

The Effectiveness of Recognizing the Existence of Traditional Institutions in Indonesia Based on The Constitution

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Abstract

Plurality is a social fact that cannot be avoided in Indonesia. The diversity of Indonesian people's tribes, religions, races, languages and religions shows their diversity. The founders of the Republic of Indonesia used the basic philosophy of "unity in diversity" to show the diverse social reality of the Indonesian nation, and the basic philosophy of "tunggal ika" to show the desire to unite the entire Indonesian nation into one. With the combination of the two, the philosophical motto of the Indonesian nation is "Unity in Diversity", which means unity in diversity. Apart from various different societal systems and structures, this community has unique norms that are considered customs and are adhered to by its community members. Customary law communities are genealogical or territorial communities that are prosperous and have citizens who are different from members of other legal communities and can act as independent and independent legal subjects. One of the problems in administering customary law communities is the existence of customary institutions. The problem currently occurring is that there is no clear and integrated mechanism for recognition and protection procedures. Regulations regarding procedural mechanisms for recognizing the rights of customary law communities through sectoral legislation are often not adhered to by various parties, in fact the nature of the regulations which do not focus on specifically regulating customary law community institutions has an impact on ineffective implementation even though customary institutions have relevance to the Indonesian constitution. The existing mechanism only concerns the process of identification, verification and determining its existence, which makes it increasingly pressured by development activities that do not pay attention to traditional rights and threaten local wisdom.

Keywords: Existence, Recognition, Traditional Institutions, Relevance

INTRODUCTION

Plurality is a social fact that cannot be avoided in Indonesia. The diversity of Indonesian people's tribes, religions, races, languages and religions shows their diversity

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(Fawwaz, 2018). The founders of the Republic of Indonesia used the basic philosophy of "unity in diversity" to show the diverse social reality of the Indonesian nation, and the basic philosophy of "tunggal ika" to show the desire to unite the entire Indonesian nation into one. With the combination of the two, the philosophical motto of the Indonesian nation is "Unity in Diversity", which means unity in diversity (Abdulkarim et al., 2020). Apart from various different societal systems and structures, this community has unique norms that are considered customs and are adhered to by its community members. Customary law communities are genealogical or territorial communities that are prosperous and have citizens who are different from members of other legal communities and can act as independent, independent legal subjects and are seen as a "social energy" (Irene Mariane, 2014).

Plurality includes various social systems and structures, as well as unique norms that become customs and are followed by the community. A customary law community is a community unit that has a strong territorial or genealogical character with citizens who can be differentiated from members of other legal communities. Customary law communities can also act as legal entities (legal subjects) that are independent and self-governing (Ni'matul Huda, 2015). Actually, the term "customary law community" and its meaning are different. Local communities, traditional communities, indigenous communities, customary law communities, and so on are the terms used. Various statutory regulations, such as Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles (UUPA), Law Number 4 of 2009 concerning Mining, Law Number 41 of 2009 concerning Forestry, and Law Number 23 of 2014 concerning Regional Government, uses the term customary law community as the equivalent of *rechtsgemeenschap* or by regional government. The term customary law community was created and used by customary law experts more for theoretical purposes in the academic field. However, the term "indigenous peoples" is a term commonly used by non-legal persons to refer to several international agreements.

One of the problems in administering customary law communities is the existence of customary institutions. The problem currently occurring is that there is no clear and integrated recognition and protection mechanism. Legislative arrangements to recognize sectoral customary law community rights are often not adhered to by various parties, in fact the nature of the regulations which do not focus on specifically regulating customary law community institutions has an impact on ineffective implementation. Existing mechanisms regarding the process of identification, verification and determining its existence are increasingly being pushed by development activities that do not pay attention to traditional rights and local wisdom. This is partly due to differences in principles between traditional law communities and modern societies, especially in administrative matters. Apart from that, government development policies that do not pay attention to the traditional rights of customary law communities are also the cause of the victimization of customary law communities themselves. Traditional institutions are community groups that carry out activities to preserve and develop cultural traditions because of their history or origins (39, 2007).

