



Reconfiguring State Recognition: Changing Legal Patterns for Indigenous Communities in Indonesia's Legal System

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Abstract

Indigenous peoples' constitutional rights recognition is closely related to the struggle for Human Rights. Although Indonesia has thousands of indigenous communities that have been recognized since the colonial era, the legal issue of identifying the identity of indigenous peoples as legitimate citizens is still ongoing. This problem arises with the absence of definite indicators in the constitution that can be used to describe the resolution of indigenous peoples clearly. This article aims to examine the consistency of the mechanism for recognizing the rights of indigenous peoples in the Draft Law on Indigenous Peoples with the principles of Good Legal Formulation. The research was conducted using doctrinal research methods. The conceptual and regulatory approaches were used to find the construction of the ideal legal form in guaranteeing the rights of indigenous peoples. The eight principles of legality are the basis for building legal arguments in ensuring that the Draft Law on Indigenous Peoples has been made following the principles of Good Legal Formulation. The results of the study show that there are still weaknesses in the procedure for recognizing indigenous peoples that have the potential to harm these communities, thereby causing social change. From these findings, it can be concluded that the government needs to review the indicators and procedures used to obtain constitutive recognition for indigenous peoples. This research will have a significant impact on the provision of constitutional rights and improving the standard of living of indigenous peoples in Indonesia.

Keywords: Human Rights; Indigenous People; Public Policy

INTRODUCTION

This article seeks to examine the extent to which the principles underlying the recognition of Indigenous Peoples (IPs) in the Draft Law on Indigenous Peoples (RUU Masyarakat Adat) align with the fundamental principles of correct legal drafting. This study is significant as it aims to contribute to the advancement of human rights protections for Indigenous communities in Indonesia. Indigenous Peoples continue to face marginalization and various obstacles in exercising their constitutional rights, primarily due to the unresolved issue of identity recognition. In accordance with constitutional provisions, the State is obliged to provide protection and formal recognition of the traditional rights inherent to Indigenous communities throughout the country. Nevertheless, a considerable number of implementing regulations remain inconsistent or inadequate in establishing the legal basis for the constitutional recognition of Indigenous

Peoples. This regulatory gap often gives rise to conflicts, particularly in situations where Indigenous communities perceive that their rights have been violated by external parties. Furthermore, the fulfillment of basic citizenship rights is frequently hindered by the complexities involved in the recognition of Indigenous identity, thereby compounding the challenges faced by these communities.

This research is conducted with the aim of making an active contribution to the ongoing formulation process of the Draft Law on Indigenous Peoples (RUU Masyarakat Adat). The study employs a doctrinal legal research method, incorporating both conceptual and statutory approaches. Through this methodology, legal arguments are constructed to formulate solutions to the issues surrounding the recognition of Indigenous identity in Indonesia. The foundation of these legal arguments is grounded in *the eight principles of legality* as articulated by Lon L. Fuller.¹ Substantive refinement of the Draft Law on Indigenous Peoples (RUU MA) is necessary, as this regulation may serve as a critical determinant for the continued existence of Indigenous Peoples as a vulnerable group requiring special attention from the government. Recognition of the identity and ancestral rights of Indigenous communities is an integral part of the broader struggle for the protection of human rights. Accordingly, a focused legal analysis is needed to assess the effectiveness of the RUU MA's substantive provisions as a source of constitutive recognition for Indigenous Peoples. Thus far, the recognition process has largely depended on the authority of local governments to enact regional regulations (*Peraturan Daerah* or *Perda*) for communities that have already been officially registered.²

Human rights (HAM) represent the recognition of the inherent dignity and worth of every individual. This awareness has been firmly established within the international community and has become one of the core principles advocated by the United Nations (UN). In order to promote global movements in support of human rights recognition, the UN subsequently adopted the *Universal Declaration of Human Rights*.³ The Declaration was adopted at the end of 1948 and resulted in a resolution that recognized, among others, the following rights: (a) the right to life, liberty, and personal security; (b) the right to be free from servitude and slavery; (c) the right to be free from torture and cruel, inhuman, or degrading treatment; (d) the right to legal protection based on the principle of equality before the law; (e) the right to be free

¹ Raff Donelson and Ivar R. Hannikainen, "Fuller and the Folk: The Inner Morality of Law Revisited," in *Oxford Studies in Experimental Philosophy Volume 3*, by Raff Donelson and Ivar R. Hannikainen (Oxford University Press, 2020), 6-28, accessed November 19, 2021, <https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198852407.001.0001/oso-9780198852407-chapter-2>.

