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Juridical Review of the Indigenous Peoples Bill and the Recognition of Indigenous Peoples

Linda Noviana Mita Devi*

Fakultas Ilmu Sosial dan Hukum, Universitas Negeri Surabaya, Indonesia, lindanoviana23@gmail.com

Maulana Abdi Hanifa

Fakultas Ilmu Sosial dan Hukum, Universitas Negeri Surabaya, Indonesia, maulanaabdih@gmail.com

Yuniar Prehatini

Fakultas Ilmu Sosial dan Hukum, Universitas Negeri Surabaya, Indonesia, yuniarpy28@gmail.com

Abstract. This study aims to find out how the regulation regarding the recognition of indigenous peoples in the draft law on indigenous peoples. This research uses normative juridical research methods using references to library materials and secondary data. In this study, it is explained how the draft law on Indigenous Peoples regulates the mechanism for recognizing indigenous peoples. In the recognition mechanism of indigenous peoples now still based on law number 41 of 1999 About Forestry in which it is regulated that the recognition of indigenous peoples is carried out by local governments who are passive in carrying out the recognition of customary law communities. In the indigenous peoples draft law, the regulated mechanism involves the central government more actively in carrying out the recognition of indigenous peoples. However, the draft Community Law has not been passed until now.

Keyword: indigenous peoples, customary forests, recognition, indigenous territory.

Abstrak. *Penelitian ini bertujuan untuk mengetahui bagaimana pengaturan mengenai pengakuan terhadap Masyarakat adat dalam rancangan undang undang tentang Masyarakat adat. Dengan menggunakan metode penelitian yuridis normatif dengan menggunakan rujukan bahan Pustaka dan data sekunder. Dalam penelitian ini dijelaskan bagaimana rancangan undang undang tentang Masyarakat hukum adat mengatur terkait mekanisme pengakuan Masyarakat hukum adat. Dalam mekanisme pengakuan Masyarakat hukum adat sekarang masih didasarkan pada Undang-Undang Nomor 41 Tahun 1999 tentang Kehutanan yang didalamnya diatur bahwa pengakuan Masyarakat hukum adat dilaksanakan oleh pemerintah daerah sedangkan berdasarkan perbandingan jumlah Masyarakat hukum adat yang telah diakui berdasarkan mekanisme ini dinilai masih rendah karena peran pemerintah daerah yang pasif dalam melakukan pengakuan masyarakat hukum adat. Dalam rancangan undang undang masyarakat adat mekanisme yang diatur lebih melibatkan pemerintah pusat secara aktif dalam melaksanakan pengakuan Masyarakat adat. Meski demikian rancangan undang undang Masyarakat belum disahkan hingga saat ini.*

Kata kunci*: masyarakat adat, hutan adat, pengakuan, wilayah adat*

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INTRODUCTION

Indigenous peoples are the unity of indigenous peoples who inhabit an area and impose their own leadership or power and have ancestral origins that have been preserved and upheld by indigenous peoples in their life system for generations. Indigenous peoples (MHA) is one of the subjects of state law that needs to be recognized in national regulations. The existence of national regulations that regulate customary law communities bridges the relationship between indigenous peoples and the government in determining the renewal of the conception of development and also the constitution of a country. United Nations declaring the recognition of indigenous peoples as a form of hope from international nations in overcoming indigenous peoples' problems, which include the protection of human rights, the environment, development, education, and also health. [1] Basically, MHA's relationship with existing natural resources or matters related to its living area is more appropriate if it is categorized as a relationship of obligations rather than rights. These existing relationships can be categorized as rights if indigenous peoples are related to outside parties such as the government, businessmen, and other communities. But on the one hand, the relationship can also turn into something politically charged and contested and become the object of regulations in the law at the same time. The United Nations Declaration on the Rights of Indigenous Peoples contains that the United Nations declares, recognizes, and reaffirms that indigenous peoples are recognized regardless of differences in all human rights as in international law, in addition to the fact that the MHA has a very important collective right in their life and existence as a community group.[2] Customary law communities have the right to strengthen or maintain their existence as an indigenous group if they wish to participate in political, economic, and socio-cultural life.

[1] Udiana Puspa Dewi, "Nasib Masyarakat Adat Di Indonesia: Terabaikan, Termarginalisasi, Tidak Punya Perlindungan Hukum Yang Jelas," 2022, https://theconversation.com/nasib-masyarakat-adat-di-indonesia-terabaikan-termarginalisasi-tidak-punya-perlindungan-hukum-yang-jelas-187878.

[2] Yusuf Salamat, "Pengaturan Mengenai Hak Atas Tanah Masyarakat Hukum Adat (Studi Kasus Pengakuan Terhadap Hak Atas Tanah Masyarakat Hukum Adat Dayak Di Kalimantan Tengah) (Case Study of Recognition of the Dayak Adat Law Community Land In," *Jurnal Legislasi Indonesia* 13, no. 04 (2016): 411–20.