The term institution comes from the Minangkabau language which means "determination of consensus". Institutions are defined as decisions that are decided upon with the collective agreement of traditional elders in traditional deliberations in order to implement applicable customs. Institutions are not customs that cannot be changed because their binding force is already rooted in people's lives, but they are customs that are formed in the form of behavior or actions based on the results of deliberation and consensus from a customary deliberation which can be used to implement permanent customary provisions. Currently, legislative members can be elected up to three or four times during their term of office, leading to a lasting periodization of power and a dulling of leadership regeneration in political parties. One of the facts is that Tjahyo² and Ceu Popong, who are 76 years old, are members of the DPR who served for six terms from 1987 to 2019. Both of them served until 2014, or currently, have still served as members of the DPR since 1987. Deliberative institutions Custom is the way people interact with each other to achieve the goals of living together by talking to each other in accordance with customary rules. Deliberation can be carried out by talking openly between the parties or by deliberation between each other. According to Hilman Hadikusuma, deliberation is a discussion carried out collectively with the aim of reaching a decision (Kordiyana, n.d.).

Traditional Deliberative Institutions are divided into three parts, namely within the kinship environment, constitutional alliances, and organizational alliances. There are also known as kinship deliberation institutions, which are deliberation institutions used to carry out alliance government based on kinship customary law. This begins with internal deliberations within the family (Javanese: Seomah), then increases to the scope of large family deliberations, then further increases to tribal deliberations, and large customary deliberations in general taking place in a traditional hall, for example in the Batak Customary Law Community, namely Balai Sopo, while the traditional hall for Lampung is Sesat, and Maluku is Baileo. This Kinship Deliberation Institution is genealogical - territorial in nature, namely an association based on neighbors (villages) based on kinship ties (Hadikusuma, 1979). Therefore, it can be concluded that regional governments are responsible for taking concrete actions, such as recognizing and respecting the unity of customary law communities and their traditional rights through recognition, structuring, empowerment and guidance. Thus, local governments play a very important role in carrying out the process of recognizing and protecting the rights of customary law communities (Mahendra, 2002). To support the socio-cultural diversity of existing communities, it is natural to develop customary law as part of the legal substance by providing a forum. Legal certainty in a rule of law state is not only based on valid laws, but also on community values, such as customary law.

The researchers conducted this research to find out the procedures for recognizing traditional institutions in Indonesia and the relevance of the existence of traditional institutions in the Indonesian constitution. Bearing in mind that traditional institutions in Indonesia are still very minimal and of course it would be beneficial for indigenous peoples if their existence received recognition to be present in society.

METHODOLOGY

This research uses a statutory approach and a secondary data approach as a basis for solving the problem. This approach was taken to examine the procedures for recognizing traditional institutions in Indonesia and the relevance of the existence of traditional institutions in the Indonesian constitution based on current laws and regulations. Researchers collect as many secondary data sources as possible such as theory, information and literary studies to provide further study in this research.

RESULTS AND DISCUSSION

A. Recognition Process for Traditional Institutions

Traditional institutions, as social institutions within a community, are tasked with maintaining order and harmony among people by implementing traditional rules or customs. Traditional institutions pay attention to the public interest and have procedures or management systems that are similar to true government. Minister of Home Affairs Regulation Number 5 of 2007 concerning Guidelines for Structuring Community Institutions regulates traditional institutions. Traditional institutions are community institutions that have been formed naturally and have developed historically in society or in certain customary law communities. Traditional institutions have territory and property, as well as the right to regulate, manage and resolve various life problems related to and referring to applicable customs and customary laws. In handling and defending the rights of indigenous peoples, customary institutions are recognized by various laws and regulations, such as:

1. The 1945 Constitution of the Republic of Indonesia: Article 18B paragraph (2) states that "The State recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia"
2. Law Number 3 of 2024, Second Amendment to Law Number 6 of 2014 concerning Villages: Recognizes the term "traditional village" as a form of collective recognition of traditional law communities.
3. Minister of Home Affairs Regulation Number 52 of 2015 concerning Procedures for Recognition and Protection of Customary Law Communities: establishes procedures for recognition of customary law communities.

Traditional institutions as pillars of the culture and identity of Indonesian society play an important role in preserving the culture and traditional values of Indonesian society as well as protecting the rights of the indigenous people themselves, so the existence of traditional institutions is very crucial. The process of recognizing traditional institutions is a challenge that has now become an issue that needs attention, because considering the cultural diversity in Indonesia, there are many traditional tribes that must be accommodated by Traditional Institutions. Apart from that, it is necessary to formulate procedural recognition of traditional

institutions themselves so that they have the power to act for indigenous peoples. To gain recognition, traditional institutions need recognition by both the government and the community in their respective regions to create acceptance on the basis of actions that can help indigenous communities. There are also conditions that must be met to ensure the effectiveness of the presence of the traditional institution itself, such as:

1. Has clear origins and history;
2. Having a recognized customary territory;
3. Having a customary law system that is still alive and adhered to; And
4. Has social and cultural institutions that are still alive.

