UUD 1945 declares that: "The state admits and respects the unities of indigenous community therewith its traditional rights as long as they are still alive and in accordance with the society development and the principles of State Unity of Indonesian Republic which is regulated in the legislation".

The constitution formulation requires 4 (four) aspects of state admission and respect to the existence of indigenous community therewith its indigenous law i.e. as long as it is still alive; in accordance with the society development, meet the principles of the State Unity of Indonesian Republic; regulated in the legislation.

Satjipto Rahardjo[9] gives some following notes on the article 18B of the constitution. First, article 18B has become positive law so consequently every citizen is bound to it. Being bound means that every citizen should accept and read the content of the regulation. Reading means not only reading it sentence by sentence but also give meaning to the regulation. The interpretation should be referred to the mindset that indigenous law is a unique law that contain socio-anthropological load of Indonesia. Its full-of-affection characteristic makes the user of the law feel happy. This becomes an important reason to keep and maintain the indigenous law. Secondly, such mindset should be the guidance in observing and understanding the four requirements mentioned above. Rahardjo has explained the four conditions as followings.

The requirement of it should be still alive means that the condition needs to be observed and investigated carefully and thoroughly not only using measuring rod which is quantitative-rational but also more emphatic and participative. The observation is not merely done from outside but also from the inside by diving the feeling of the local people. The method that is used here should be participative.

In accordance with the society development requirement should not be interpreted from the economical and political aspect but from the perspectives of the local people. The interpretation from economic and political view contains the risk of imposing the giant interest on behalf of society development. The indigenous community should be provided with opportunity and they should be allowed to process by themselves independently.

Meet the principle of State Unity of the Indonesian Republic aspect should be understood and interpreted together with the principle that indigenous community is one

[9] Satjipto Rahardjo, *Hukum Adat dalam Negara Kesatuan Republik Indonesia," Paper for Reading material in Doctoirate Program for Law in* Diponegoro University, Semarang, 2006. pp. 12

unity from the body of State Unity of the Indonesian Republic. It is not necessary to contrast both aspects as dichotomy or black and white thing. In other word, the indigenous community is the flesh and blood of the State Unity of the Indonesian Republic. The method that should be developed in this case is holistic method.

In the *regulated by the law* condition, we should note that in the Indonesian State of Law, it is inadequate to rely all aspect of daily life to the constitution because it will be not be productive for the society. There are many cases proving that fact. The law (act) that always wants to regulate its own domain and considers its own self capable has failed. Nonet & Selznick (1978) suggest that law should be enlightened and enriched with social sciences.

The arrangements of indigenous community by the acts should consider the fact that the Indonesian area is popular as archipelago in which the development of every area is not the same. Generally, the area in Java is more urban compared to the most areas outside Java. The societies in Java have experienced strong impact of the industrialization and modernity penetration. The different developments have caused dichotomy between the areas that have experienced *industrialization penetration* and *virgin areas.*

According to the perspective from Unger[10], modern law (positive) is easier to enter the area that has been touched by industrialization and has become urban because the resistance of the indigenous law has been weakened. The presence of modern (positive) law needs the collapse like the development of modernity in Europe.

In such condition, extraordinary carefulness is needed in the legislative body so that it will be able to control itself above the configuration of Indonesian society as described above. It seems that Indonesia cannot be regulated and punished in the perspectives of the "people in Senayan" (legislatives members) although it has good purpose. Without anthropological and sociological law understanding, which is the need of considering the law pluralism in Indonesian Society, in contrast it may cause calamity like what has happened. Law (acts) which is made with modern mindset without considering and anticipating the effects in the local level, may cause a product which is criminogenic or legislative crime, in Raharjo's terms.

Thus, to protect indigenous or local community, at least some strategic steps with following approaches are needed: 1. Knowing and understanding the local indigenous community. In this step, we need to find some information related with: (a). Knowing the culture, customs, law, habits, religions, and beliefs. In indigenous community, there are some habits, culture, law, and so on, which should be respected and appreciated although maybe the outsiders consider as something incorrect. Violation on the habits or the law will hurt the indigenous community although they do not voice it openly to the violators. Once they are hurt, then they will consider foreigners or outsiders as the part that they have to be alert of. So it will be difficult to work together or to collaborate with them; (b). Knowing the social layers and social conflicts that may exist. Generally, there are three social layers in the indigenous community. They are native people, immigrants who steeled because of marriage bind, and temporary immigrants such as teachers, traders, public health staffs, and so on. Those layers have different right, obligation and access to the agrarian resources, traditional ceremonies, and decision making process. First layer

[10] Roberto Mangaira Unger, *Teori-teori Hukum Kritis, Posisi Hukum dalam Masyarakat Modern,* 2007, translated by Dariyatno and Derta Sri Widowatie. From *law and Modern Society: Toward a Criticism of Social Theory,* 1976

always actively participates and it is militant in the strengthening and empowering process. While the second layers only tends to support the movement without active involvement. Finally, the third layer is the passive side because generally they do not have direct interest; (c). Knowing the local leaders. In indigenous community, usually there are three kinds of leaders with its own basis i.e. custom based leader (Custom Figure), religion-based leader (religious figure), and formal education-based leader (Headmasters and teachers). Those three figures have strong influence in the indigenous community so that it is important to collaborate with them; (d) knowing the geographical condition of local indigenous allies. It is important to know whether the indigenous communities live in coastal area, mountain, lowland, or highland, and so on; 2. Mutual Transformation. This step is conducted for knowledge, skills, and technology transfer. The steps that can be done are following training activities: legal education, indigenous territory mapping and so on; 3. Support Raising. This step is done for admitting and respecting the rights of indigenous community to the other sides outside the indigenous community.

Conclusion

Although the existence of indigenous community has been protected and guaranteed according to the constitution and laws, in the empirical fact, various problems emerge to the indigenous community in Indonesia. The problems have caused several conflicts that happen to indigenous community especially vertical or structural conflict. This conflict occurs between the indigenous community against the state or indigenous law against positive law. The conflicts that involve indigenous community is usually the dispute about control on economic resources and cultural base which in daily life is believed and guaranteed as traditional right of indigenous community against the interest of investors through the medium of state law. Facing such conflicts, the indigenous community is really vulnerable and in the practice, the effort to weaken and to eradicate indigenous community through legal regulation, acts, policies, practical actions of the government. Therefore, accurate strategy and approach is needed to protect the existence of indigenous community along with the traditional rights. The strategy and approach may include: (a). knowing and understanding the local indigenous community by: (1) Knowing the culture, customs, law, habits, religions, and beliefs; (2) Knowing the social layers and the social conflicts that may exist; (3) Knowing the local leaders; (4) Knowing the geographical condition of the local indigenous allies. (5) Mutual Transformation. (b) Conducting knowledge, skill, and technology transfer that can be in the form of training activities such as: legal education, indigenous territory mapping, and so on. (C) Conducting support raising from other parties for admitting and respecting the rights of indigenous community.

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