The existence of customary law communities, one of which is found in forest areas. For MHAs, forests are part of their living area because forests are a source of life and an existential factor if there is damage or loss of forests, it can be said to be the loss of their lives. It is undeniable that from the government's side, it often ignores customary institutions in forest and natural resource management so that it unilaterally replaces them with new methods in the name of modernization.[3] The process of taking over the rights of indigenous peoples over forest areas carried out by the government is considered to be less familial, so it is not uncommon for conflicts between the government and customary law communities to be inevitable.

Customary law communities have very high wisdom, and social life is more closely intertwined than outside customary law communities, especially today. In a transition period like now, the condition of indigenous peoples continues to experience pressure due to land investment made by the government and the private sector. In Indonesia itself, in March 2024, the Head of the Customary Territory Registration Agency (BRWA), Kasmita Widodo, said that a total of 1,425 customary areas covering an area of 28.2 million hectares had been registered.[4] The area of the area is only 13.8% - 14% of the total registered customary territory. The low achievement of recognition of customary law community territories can be said to be due to the lack of government effectiveness in its programs regarding indigenous peoples and customary territories and the funds provided by the government are inadequate.

This can be a threat to unity in Indonesia if there is a rampant rebellion from customary law communities that is not handled by the government. If this continues, it will become a threat and has the potential to cause division in the current and future government transition periods. The absence of a law regulating customary law communities makes this problem still a homework problem because there is still massive investment from private companies to manage or use land from customary law community areas without considering the existence of MHA, the implementation of the government's

[3] National Inquiry of Komnas HAM, *Book I: Rights of Customary Law Communities to Their Territory in Forest Areas*, 2016.

[4] Ariya, "STATUS PENGAKUAN WILAYAH ADAT DI INDONESIA PADA HARI KEBANGKITAN MASYARAKAT ADAT NUSANTARA 2024," BRWA, 2024.

national strategic project (PSN) is a perfect combination in the seizure of customary territories and the removal of indigenous peoples from their homes.

Therefore, in efforts to reform the law in Indonesia, the government must not forget or override the existence of customary law communities because, related to the determination of the paradigm of reform of the conception of legal development, there are values that grow in customary law communities that have been constitutionally recognized and listed in the UN Declaration. If you look at the highest legislative arrangement, namely the 1945 Constitution, it has been regulated regarding the recognition of customary law communities, but the constitution provides a mandate to regulate this matter further in the law. However, in fact, the regulation of customary law communities has not been regulated by law, but only in Regional Regulations which in the legislative hierarchy have a lower position than the law.

METHODOLOGY

In this study, a normative juridical law research method is used. In this method, the author uses library materials and secondary data as a reference in compiling research. The literature materials used as sources in this research method are in the form of books, journals, and other publications that are related to the research.

RESULTS AND DISCUSSION

Neglecting of Recognition of Customary Law Communities in Regulatory Arrangements

The enactment of customary law does not depend on the ruler of the state or the state administrator's political will alone, because customary law is part of the will of the constitution. The existence of customary law is strengthened by the UN Declaration on the Rights of Indigenous Peoples, among others, by stating, recognizing, and reaffirming that citizens of customary law communities are recognized without distinction in all human rights recognized in international law.

The state legitimizes the existence of customary law based on the existence of a society and as the sound of the adagio "*ubi societas, ibi ius*" which means that where there is a society, there is the law. Indonesia as one of the countries that is a member of the UN takes a stance as a form of Indonesia's moral and legal responsibility in respecting and implementing the Declaration on Human Rights in 1948 by ratifying it in the national law, namely law Number 39 of 1999 concerning human rights.[5] In article 6 paragraphs (1), (2) of Law Number 39 of 1999 is also regulate on the recognition of customary law communities. The government, the community, and even the law are required to pay attention to and protect the rights of indigenous peoples. Although in the development of the times towards modernity, indigenous peoples should not be marginalized based on human rights enforcement.[6] In human rights, every individual is protected as an independent human being. Therefore, it is appropriate that the existence of Indigenous peoples who have inhabited the land of Indonesia for thousands of years deserves good attention with the recognition of land and forest forests that are the source of life for Indigenous peoples. Examining from the historical side, the existence of customary law communities has filled the legal system in Indonesia with local wisdom from each existing customary territory and the communal nature inherent in the body of the Indigenous peoples before the existence of national regulations.[7]

Indigenous peoples have collective rights that are indispensable for their lives and existence as well as for the development of a whole community as a group. The regulation of customary areas is made as a form of recognition and also the government's respect for customary law communities in Indonesia.[8] Based on the differences in the existence and conditions of customary law communities in

[5] Ministry of Foreign Affairs of the Republic of Indonesia, "Indonesia and Human Rights," Ministry of Foreign Affairs of the Republic of Indonesia, 2019, https://kemlu.go.id/portal/id/read/40/halaman_list_lainnya/indonesia-dan-hak-asasi-manusia).