Traditional Institutions must further formulate their roles and functions to gain recognition, such as:

1. Preserving and developing traditional cultural values;
2. Maintain and manage customary territories;
3. Resolving customary disputes; And
4. Providing services to indigenous communities.

Recognition of Traditional Institutions itself has a positive impact which is expected to be a form of concern for the community, the positive impacts in question are: a. Strengthening the cultural identity of indigenous communities; b. Protecting the rights of indigenous peoples; c. Improving the welfare of indigenous communities; and d. Supporting environmental preservation. The procedural process for recognizing Traditional Institutions has indeed been regulated in Minister of Home Affairs Regulation Number 52 of 2014 concerning Procedures for Recognition and Protection of Indigenous Peoples. However, complicated regulations make recognition more difficult and take longer, especially for indigenous communities who lack resources and knowledge. In Permendagri 52/2014, the criteria used to determine whether a community group can be considered a customary law community are unclear and undefined, which can cause confusion and enable abuse. Permendagri 52/2014 itself is not accompanied by a strong law enforcement mechanism, so the public is concerned that this regulation is not effective in protecting the rights of indigenous peoples. It is inevitable that Permendagri 52/2014 will overlap with other regulations. This includes Law Number 32 of 2004 concerning Regional Government. Undoubtedly, these two regulations have an important role in the process of legal recognition of customary institutions. However, unfortunately, they still do not meet human rights standards because they have not been able to provide clear regulations, especially regarding the recognition of rights to land and customary territories.

B. The Relevance of the Existence of Traditional Institutions in the Indonesian Constitution

The existence of traditional institutions needs to be given full recognition because in the eyes of traditional communities, the option of resolving disputes in traditional institutions is a priority in resolving and overcoming a problem. The values held by the community and passed down from generation to generation form

the process of settling traditional institutions. On the other hand, the structural characteristics of traditional institutions tend to be flexible and accept social change. In legal construction, recognition of customary institutions is required in a formal legal manner, not just sociologically as it currently exists. Traditional institutions have an important role in the lives of indigenous peoples so that they have an existence that is relevant to the constitution because their existence is recognized and protected by the constitution itself as stated in the following articles:

1. Article 18 paragraphs (1) and (2) of the 1945 Constitution: Article 18 paragraph (1) states that "The State recognizes and respects the existence of indigenous peoples with their traditional rights, as long as they are in line with the principles of the Unitary State of the Republic of Indonesia and national development." Article 18 paragraph (2) states that "The State recognizes and protects the rights of indigenous peoples in managing their households and developing their culture, within their customary territories, as long as they do not conflict with the provisions of applicable laws and regulations."
2. Article 28 paragraph (1) of the 1945 Constitution: Article 28 paragraph (1) states that "Everyone has the right to recognition, guarantees, protection and fair legal certainty and equal treatment before the law." This article means that indigenous peoples have the right to recognition and protection of their customary rights, including the right to own and manage their own customary institutions.
3. Article 33 paragraph (3) of the 1945 Constitution: Article 33 paragraph (3) states that "Earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people." This article means that the state must recognize and protect the rights of indigenous peoples over their customary territories, including the right to manage natural resources in their customary territories.
4. Other Provisions: Apart from these articles, the constitution includes several other provisions relating to the existence of traditional institutions, such as: Law Number 32 of 2004 concerning Regional Government; Minister of Home Affairs Regulation Number 52 of 2014 concerning Procedures for Recognition and Protection of Customary Law Communities; and regional regulations relating to the recognition and protection of indigenous communities in their respective regions.

Thus, the existence of customary institutions in the Indonesian constitution shows that the state recognizes and respects the existence of indigenous peoples and their customary culture, and the state is obliged to protect the rights of indigenous peoples, including the right to own and manage their own customary institutions. Traditional institutions also have an important role in maintaining traditional culture and protecting the rights of indigenous peoples. Therefore, the existence of traditional institutions in the Indonesian constitution shows that the state recognizes and respects the existence of indigenous peoples and their traditional culture. Customary practices in Indonesia Customary institutions exist independently outside

the structure of government organizations (1, 2015). The need for positive recognition of traditional institutions cannot be separated from efforts to maintain the existence of customs themselves. Referring to several literature presented by Prof. Satjipto Rahardjo, the conditions for a traditional institution to exist are as follows; (Topo, 2017)

- a. For a long time, customary law is still applied in several villages in Bima Regency, especially Donggo sub-district, although its function is decreasing and appears to be ineffective.
- b. In accordance with societal developments: Customary law is not much influenced by positive societal developments. For example, customary law says that laws must always be adapted to changes in society.
- c. Regulated in Law: Since the 1945 Constitution was amended and Law Number 32 of 2004 concerning Regional Government was enacted, there has been room to provide freedom for villages to make their own laws. Now the problem is how this law is implemented at the regional government level, especially in Bima Regency.