² Sukri Tamma and Timo Duile, "Indigeneity and the State in Indonesia: The Local Turn in the Dialectic of Recognition," *Journal of Current Southeast Asian Affairs* 39, no. 2 (August 2020): 270-289.

³ Antoine Laham and Caroline Allibert, *Human Rights Aspects* (Switzerland: EUR-OPA & IOM-OIM, 2001), <https://www.coe.int/t/dg4/majorhazards/ressources/pub/handbookfiles/1b.pdf>.

from arbitrary arrest, detention, or exile; (f) the right to privacy; (g) equal rights in marriage and its dissolution; (h) the right to property, which shall not be arbitrarily taken away; (i) the right to freedom of thought, religion, expression, belief, and opinion; and (j) the right to a standard of living adequate for health and well-being of oneself and one's family. The Declaration, adopted by UN member states, subsequently influenced national policies that were expected to align with these internationally agreed-upon standards.⁴

The recognition of human rights as articulated in the 30 articles of the *Universal Declaration of Human Rights* was later adopted by the Government of Indonesia. Specifically, the protection and fulfillment of human rights in Indonesia have been formally guaranteed through the enactment of the *Human Rights Law* (Law No. 39 of 1999).⁵ Nevertheless, the recognition of human rights in Indonesia can be traced back to the drafting of the Constitution in 1945. The Investigating Committee for Preparatory Work for Indonesian Independence (BPUPKI) explicitly included the recognition of human rights for Indigenous Peoples. In the context of Indonesia's formation, Indigenous communities played a crucial role in the nation's struggle for independence. Moreover, traditional law communities (*masyarakat hukum adat*) throughout the archipelago willingly united under the framework of a single nation, which later became the Republic of Indonesia. The acknowledgment of the human rights of Indigenous Peoples was enshrined in Article 18 and its explanatory notes in the original version of the 1945 Constitution, prior to its amendments.⁶ Following the constitutional amendments, the recognition and protection of the rights of Indigenous Peoples are explicitly articulated in Article 18B and Article 28I paragraph (3) of the 1945 Constitution. These provisions affirm the State's obligation to respect and acknowledge the existence and traditional rights of Indigenous communities as long as these remain in accordance with the principles of the Unitary State of the Republic of Indonesia.⁷

In practice, however, the constitutional values recognizing Indigenous Peoples have yet to be fully implemented. The recognition of Indigenous communities began to shift following the enactment of the Basic Agrarian Law (*Undang-Undang Pokok Agraria* or UUPA) in 1960. Article 3 of the UUPA stipulates that recognition of Indigenous

⁴ Anne Peters, "Supremacy Lost: International Law Meets Domestic Constitutional Law," *ICL Journal* 3, no. 3 (September 1, 2009): 170-198.

⁵ John P. Humphrey, "The Universal Declaration of Human Rights," *International Journal* 4, no. 4 (1949): 351.

⁶ Muhammad Aldi and Firmansyah Putra, "Pengakuan Dan Perlindungan Masyarakat Hukum Adat Berdasarkan Peraturan Perundang-Undangan," *Limbago: Journal of Constitutional Law* 3, no. 1 (2023): 311-320.

⁷ Yusuf Salamat, "Pengaturan Mengenai Hak Atas Tanah Masyarakat Hukum Adat (Studi Kasus Pengakuan Terhadap Hak Atas Tanah Masyarakat Hukum Adat Dayak Di Kalimantan Tengah)," *Jurnal Legislasi Indonesia* 13, no. 4 (2016): 411-420.