[6] Hayatul Ismi, "Pengakuan Dan Perlindungan Hukum Hak Masyarakat Adat Atas Tanah Ulayat Dalam Upaya Pembaharuan Hukum Nasional," *Jurnal Ilmu Hukum* 3, no. 1 (2013), https://doi.org/10.30652/jih.v3i01.1024.

[7] Rizky Julranda, Michael Geremia Siagian, and Michael Ariel Perdana Zalukhu, "PENERAPAN HUKUM PROGRESIF SEBAGAI PARADIGMA PEMBANGUNAN HUKUM NASIONAL DALAM RANCANGAN UNDANG-UNDANG MASYARAKAT HUKUM ADAT," *Jurnal Crepido* 04, no. 02 (2022): 171–83.

[8] National Inquiry of Komnas HAM, *Book I: Rights of Customary Law Communities to Their Territory in Forest Areas.*

Indonesia, there are differences in the regulatory model that is set regarding the recognition and respect for the existence of Indigenous peoples and also the rights of customary law communities. The ideal recognition is where the existing recognition can accommodate all the interests of the object that will be recognized without complicated procedures. The 1945 Constitution of the Republic of Indonesia has regulated the existence of customary law communities as legal subjects that are different from other legal subjects.[9] Since the 1945 Constitution of the Republic of Indonesia was promulgated in the first period, it was explained about the "people's law alliance" where customary law communities whose existence existed before the proclamation of the Republic of Indonesia were given authority and rights but remained in the constitution of the Republic of Indonesia. One of the basic things is the enforcement of customary law regulations to maintain environmental conservation, control and also rights for indigenous peoples as should be regulated in national regulations. The recognition of the existence of this customary law community is contained in the 1945 Constitution Article 18 B paragraph (2), where the state recognizes and respects the unity of customary law communities and also the traditional rights they have by the development and principles of the Republic of Indonesia.[10] In addition, the regulation in the 1945 Constitution the government also regulates indigenous peoples in several laws, such as Law Number 5 of 1960 concerning Agrarian Principles. The determination of the UUPA was made by the government together with the House of Representatives to end the dualism of land law based on the Agrarische Wet 1870. In addition, the regulation of customary areas is also regulated in other sectoral laws that specifically discuss, for example, Law No. 41 of 1999 concerning Forestry, which in several articles regulates customary forest areas.

Forest eviction as expected with the existence of Law No. 41 of 1999 must accommodate the dynamics of the aspirations and roles of the community, customs, and culture, as well as community values based on national legal norms. Regarding

[9] Salamat, "Pengaturan Mengenai Hak Atas Tanah Masyarakat Hukum Adat (Studi Kasus Pengakuan Terhadap Hak Atas Tanah Masyarakat Hukum Adat Dayak Di Kalimantan Tengah) (Case Study of Recognition of the Dayak Adat Law Community Land In."

[10] Iswara N Raditya, "Bunyi Pasal 18 UUD 1945: Penambahan Isi Sebelum & Setelah Amandemen," Tirto.id, 2021, https://tirto.id/bunyi-pasal-18-uud-1945-penambahan-isi-sebelum-setelah-amandemen-gk4B.

customary forest areas in Article 1 number 6, it is said that customary forests are state forests located in the territory of indigenous peoples. So, it can be said that this customary forest is still in the state forest, but its use is carried out by customary law communities. The control of customary forests is mentioned in Article 37 where in its use customary law communities still pay attention to the functions of existing forests and are also explained in Article 67 regarding customary law communities. The regulation of Indigenous people's rights in the use of customary forests is also discussed in the Regulation of the Minister of Environment and Forestry Number 9 of 2021 concerning Social Forestry Management. In Article 1 number 25, it is said that the indicative area of customary forest is a customary forest area located in the state forest area that has not obtained legal products in the form of a regional regulation but the area has been designated as an MHA forest by the Regent/Mayor.

The status of customary forests recognized by the government as Indigenous people's ownership in Indonesia is still very small compared to the original number of existing Indigenous peoples, so it is not uncommon for ownership conflicts to occur. The government's role in recognition of Indigenous peoples is still very passive because the regulation of the rights of Indigenous peoples is not explicitly contained in one law and also the procession that needs to be carried out by Indigenous peoples to get recognition of customary law communities and customary areas is so long and convoluted. Thus, even though the regulation of customary law community areas is enshrined in laws and regulations in its implementation, the government has not heeded the rights of customary law communities. One of the problems that is alleged to be one of the causes of the inability to implement laws and regulations related to customary law communities is caused by the problem of sectorization. Because in fact, the 1945 Constitution of the Republic of Indonesia does not fully regulate customary law communities, so derivative laws are made that are developed as a policy and programs made by each government agency according to their scope fields, for example, regarding customary forests is not only regulated in Law Number 5 of 1960 (UUPA) but also regulated in the Regulation of the Minister of Environment and

Forestry of the Republic of Indonesia Number 9 of 2021 concerning Social Forestry Management.