In practice, traditional institutions that still have an existence in Indonesia are an alternative choice in dealing with crime. Recognition of traditional institutions is an implementation of recognition of regional government as the lowest structure in villages or in other words a village government that is based on customary procedures even though they are not written (Muryati et al., 2022). Customary Community Law is not created, it is born, grows and develops simply and is reflected in individual behavior between individuals in the community. Taking quotes from Mawa Cara Village and Nawa Tata Country. This means that the state and society work side by side and complement each other. Mawa Cara is the freedom for the village to determine its direction, the village is a locus that has its own culture, customs and is different from one another. The village is led by an elder who is often referred to as the traditional head in directing and providing guidance based on the noble values that are embedded. The Nawa Tata State is the term for the state as the central government, and state law as the pathway for legislative and executive reconstruction that must be obeyed. Because of this legal adage, traditional values such as adab, ethics and traditional institutions can be applied to maintain their existence. Traditional institutions also contain informal rules called customary rules, which are collectively agreed upon and function as the community's standard of living (M.Rasyidi, 2008).

Article 18 B paragraph 2 of the 1945 Constitution of the Republic of Indonesia and Article 95 of Law Number 6 of 2014 concerning Villages indicate constitutional recognition of traditional institutions. LAD is an institution that carries out traditional duties and is part of the original Village structure which grows and develops on the initiative of the Village community. Regional Regulation Number 1 of 2010 accommodates the practice of recognizing traditional institutions in Central Kalimantan. This regulation requires the government to provide guidance and

financial assistance with a fixed income to the functionaries of Traditional Institutions, or *kedamangan*. *Kedamangan* is said to be a Dayak traditional institution which has traditional territories, traditional community units and customary law in the Central Kalimantan Province region. In its operations, *kedamangan* operates with assistance from provincial, district and city revenue and expenditure budgets, as well as with assistance from several villages, sub-districts, sub-districts and cities. Funding here comes from provincial, district or city revenue and expenditure budgets, as well as other legitimate sources. In Musi Banyuasin, there is a clan traditional institution which was formed according to Regional Regulation Number 6 of 2012 concerning Clan Customary Institutions and Regional Regulation of Ogan Gilir Regency Number 14 of 2008 concerning the Establishment of the Ogan Ilir Regent's Traditional Institution. This traditional institution has the same authority as other traditional institutions in the field of law, namely to resolve disputes related to the customs of the village or sub-district community concerned.

According to the compilation book, clan customary law has the authority to impose customary sanctions on someone who violates customary law provisions, acting on behalf of traditional institutions both inside and outside the court. follow the rules of association with single girls in accordance with local customs. Clan Customary Regulations must be made in accordance with local customs. Establish coordinating partnership relationships with sub-district, village and sub-district governments. Collaborate with Marga Traditional Institutions or other traditional institutions. In Bengkulu, the Regional Regulation of the Regent of West Bangka, Bangka Belitung Islands Province Number 3 of 2019 concerning Village or Subdistrict Community Institutions and Village Traditional Institutions recognizes traditional institutions. Village Traditional Institutions have the authority to regulate, manage and resolve various life problems related to and referring to applicable customs and customary laws. Among other things, he also acts as a mediator in resolving disputes and conflicts involving customary law, customs and habits of the community. By issuing village regulations, such as Banjar Village Regulation Number 4 of 2021 concerning Preserving and Strengthening Culture and Customs, traditional institutions are also recognized. Decree of the Head of Kedung Maling Village, Sooko District, Mojokerto Regency Number 2 of 2020 stipulates the formation of the Kedung Maling Village Traditional Institution Management, Sooko District, Mojokerto Regency for the 2020-2025 Service Period. Kemiren Village Regulation Number 19 of 2015 concerning Traditional Institutions also recognizes its position. There is a belief that the existence of traditional institutions has enormous potential to preserve and develop cultural traditions. At the verification stage the registration of Traditional Institutions that are positively recognized should be based on the following principles:

1. Based on Pancasila and the 1945 Constitution of the Republic of Indonesia;
2. Actively develop local values and customs that do not conflict with human rights and are adhered to by the community;