Peoples is required as the basis for the management of *ulayat* (customary) land rights.⁸ Indigenous communities that existed and were recognized by the Dutch East Indies government prior to Indonesia's independence can no longer be certain of their identity and rights under current legal frameworks. The communal rights held by Indigenous Peoples should ideally derive from declarative and spontaneous recognition, rather than being granted by any authority. However, once Indigenous communities became part of a sovereign nation-state, it became increasingly likely that their rights would require formal validation – and would only be fully accessible upon receiving constitutive recognition from the state.⁹

Legal issues arise because the process of constitutive recognition does not necessarily guarantee the protection of Indigenous Peoples' rights to maintain their traditional ways of life, which have existed for centuries. This is evidenced by the widespread violations of customary territorial management rights, leading to recurring conflicts between Indigenous communities, businesses, and government authorities. Legal uncertainty has been further exacerbated by Article 1, point 6 of the Forestry Law (*Undang-Undang Kehutanan*), which defines customary forests (*hutan adat*) as part of state forest land. This classification constitutes a violation of the constitutional rights of Indigenous Peoples, prompting the Indigenous Peoples' Alliance of the Archipelago (*Aliansi Masyarakat Adat Nusantara*, AMAN), together with the Cisu and Kanagarian Kuntu Indigenous communities, to file a request for judicial review. As a result of this legal action, the Constitutional Court reinterpreted the definition of *hutan adat*, ruling that it can no longer be categorized as state forest.

Nevertheless, the article requiring the process of recognizing the existence of Indigenous Peoples by local governments has yet to be annulled. This situation creates legal uncertainty for Indigenous communities in their struggle for recognition of their identity. Based on these considerations, the discourse on creating a specific bill that regulates the recognition of identity and rights of Indigenous Peoples has begun to take shape. Therefore, this study seeks to examine the alignment of the substance of the Draft Law on Indigenous Peoples (RUU Masyarakat Adat) with the principles of good legal rule-making. The analysis is based on the eight principles of legality as proposed by Lon L. Fuller.¹⁰ This research is expected to contribute to the improvement of the process of recognizing the identity of Indigenous Peoples in Indonesia.

⁸ Yules Moses Urasana, Adonia Ivone Laturette, and Pieter Radjawane, "Perlindungan Hukum Terhadap Hak Masyarakat Hukum Adat Setelah Berakhirnya Hak Guna Usaha," *BAMETI Customary Law Review* 1, no. 1 (2023): 26–40.

⁹ Pedro Calafate, "The Rights of the Indigenous Peoples of Brazil: Historical Development and Constitutional Acknowledgment," *International Journal on Minority and Group Rights* 25, no. 2 (May 16, 2018): 183–209.

¹⁰ H. L. A. Hart and Lon L. Fuller, "The Morality of Law," *Harvard Law Review* 78, no. 6 (April 1965): 1281.

This effort is a crucial step, as it could determine the survival and well-being of a vulnerable social group in the country.

This research on the ideal construction of the substance of regulations regarding the recognition of Indigenous Peoples' identity will be conducted using a normative legal research method, or doctrinal legal research. The analysis will be based on conceptual and statutory approaches. The *eight principles of legality* will serve as the foundation for analyzing the elements of the Draft Law on Indigenous Peoples (RUU Masyarakat Adat) and its ability to address issues related to the recognition of existence, identity, and rights of Indigenous Peoples. The statutory approach will be employed to examine the legal instruments related to the process of identity recognition for Indigenous Peoples and the rights inherent to them. The analysis will be presented in both descriptive and prescriptive forms.