The role of the government in regulating all sources of wealth in Indonesian territory is explained in Article 33 paragraph 3 of the 1945 Constitution where there is a right to control the country where forests are included in the object of Article 33 paragraph 3. In this article, the meaning of the right to control the state is that the state is not the owner, but the state gives authority to the government to regulate and manage forest areas and regulate legal acts in forest areas within the territory of the Indonesian state. To regulate legal acts in forest areas, the government is authorized to issue permits. However, in terms of development in forest areas inhabited by indigenous peoples, the government is required to listen to the aspirations of indigenous peoples and respect their rights as customary law communities. Because it is undeniable the country's constitution has recognized the existence and rights of Indigenous peoples.[11]

Indigenous peoples are often introduced as one of the diversity that the Indonesian state favors to foreign countries. However, on the other hand, the state's attitude is considered to only want to benefit from customary law communities by using it as a medium to attract tourists to visit and forget the existence of Indigenous peoples who have not been legally recognized as customary law communities and their territories which are often used by the state without heeding the existence of Indigenous peoples.

There are around 4.57 million indigenous peoples in Indonesia recorded by the Customary Territory Registration Agency (BRWA). As of August 2023, BRWA has identified 1,336 customary areas with a total area of 26.9 million hectares. Of these customary areas, only 14% are recognized by the local government. In Article 67 of Law No. 41 of 1999, it is said that the recognition of indigenous peoples must come from the Regional Regulation before it is ratified by the central government as the basis for legality. Customary law communities are still vulnerable to corporate occupation actions that take their land in the name of concessions. The large number of Indigenous peoples s inhabiting forest areas without legal protection has led to

[11] Wahyu Nugroho, "Konstitusionalitas Hak Masyarakat Hukum Adat Dalam Mengelola Hutan Adat: Fakta Empiris Legalisasi Perizinan," *Jurnal Konstitusi* 11, no. 1 (2016): 109, https://doi.org/10.31078/jk1116.

tenure conflicts and agrarian conflicts between Indigenous peoples and corporations that collaborate with the government. One example of the inefficiency of the governing law is the length of time it takes for Indigenous peoples to protect its territory, such as the indigenous group in Aceh, the Mukim who fought for seven years to gain recognition of their ancestral customary land. In fact, this only results in the recognition of 15% of the total existing customary forests.[12]

The right of Indigenous Peoples to sustain their lives is often not heeded in the land management system in Indonesia. In fact, it is clear that the existence of indigenous peoples has been clearly regulated in 18B paragraph 2 of the 1945 Constitution. If its existence has been recognized by the Indonesian constitution, then the place where they preserve the culture that has been carried out for generations in one geographical area in Indonesia is legitimate. Indigenous peoples and customary lands are a unit that cannot be separated from each other. The implication that occurred as a result of this separation was the destruction of the legal order in Indigenous peoples.[13]

Referring to Article 2 paragraph 4 of Law Number 5 of 1960, it is explained that state land can be authorized to indigenous peoples as long as it does not conflict with national interests. From this article, it is clear that the ownership of customary territories is not true to indigenous peoples, the land is in state ownership which can be taken at any time for reasons for public interest. The survival of customary law communities depends on the land for the survival of 71.06% of the 31,957 customary villages depend on forests.[14] Existing laws have not provided a definite guarantee of the rights obtained by indigenous peoples.

The weakness of customary land control in indigenous peoples is clearly felt in the gap in the sustainability of the state. Development programs promoted by the government are often targeted at the point of customary areas where indigenous peoples are ultimately cornered. The consequences obtained by customary law communities due to the absence of legal protection and recognition from the state have

[12] "Pengakuan Masyarakat Adat Terganjal Peraturan Daerahle," forestdigest, 2023.
[13] Inkuiri Nasional Komnas HAM, *Buku I: Hak Masyarakat Hukum Adat Atas Wilayahnya Di Kawasan Hutan*.
[14] Inkuiri Nasional Komnas HAM.