3. Located in a local village;
4. Useful and necessary for the Village community;
5. Have permanent management;
6. Have a permanent secretariat; And
7. Not affiliated with any political party. In fact, traditional institutions are recognized and appreciated. However, there has been no official detailed acknowledgment. Therefore, this regional regulation aims to provide a legal basis for the efforts of regional governments and all related parties to recognize and protect traditional institutions as a means of alternative dispute resolution. Recognition of traditional institutions needs to be regulated in an integrated manner in terms of reach and direction of regulation. Currently, the regulation of recognition of traditional institutions still overlaps in the realm of regional regulations to village regulations. This inconsistency in regulatory space creates confusion for legal product actors in implementing them. This is made worse by differences in authority, sanctions and other things between regulations with different hierarchies. In general, these regulations include: principles, objectives and scope, recognition and inauguration, procedures for inauguration, obligations and authority of traditional institutions, membership of traditional institutions, sources of funds for agat institutions, empowerment of traditional institutions, community participation and other matters deemed necessary.

CONCLUSION

The existence of Traditional Institutions has relevance to the Indonesian constitution so that their existence deserves to be recognized and empowered further. The presence of Traditional Institutions will certainly have a positive impact, especially in maintaining and protecting the rights of indigenous peoples. Recognition of traditional institutions in Indonesia is a crucial step in respecting cultural diversity and protecting the rights of indigenous peoples. Even though there is constitutional recognition, implementation in the field still faces various challenges, such as complicated procedures, lack of understanding, and conflicts of interest. Traditional institutions have a very important role in preserving the environment, preserving cultural values, and resolving conflicts at the local level. Local wisdom possessed by traditional institutions can be a solution to various contemporary problems. Recognition of traditional institutions is also in line with the principles of democracy and decentralization contained in the constitution. The main challenges in recognizing traditional institutions are climate change, exploitation of natural resources, and social conflict. Climate change threatens the survival of indigenous peoples and their traditional territories. Pressure to exploit natural resources in customary territories continues to increase, and conflicts between indigenous peoples and other parties who have interests in customary territories still frequently occur. However, there are also great opportunities to strengthen the role of traditional institutions in the future. By providing training and mentoring to indigenous communities, building

partnerships with various parties, and carrying out policy advocacy, we can ensure that traditional institutions remain relevant and contribute to nation-building. In conclusion, recognition of traditional institutions is a long-term investment for sustainable development in Indonesia. By providing space for indigenous peoples to manage their customary territories independently, we not only protect their rights, but also preserve the nation's biodiversity and culture.

REFERENCE

- 1, S. A. 3 P. (2015). *See Article 3 Paragraph 1 of Kemiren Village Regulation Number 19 of 2015 concerning Traditional Institutions.*
- 39, S. A. 1 P. 8 of M. of H. A. R. N. (2007). *concerning Guidelines for Facilitation of Community Organizations in the Field of Culture, Palaces and Traditional Institutions in the Preservation and Development of Regional Culture.*
- Abdulkarim, A., Komalasari, K., Saripudin, D., Ratmaningsih, N., & Anggraini, D. N. (2020). Development of a Unity in Diversity-Based Pancasila Education Text Book for Indonesian Universities. *International Journal of Instruction*, 13(1), 371–386.
- Fawwaz, A. G. (2018). Religious Pluralism in Indonesia: Its Advantages And Challenges. *Journal. Researchgate. Net.*
- Hadikusuma, H. (1979). *Customary Criminal Law* (Alumni Pub).
- Irene Mariane. (2014). *Local Wisdom in Customary Forest Management, Print I* (Rajawali P).
- Kordiyana, S. G. and. (n.d.). *Op.Cit.*
- M.Rasyidi. (2008). Study of Cultural Values in Sasak Tribal Institutions as a Strength in Building the Nation's Ancestral Cultural Values. *Agroteksos Scientific Work (Journal)*, 18(1–3), 3.
- Mahendra, Y. I. (2002). *Realizing the Rule of Law in Indonesia*. Indonesian Ministry of Justice and Human Rights.
- Muryati, S., Sudiatmi, T., & Saptomo, S. W. (2022). Stimulasi Keterampilan Abad Ke-21 bagi Siswa dalam Buku Teks Bahasa Indonesia. *Klitika: Jurnal Ilmiah Pendidikan Bahasa Dan Sastra Indonesia*, 4(1), 51–58.
- Ni'matul Huda, V. G. L. (2015). *In the Indonesian Constitution from Independence to the Reformation Era* (Setara Pre).
- Topo, S. (2017). *Criminology*.