The analysis will be presented in several sub-studies. First, the discussion will begin with an elaboration on the principles of good legal rule-making. This topic will be covered in the section titled *The Principles of Legality from Fuller's Perspective*. Second, the discussion will proceed with an examination of *The Recognition of Indigenous Peoples within the Legal System in Indonesia*. Third, an analysis will be conducted to explore the relationship between the principles articulated by Fuller, the substance of the Draft Law currently being developed, and its predicted effectiveness in addressing issues related to the recognition of Indigenous Peoples' existence. This analysis will be presented in the sub-section *The Principles of Good Law-Making in Recognizing Indigenous Peoples' Existence in Indonesia*.

RESEARCH METHODS

This research employs a doctrinal legal research method. Primary and secondary legal materials are collected and analyzed using the PRISMA model to ensure their relevance to the research topic. The primary legal materials used in this study are sourced from the Draft Law on Indigenous Law Communities (*RUU Masyarakat Hukum Adat*), the Ministry of Home Affairs Regulation No. 52 of 2014 concerning the Procedures for Recognizing Indigenous Peoples, and the Ministry of Agrarian Affairs and Spatial Planning / National Land Agency (ATR/BPN) Regulation No. 10 of 2016 regarding the Procedures for Determining Communal Land Rights of Indigenous Peoples. The secondary legal materials consist of books, journals, and other scholarly works. These secondary sources provide the theoretical framework used as the analytical lens in this study. The results of the analysis are presented in descriptive form.

ANALYSIS AND DISCUSSION

A. Fuller's Perspective on 'The Eight Principles of Legality' as the Foundation of Legal System Framework

The moral values of a society living within a state will significantly influence and be influenced by the presence of a legal system. Law, in this context, is created to regulate the boundaries of acceptable actions that can be taken by each citizen. However, the law also becomes the basis of authority for policymakers.¹¹ Therefore, there must be public awareness that serves as the primary motivation for individuals to comply with and respect the laws in place. This is essential to ensure that the governance structure functions optimally and can contribute to the well-being of society. To maintain the quality of legal products, standards are necessary as a common reference, ensuring that moral values in legal regulations are upheld by judicial institutions. This helps ensure that policy-making is not solely based on short-term political considerations.¹²

According to Dworkin's Perspective¹³, The government must continually maintain a close relationship between morality and law. One of the efforts that can be made to ensure this is by monitoring the policy-making process so that the resulting legal products possess values of justice and can be justified administratively.¹⁴ The view on the importance of the regulatory formation process, centered on the elements of good law, emerged as an evolution from the story of King Rex's regime, which sought to introduce legal reforms and address issues of governmental inefficiency.¹⁵ His policy of repealing all existing laws and addressing each case individually did not yield the expected results. The people were faced with a dilemma arising from the lack of clarity in King Rex's reasoning when making decisions, which made the boundaries between right and wrong more ambiguous.

To address these issues, a formal legal code was subsequently created to guide the systematics of decisions made.¹⁶ However, problems arose when these codes were created without being published, leaving the public unable to ensure that their actions

¹¹ Moh Gandara, "Kewenangan Atribusi, Delegasi Dan Mandat," *Khazanah Hukum* 2, no. 3 (2020).

¹² Alexander B. Aikman, *Art and Practice of Court Administration*, Public administration and public policy 128 (Boca Raton: CRC Press/Taylor & Francis Group, 2007).

¹³ Jeremy Waldron, "The Rule of Law," *Stanford Encyclopedia of Philosophy* (New York: Stanford University, June 22, 2016).

¹⁴ George C. Christie, "Dworkin's 'Empire,'" *Duke University School of Law* 1987, no. 1 (February 1987).

¹⁵ Eashan Nakra, "Socio-Legal Significance of Lon Fuller's Theory of 'Inner Morality of Law,'" *International Journal of Law Management and Humanities* 5, no. 1 (2021): 1457-1461.

¹⁶ Colleen Murphy, "Lon Fuller and The Moral Value of The Rule of Law," *Law and Philosophy* 24, no. 1 (2005): 239-262.

were in accordance with the applicable legal rules. After King Rex agreed to publish the codes, the people found that the substance of these legal codes was confusing, contradictory, and unrealistic. In this case, it became apparent that consistency was necessary as a guarantee of legal certainty for the public. Exceptions could be made as minimally as possible, considering the moral and ethical values that arise in specific cases. Based on these considerations, the idea of creating a procedure for the formation of good regulations emerged.