become a national problem that never ends, not to mention the spirit of investment industrialization promoted by the government with the enactment of the Job Creation Law increasingly threatens the existence of customary law communities in their territories. There is no defence that indigenous peoples can take if the reason the state takes its territory is in the national interest. Such an arrangement has backfired the government always seizes customary forest areas under the pretext that the area will be used for the benefit of the state without considering the existence of MHA that has been inhabiting the area for a long time just because there is no recognition from the state of its status as a customary law community and the process that needs to be taken by the customary law community to obtain legal recognition of its existence status by the state must meet the requirements administrative bureaucratic procedures are very complicated and if these conditions are not met, their status of existence will be forcibly revoked by the state.[15] Discrimination, violence, and even threats from the state by moving state instruments are often obtained if customary law communities insist on refusing eviction. The Customary Law Society is not an organization, non-governmental organization (NGO), and the like when one of the factors that are the conditions is not met, it can be dissolved or forcibly abolished by the state. The evaluation made by the government in regulating the MHA is not in line with the spirit of recognition, protection, respect, and fulfilment of the right to life of customary law communities launched by the government in its practical efforts. If the existence of customary law communities is not in accordance with the conditions as stipulated in the law, there needs to be a deeper evaluation of the rights of customary law communities that should be facilitated and protected by the state because of their existence that exists naturally, then the end of their status as indigenous peoples should be determined by themselves as a group and not in the hands of the state.

The eviction of indigenous peoples from customary forests that have been inhabited for thousands of years is often based on overlapping interests. The government stipulates the progressive development of forest areas by considering economic

[15] Julranda, Siagian, and Zalukhu, "PENERAPAN HUKUM PROGRESIF SEBAGAI PARADIGMA PEMBANGUNAN HUKUM NASIONAL DALAM RANCANGAN UNDANG-UNDANG MASYARAKAT HUKUM ADAT."

factors that will have a big impact on the surrounding areas and even the regions. However, in this development process, the government chose the option to evict Indigenous peoples and claimed that the development was used for the public interest as stipulated in Article 5 of the 1960 Agrarian Laws. In a situation where there is an imbalance of interests, the government should be able to build good communication with indigenous peoples and take the best option by considering the interests of all parties.[16] Not only seen from the government's profits but also the interests of the indigenous peoples themselves. Basically, the survival of customary law communities is highly dependent on customary forests as the main source of livelihood for indigenous peoples.

It is known that the area of customary areas that have not been registered reaches 1336 areas out of 219 customary areas that have been registered through recognition by the local government.[17] An obstacle in the inauguration of customary territories is a process that goes through quite a long process where article 66 paragraph 2 Letter C of the Regulation of the Minister of Environment and Forestry explains that the inauguration of the status of customary areas must first obtain the inauguration of indigenous peoples in the form of regional regulations and/or decrees of the new governor/regent/mayor that the inauguration of the area can be processed.

Regarding the inauguration of customary areas regulated through Government Regulation No. 18 of 2021, it is stated that there is a grant of Land Management Rights (HPL) certificates in customary areas for economic benefits with the arrival of investors to enter land management. Land cultivation by involving investors will bring new conflicts between indigenous peoples and investors because in one area two interests will rub against each other. The involvement of investors is also implicitly interpreted as the state taking the authority to manage the land rights of

[16] Dyah Ayu Widowati, Ahmad Nashih Luthfi, and I Gusti Nyoman Guntur, *Pengakuan Dan Perlindungan Hak Atas Tanah Masyarakat Hukum Adat Di Kawasan Hutan. Yogyakarta: Pusat Penelitian Dan Pengabdian Kepada Masyarakat, Sekolah Tinggi Pertanahan Nasiona. Sekolah Tinggi Pertanahan Nasiona*, 2014.

[17] Ady Thea DA, "Belum Adanya Pengakuan Pemerintah Atas Puluhan Juta Hektar Wilayah Hukum Adat," Hukumonline.Com, 2023, https://www.hukumonline.com/berita/a/belum-adanya-pengakuan-pemerintah-atas-puluhan-juta-hektar-wilayah-hukum-adat-lt64d5a7ab14493/.

indigenous peoples.[18] It is clearly stated in the Constitutional Court Decision No.35/PUU-X/2012 that customary forests are no longer state forests but rights forests. Rights forests are forests that are fully managed by customary law communities by considering the function of forests.[19] In terms of state authority over customary forests, it acts massively/indirectly. With this decision, it does provide a better solution for customary law communities. However, the facts on the ground that have occurred, the government has not been able to implement the Constitutional Court decision Number 35/PUU-X/2012 properly. After the issuance of the decision, there was an insistence from the Ministry of Forestry with Ministerial Regulation No. 62 of 2013 where the recognition of customary forests will be carried out by the government if there is official evidence in writing stating ownership of the forests inhabited by indigenous peoples.[20] The result of this Ministerial regulation is that it is difficult for indigenous people to prove their ownership of customary forests because the requested evidence does not exist. They inhabited for thousands of years even before Indonesia's independence, but in reality, the rights as indigenous peoples and the right of individuals to live well were not given.

In 2023, due to the regulation of customs that has not been regulated, it is the Rempang case. The Rempang case brought three indigenous tribes to be evicted due to a government project, namely Rempang Eco City. Of the 17,000 hectares, the government will manage the remaining 7000-8000 hectares to be left as protected forests.[21] The rejection of the indigenous people is due to historical reasons, namely the village they live in as a form of the result of the conquest of the Riau Malay Kingdom in the Dutch era which is around 1784.[22] If examined more deeply, the

[18] "Bahaya Di Balik Sertifikasi Tanah Ulayat," tempo, 2023.

[19] Tesya Veronika and Atik Winanti, "Keberadaan Hak Atas Tanah Ulayat Masyarakat Hukum Adat Ditinjau Dari Konsephak Menguasai Oleh Negara," *Humani (Hukum Dan Masyarakat Madani)* 11, no. 2 (2021): 305–17, https://journals.usm.ac.id/index.php/humani/article/view/4397.

[20] Muthia Septarina, "Tata Kelola Hutan Adat Pasca Putusan Mk No 35/Puu-X/2012," *Al-Adl : Jurnal Hukum* 5, no. 10 (2013): 1–9, https://doi.org/10.31602/al-adl.v5i10.190.

[21] BBC Indonesia, "Pulau Rempang Batal Dikosongkan Tanggal 28 September, Kata Menteri Bahlil," BBC Indonesia, 2023, https://www.bbc.com/indonesia/articles/c2x8lgry37jo.

[22] Fitri Wahyuni, "Getting to Know Rempang Island, 7,500 Residents Evicted Due to the Rempang Eco City Project," bangkapos.com, 2023, https://bangka.tribunnews.com/2023/09/16/mengenal-pulau-rempang-7500-penduduk-digusur-karena-proyek-rempang-eco-city?page=2.

mechanism for recognition of Indigenous peoples is still not well optimized in solving problems and has not provided justice for Indigenous peoples in full. Indigenous people's existence of customary forest areas is clear but it is eliminated by the interests of plantation corporations whose position is stronger, so that their existence will be marginalized.

Mechanism for Recognition of Customary Law Communities in the Draft Law on Customary Law Communities

To clarify the mechanism for the recognition of indigenous peoples (MHA), the ratification of the draft law on indigenous peoples is needed to provide legal certainty on the status of MHA. In the academic text of the draft law on indigenous peoples, it is explained that the national inquiry wants to follow up on Constitutional Decision Number 35/PUU-X/2012 which states that customary forests are no longer state forests and state control over customary forests is contrary to the 1945 Constitution.[23]

The recognition process which at this time is based on paragraph (2) of article 67 of Law Number 41 of 1999 which states that in the inauguration related to the existence of Indigenous peoples MHA is stipulated in regional regulations and further regulated in the Regulation of the Minister of Home Affairs Number 52 of 2014 concerning guidelines for the recognition of customary law communities, it is considered convoluted and has political nuances, but it is understandable because it is to fill a legal void. Thus, the existence of a customary law community law that regulates the mechanism for MHA recognition is very necessary so that in the future in the process of MHA recognition, the state can facilitate a conflict resolution mechanism that not only guarantees legal certainty but can also provide a guarantee of obtaining justice for indigenous peoples in resolving conflicts through judicial channels because at this time this path is still very risky for MHA which in its legal status is still It is not clear yet.

In Articles 2 and 3 of the regulation of the Minister of Home Affairs Number 52 of 2014, it is stated that the governor and regent or mayor are officials who are authorized

[23] Dewan Perwakilan Rakyat and Republik Indonesia, "RANCANGAN UNDANG-UNDANG," n.d.

in the recognition and protection of Indigenous peoples and are authorized in the formation of committees. The authority delegated to the local government is mostly considered passive in recognizing Indigenous peoples, as evidenced by the minimum number of Indigenous people's areas recorded by the Customary Territory Registration Agency (BRWA) in Indonesia of 1,336 which is mapped with a total area of 26.9 million hectares. Among the total Indigenous people's areas that have been recorded so far, only 3.73 million hectares or 13.9% have been recognized by the local government. Thus, there are still 23.17 million hectares of Indigenous peoples areas that have not been managed by the local government to date.[24] From this data, a very contrasting difference can be found between the number of Indigenous peoples areas that have received recognition and those that have not received recognition, so from here it can be seen that the representation of the passivity of the local government in carrying out recognition of customary law communities.

Indigenous people's recognition based on the regulation of the Minister of Home Affairs Number 52 of 2014 certainly cannot always fulfils people's recognition efficiently due to the passivity of local governments in exercising the authority to recognize Indigenous peoples considering the contrast between the number of Indigenous peoples that have received recognition and the number of Indigenous peoples that have not received recognition. Therefore, the existence of the Indigenous Peoples Bill is needed to overcome existing problems.