As stated by Dworkin,¹⁷ According to Dworkin, the consideration of the substance of the law must be based on the moral values that will be applied. For Fuller, morality in law should consist of at least two components: morality of duty and morality of aspiration. Morality of aspiration refers to the ideal of perfection that one strives to achieve, thus requiring the best efforts to attain the highest possible goals.¹⁸ This moral value is envisioned similarly to the formulation of how the composition of a good piece of writing is made and what the purpose of that writing is. From this characteristic, it can be said that morality of aspiration will shape the concept of how the process of writing well should unfold. Meanwhile, morality of duty establishes the lowest standard that can serve as a guide for the orderliness of social life.¹⁹ The second moral value emphasizes prohibitions that must be avoided in order to achieve a certain condition. Punishment only applies to those who violate these provisions. As an illustration, this moral value provides institutions or mechanisms that can be used to support the social life of society. In other words, morality of duty functions like the rule of grammar in a writing process. Both moral values play a crucial role in constructing the foundational principles of law because the law serves as a guide for the actions of the general public.²⁰ In order to determine that an action is bad, society must first have an understanding of actions that can truly be categorized as good.

After understanding the moral values that should be embedded in law, Fuller then emphasizes the importance of fulfilling the principles of good lawmaking in order for the legal rules to be effective in achieving the desired goals. The eight principles of legality proposed by Fuller include, first, the general nature of a legal rule. In this context, Fuller emphasizes the importance of formulating laws that are general in nature. This is essential as a foundation to ensure the principle of equality before the law,²¹ it must be applicable to all, and the law should not be used to regulate only cer-

¹⁷ Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press, 1988).

¹⁸ E.g. A.A.G Peters, *Law as Critical Discussion* (Berlin: De Gruyter, 1986).

¹⁹ Peter L. Jennings and Sean T. Hannah, "The Moralities of Obligation and Aspiration: Towards a Concept of Exemplary Military Ethics and Leadership," *Military Psychology* 23, no. 5 (September 2011): 550-571.

²⁰ Peter P. Nicholson, "The Internal Morality of Law: Fuller and His Critics," *The University of Chicago Press* 84, no. 4 (1974): 307-326.

²¹ Kate Lumley and Anne Murphy, eds., *Equality before the Law Bench Book* (Sydney: Judicial Commission of New South Wales, 2006).

tain groups, as this could lead to discrimination. Second, there is the aspect of publicity that must be fulfilled in the creation of good laws. This aspect is related to the process of promulgation and public transparency, ensuring that the public can truly understand the content of the rules that have been established.

Third, the law must be prospective, or it should regulate future actions. This principle indicates that the law should not be created to prohibit actions that have already occurred but rather focus on how individuals should act in the future. Fourth, the substance of the law must be made as clear as possible. This principle is essential to ensure that the people who are subjects of the law can truly understand the limitations set by the legal rules. Fifth, when creating a law, legislators must consider the alignment of values and norms within the same legal system. The creation of a regulation must not contradict or be inconsistent with other legal rules.

Sixth, the law must not require something that is impossible for its subjects to fulfill. In this regard, the law must be realistic so that it can be followed by society. Seventh, the law must not be arbitrary; it should be constant. This principle is closely related to the prospective nature of legal rules. The law's ability to adapt to future conditions will greatly affect the consistency of the rules created. Revisions to certain components of the law are allowed to adjust to the evolving conditions in society. However, this does not mean that the government can continuously change regulations in a short period. Eighth, there must be alignment between the substance of the law and its enforcement process. Since these principles are used to ensure there is a systemic standard in the judicial process, judges must adhere to the values outlined in the regulations when making decisions. This is a crucial prerequisite for establishing a fair legal order for all members of society.