As for the Indigenous Peoples Bill drafted by the House of Representatives of the Republic of Indonesia in article 9 of the Indigenous Peoples Bill, it is explained that the minister can also recognize Indigenous peoples in contrast to the regulation of the Minister of Home Affairs number 52 of 2014 in which the authority to recognize Indigenous peoples is only limited to local governments. With the addition of the minister as a party who can carry out recognition, it can overcome the problem of the mechanism for recognition of Indigenous peoples by local governments which was considered passive before. In paragraph 2, it is also explained that the committee

[24] DA, "There has been no government recognition of tens of millions of hectares of customary law territory."

composed consists of elements of related ministries, local governments, and academics. Furthermore, in Article 33 letters c and e, it is also explained that the central government has the task of forming a committee to recognize indigenous peoples and carry out mapping and administration of customary territories. Then in Article 5, it is stated that the central government in conducting measurements must record indigenous peoples who are still growing and developing in the territory of the Republic of Indonesia. In this article, it is found that the involvement of the central government is more active in recognizing indigenous peoples.

Community recognition becomes more active with the determination of the number of committees formed in the process of recognition of customary law communities mentioned in paragraphs 1 and 2 of article 8 where it is determined that the governor in forming a committee for the recognition of indigenous peoples must amount to at least 2 districts/cities in one province and at the district/city level, the regent/mayor is required to form at least a committee for the recognition of indigenous peoples in 1 city/district area. In addition, the Minister in the formation of the recognition committee in Article 9 explained that at least he must form at least 2 provinces. Although Article 7 states that the committee formed to identify, verify, validate, and determine customary law communities is ad hoc, with the determination of the minimum number of recognition committees formed at both the ministerial, governor, and district/city levels, it can increase the capacity of processing the recognition of customary law communities compared to before.

Thus, the existence of this law is a hope for indigenous peoples to obtain their recognition by involving the central government as a party that actively identifies, verifies, validates, and determines indigenous peoples. In addition, indigenous peoples can also actively seek their recognition by identifying and then submitting the identification results that they have obtained to the district/city committee which will later be forwarded to the provincial committee to the central committee so that after that the verification stage can be carried out as mentioned in Article 11. Thus, a passive process like before can be avoided because both the government and the

community can be involved in identifying the existence of Indigenous peoples that require recognition.

Furthermore, in paragraph 2, article 5 of the draft law on Indigenous peoples, it is explained that in collecting data on Indigenous peoples, it must meet several conditions that must be met, including Indigenous peoples who want to be recorded to obtain recognition must be in the form of community communities that live in groups in the form of associations and have attachments based on similarity of descent and territory. Then the indigenous people have inhabited the area that wants to be recognized as the territory of the indigenous people for generations and have local wisdom with the same identity. Furthermore, in order to prove the existence of living law in indigenous peoples, it is necessary to have laws that are obeyed by indigenous groups and have customary institutions. The results of data collection from this will later be needed as the basis for making a confession.

Then in paragraphs 1 and 2 of article 46, it is explained the prohibition which states that Indigenous peoples should not be hindered in managing and utilizing natural resources in their territory and there are criminal sanctions if the prohibition in paragraph 1 is violated in the form of imprisonment for a maximum of 5 years and a maximum fine of 5 billion rupiahs. The regulation of this prohibition and the existence of criminal sanctions for perpetrators of crimes against Indigenous peoples has shown a form of government protection for Indigenous peoples. This regulation answers the concerns mentioned in the press release released by the Executive Board of the Indigenous Peoples Alliance which discusses the Omnibus Law on Seizing Customary Territories amid uncertainty over indigenous peoples' laws, one of which states that in article 82A of the Job Creation Law, the sanctions given to business actors who violate business licenses are only in the form of administrative sanctions. Article 22, it is also explained that perpetrators who do not conduct deliberations with customary law communities are only subject to administrative sanctions in the form of temporary suspension of business activities, imposition of administrative fines, coercion from the government, freezing of business licenses, revocation of business licenses and no

criminal sanctions are imposed.[25] The existence of criminal sanctions is necessary for imposing sanctions against violators in the Indigenous people's law to protect Indigenous peoples and to carry out general prevention to business actors so as not to violate existing prohibitions and provide psychological coercion. In addition, criminal sanctions in the Indigenous Peoples Law also aim as a special prevention mechanism that is expected to provide a sense of deterrence to the perpetrators so that later they will no longer repeat their actions because they view criminal sanctions as suffering. Thus, the existence of article 46 of the Indigenous Peoples Law which contains criminal sanctions can provide protection for indigenous peoples in managing and utilizing natural resources in their areas.

Rules that regulate the mechanism for recognition of customary law communities with a better mechanism than the current rules are needed to provide legal certainty to customary law communities. However, in reality, the existence of the draft law has never been ratified until now. The beginning of the process of forming the indigenous peoples bill began with the making of the indigenous peoples bill as an initiative of the House of Representatives of the Republic of Indonesia in April 2013 which was sent to the president after this bill was discussed in the legislature. In 2014, communication was carried out by the special committee of the House of Representatives of the Republic of Indonesia which invited the Alliance of Indigenous Peoples of the Archipelago to hold a Public Hearing Meeting on the Indigenous Peoples Bill. Although the draft law has been processed for a long time by the special committee of the House of Representatives, it has not yet been passed in 2014.[26]

The Indigenous Peoples Bill has actually been repeatedly included in the National Legislation Program (Prolegnas) and has also been issued a Presidential Decree (Presidential Letter) in which there are instructions to accelerate the Indigenous Peoples' Law but still do not yield any results related to the ratification of the

[25] Rukka Sombolinggi and Erasmus Cahyadi, "Undang-Undang Omnibus Law Merampas Wilayah Adat Ditengah Ketidakpastian Pengesahan Undang-Undang Masyarakat Adat," *Siaran Pers*, no. 3 (2020): 1–3, https://www.aman.or.id/wp-content/uploads/2020/10/SIARAN-PERS-Sikap-AMAN-terhadap-UU-Omnibuslaw.pdf.

[26] Aliansi Masyarakat Adat Nusantara, "Mengapa Indonesia Memerlukan UU Pengakuan Dan Perlindungan Hak Masyarakat Adat?," *Artikel Publikasi Online AMAN*, 2017, 3.

Indigenous Peoples Bill. Since 2014, at least the Indigenous Peoples Bill has been included in the National Legislation Program (Prolegnas) three times. In 2020, the discussion of the Indigenous Peoples Bill had been discussed at the Legislation Body (Baleg), but the draft law was not included in the plenary stage of discussion for ratification.

According to Sardi Razak, Chairman of the Daily Management of the Alliance of Indigenous Peoples of the Archipelago of South Sulawesi at a discussion in Makassar, he said that the reason why the Indigenous Peoples Bill has not been passed so far consists of 5 reasons, including the existence of diverse interests, diverse experiences and knowledge, limited commitment, communication barriers and ineffective participation with all of these reasons being manifested in 2 problems that are the main in the draft The Indigenous Peoples Law, which in its content has not reached the basic problems and still follows the concept of sectoral recognition, avoids conflicts from the past, and complicates the recognition process.[27]

However, it should be remembered that as a draft law, the existence of this article cannot guarantee the recognition and protection of Indigenous Peoples because this draft law can still undergo changes from time to time while it has not been passed. The establishment of this bill is a follow-up to Article 18B paragraph (2) which recognizes and respects the MHA and its traditional rights and mandates to be regulated in the law. The existence of regulations related to the recognition of indigenous peoples that are currently in force does not stand alone as a separate law but is still entrusted to other laws such as in Law Number 41 of 1999 concerning forestry. So the existence of this draft law is needed as a form of recognition and respect for customary law communities as mandated by the constitution.

[27] Wahyu Candra and Della Syahni, "Menanti UU Masyarakat Adat, Belasan Tahun Proses Tak Ada Kejelasan," Mongobay, 2023, https://www.mongabay.co.id/2023/08/09/menanti-uu-masyarakat-adat-belasan-tahun-proses-tak-ada-kejelasan/.

CONCLUSION

The existence of customary law communities that have been recognized and respected in the state constitution is in article 18B of the 1945 Constitution and along with several laws such as the Human Rights Law and the 1960 Law on Human Rights. However, in reality, so far in the recognition of indigenous peoples, customary law is still entrusted to Law 41 of 1999 concerning forestry and there is no law that specifically regulates indigenous peoples. In the current regulations, there are often problems where in the recognition of customary law communities does not run optimally because in recognition it is only left to the local government and the state is not directly involved in the recognition of customary law communities.

The marginalization of the rights of customary law communities leads them to a form of discrimination from the government. The government's indifference has made them experience the loss of their territory, one of which is customary forests. Forests are the source of their search, which in the data is said to be 71.06% of the 31,957 customary villages depend on forests. The attitude of the government in responding to the inequality of interests always puts indigenous peoples defeated on the grounds of national interest development. The problem of passive indigenous peoples recognition mechanism is considered to be able to be overcome in the indigenous peoples draft law because of the government's active role in recognizing and protecting indigenous peoples. However, the existence of this draft law has been included in the national legislation since 2014 but until now there has been no ratification. The existence of indigenous peoples' laws is a hope for indigenous peoples who often do not have legal certainty in terms of their status as legal subjects. The existence of customary law communities that existed much longer before the state was formed needed to protect the land, forests, and customs along with the surrounding natural resources in order to preserve the life of customary law communities.

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