In relation to the research to be conducted on the Draft Bill on Indigenous Peoples (RUU Masyarakat Adat), the eight principles of legality will serve as a framework for evaluating the quality of the substance of the regulation. By referring to these eight principles, it is hoped that the content of the RUU Masyarakat Adat will address the issues arising from the identification and formal recognition of the indigenous peoples' identity in a constitutional manner. The points within these principles will highlight both the strengths and weaknesses in the procedure for drafting the RUU Masyarakat Adat, allowing for recommendations to improve the formulation of the regulation currently being developed.

B. Recognition of Indigenous Peoples in the Legal System of Indonesia

Indigenous peoples in the first Constitution of Indonesia were regulated under Article 18B paragraph (2) and Article 28I paragraph (2) of the 1945 Constitution. From these two articles, the government has an obligation to recognize the existence of indigenous communities along with their traditional rights, as long as they remain alive and in accordance with the development and principles of the Unitary State of the Republic of Indonesia. However, despite being recognized in the Constitution, there is no clear definition provided for what constitutes "indigenous peoples" under this constitutional framework. As a result, the interpretation and indicators used to describe indigenous peoples have varied between different regulations.

An example of this can be seen in Article 67 of the Forestry Law, which requires the formal recognition of indigenous peoples through regional regulations issued by Governors, Regents, or Mayors. This provision differs from the substance of the Ministry of Home Affairs Regulation No. 52 of 2014 on the Procedure for Recognizing Indigenous Peoples, which states that the protection of Indigenous Peoples falls under the authority of regional heads and is regulated by the Decision of the Regional Head. Meanwhile, in the Ministry of Agrarian Affairs and Spatial Planning / National Land Agency (ATR/BPN) Regulation No. 10 of 2016 on the Procedure for Determining Communal Land Rights of Indigenous Peoples and communities in certain areas, it is stated that the existence and rights over the land are determined by the regional head.

Referring to the history of the Indonesian nation, the issue of recognizing the identity of indigenous peoples actually only emerged after the enactment of the Basic Agrarian Law (UUPA). However, indigenous peoples had existed long before Indonesia's independence. Even when the Dutch colonial government arrived in Indonesia and colonialism took place, indigenous peoples were already inhabiting the customary law areas they had established. Although the colonial government acknowledged the existence of indigenous peoples, disputes continued due to conflicts over rights to manage customary land. The Dutch occupation, which applied the principles of *lex nullus* and *lex legalia*, denied all the rights held by indigenous peoples. This action was an extension of the *mare liberium* theory used by Hugo de Groot to conquer his colonies. This ideology was later developed into the *domein verklaring* theory, which was used by the Dutch to control indigenous lands.

The presence of legal scholars such as Cornellis van Vollenhoven and Ter Haar then brought forward the discourse on the importance of recognizing communal property rights for indigenous peoples in the Dutch East Indies colonies. This perspective led to the development of a doctrine in indigenous legal studies, which framed indigenous peoples as a form of legal community (*adatrechtsgemeenschap*). The recognition of indigenous peoples was closely related to the right to manage their customary land, known as *hak ulayat*. This right differs fundamentally from the general rights to land

management because the land is owned communally, and its management still involves sacred, magical, and religious elements. This understanding then placed an obligation on the colonial government to negotiate direct lease agreements when utilizing indigenous land and prohibited the confiscation of their rights (*onteigening*).

The unconditional recognition of indigenous peoples during the Dutch colonial administration was a form of acknowledgment of the inherent rights tied to the indigenous communities that inhabited these areas first. Recognition of the *hak ulayat* (communal land rights) held by indigenous peoples after Indonesia's independence then faced obstacles with the provisions of Article 3 of the Basic Agrarian Law (UU-PA), which stipulates that indigenous peoples must first be recognized in order to obtain their right to manage their communal land. This concept of constitutional recognition of the existence of indigenous peoples is also reflected in the Forestry Law. This requirement has led to situations where human rights violations have occurred. Some indigenous communities have successfully registered and received recognition from local governments in accordance with applicable laws and regulations. However, their rights to manage their customary territories are often neglected.

For example, the opening of palm oil plantations in the Jambi Province from 2001 to 2017 has threatened the Suku Anak Dalam (SAD), an indigenous group that traditionally lives a nomadic lifestyle. The SAD, who live in small groups and move from place to place, are now unable to perform their rituals because they have lost access to the forest. The forest where they once lived has been transformed into palm oil plantations, forcing them to leave their ancestral land. As a result, they can no longer forage for food or plant crops as they once did. In addition, the palm oil plantations have damaged their water sources. With these numerous limitations, they cannot claim their rights as indigenous people and, consequently, lose the opportunity to have their identity officially recognized by the government. This recognition is crucial as it forms the basis for legal actions they could take to defend their traditional lands that have been taken away and to access other constitutional rights that should be guaranteed by the state.²²

A different situation is experienced by the Kasepuhan C situ, which has received recognition from the government of Lebak Regency, Banten Province, based on the Decree Number 430/kep.318/Disporabudpar/2010 concerning the recognition of the existence of the Kasepuhan C situ Indigenous Community in the Banten Kidul Adat Union in Lebak Regency, Cibeber District. The Kasepuhan C situ has inhabited the Halimun Mountains since 1621. In 2010, their population was recorded at 2,191 people. According to participatory mapping data carried out by AMAN, the Kasepuhan C situ should have an adat area of 7,200 hectares. In this case, their right to manage

²² Human Rights Watch, *Kehilangan Hutan Berarti Kehilangan Segalanya: Perkebunan Kelapa Sawit Dan Pelanggaran Hak Asasi Manusia Di Indonesia* (Jakarta: Human Rights Watch, 2019).

their customary territory has clashed with the rights to manage forest areas in the Halimun Mountain region designated by the government. Since the colonial period, the area has been categorized as a protected forest, which later became a conservation area managed by the Forestry Department. After Indonesia's independence, the forest management rights were transferred to a national park, managed by Perum Perhutani, and later to the Gunung Gede Pangrango National Park Authority.

The enactment of the Forestry Law, which categorizes customary forests as part of state forests, has led to conflicts over the management rights of customary forest areas.²³ As a result of the management rights attached to the customary forest area of Kasepuhan Cisitu, they lost the right to manage the area. In addition, they also faced criminalization, even though the area had been constitutionally recognized as part of the customary forest. This situation was further exacerbated by the granting of a gold mining concession to PT Aneka Tambang. From these two examples, it can be said that the recognition of indigenous peoples' identities in Indonesia has not been fully optimized. The requirements set by the government for their legal recognition have made it difficult for many indigenous communities who still live deep in the forest and are unfamiliar with modern governance systems. For indigenous communities that have met the requirements of positive law, violations of their customary forest management rights continue to occur..

Based on these issues, a legal effort in the form of a judicial review was submitted to the Constitutional Court, seeking that the government provide protection for indigenous peoples. In Decision No. 35/PUU-X/2012, the Constitutional Court granted part of the petition, ruling that customary forests are no longer considered part of state forests.²⁴ However, in practice, the provision that requires the recognition of indigenous peoples through regional regulations still applies. The judges opined that such recognition must be granted by the local government as a form of protection for indigenous peoples, in order to avoid legal vacuums. As a result of this situation, the conflict affecting the Suku Anak Dalam (Child Tribe) has not yet been resolved. In response to this issue, the discourse emerged to draft a law that specifically addresses the recognition of indigenous peoples' identities and the rights attached to them.

²³ Raithah Noor Sabandiah and Endra Wijaya, "Diskriminasi Terhadap Agama Tradisional Masyarakat Hukum Adat Cigugur," *Jurnal Penelitian Hukum De Jure* 18, no. 3 (2018): 335-352.

²⁴ Subarudi, "Kebijakan Hutan Adat Pasca Putusan Mahkamah Konstitusi Nomor 35/PUU-X/2012: Suatu Tinjauan Kritis," *Jurnal Analisis Kebijakan Kehutanan* 11, no. 3 (2014): 207-224.

C. The Principle of Good Law Formulation in Recognizing the Existence of Indigenous Peoples in Indonesia

If we refer to Fuller's principles of good law formulation, an analysis should typically be conducted on a regulation that has already been enacted. However, in the context of this study, the analysis needs to be carried out before the Indigenous Peoples Bill (RUU MA) is enacted, so that the substance of the provisions created by the government can meet the basic needs of the Indigenous legal communities in Indonesia. This analysis can be conducted because of the openness of public information, which has improved significantly, allowing access to documents related to the academic text and the draft of the RUU MA for further study. Based on the first principle, the substance of the RUU MA should include provisions that are general in nature. Referring to the draft RUU MA, which has not been ratified as of 2023, it can be observed that the general provisions in Article 1 are indeed general and can serve as a reference for all Indigenous communities in Indonesia.

Secondly, regarding publicity, the Indigenous Peoples Bill (RUU MA) has been discussed for over 10 years and has not yet been agreed upon for official enactment in Indonesia. However, the publication of the draft RUU and the academic text that underlies the creation of the regulation has already been made accessible to the public, allowing discussions and the expression of aspirations regarding the substance of the RUU MA. This process becomes an important part of supporting the government's success in achieving the objectives of recognizing, protecting, and empowering Indigenous communities.

Thirdly, the review is conducted concerning the prospective nature of the Indigenous Peoples Bill (RUU MA), which specifically relates to the process of recognizing Indigenous communities. In general, the process of recognition in this regulation aims to provide legal certainty and guarantee the fulfillment of their constitutional rights. Article 5 states that recognition is granted by the government based on data collection of Indigenous communities that are still growing and developing. To prove their existence, Indigenous communities must meet several requirements, including:

- a. having a community that lives in groups, bound by common descent, territory, or a combination of both;
- b. occupying a specific traditional territory with clearly defined boundaries, passed down through generations;
- c. having local wisdom and a shared cultural identity;
- d. having customary institutions or legal frameworks followed by the community as a guideline for their life;
- e. having recognized and functional customary institutions.

These requirements must be met by Indigenous communities wishing to register. The process involves at least four stages: identification, verification, validation, and

establishment. The identification process itself can be initiated either by the Indigenous communities or an ad hoc committee formed by the government, in accordance with Articles 8 and 9. Referring to the autochthonous nature of Indigenous communities, which means that Indigenous peoples emerge and are formed by the community itself and not by external forces, this recognition process should be reconsidered. As previously practiced by the Dutch colonial government, Indigenous communities lived and developed based on a declarative recognition model. Therefore, the government must ensure that the recognition granted to Indigenous communities is not constitutive in nature.

Constitutive recognition emphasizes that the recognition process is conducted to grant rights to individuals. However, in this case, the rights of Indigenous peoples to their ancestral lands already existed even before Indonesia's independence, which further asserts that these management rights have long been in place. A reconsideration of the nature of recognition granted by the government to Indigenous communities is a critical review of the provisions in Article 18 of the Indigenous Peoples Bill (RUU MA), which requires the designation of Indigenous communities to be eligible for government protection. Textually, this provision can be interpreted as a form of constitutive recognition, disregarding the government's obligation to protect the rights of Indigenous communities that cannot meet the data collection procedures, even though de facto they have existed as Indigenous communities since before Indonesia's independence. Therefore, the protection of Indigenous peoples outlined in Article 18 of the RUU MA should be extended to all Indigenous communities in Indonesia. This also aligns with the first principle, which stipulates that regulations should be general in nature.

Fourth, the next principle relates to the clarity of the requirements outlined in the Indigenous Peoples Bill (RUU MA) for the recognition of Indigenous communities' identity by the government. In this regard, the conditions and procedures that Indigenous communities must follow for data collection are sufficiently clear. The indicators that need to be met and the authorities of government institutions overseeing the process have been well identified. However, there are still provisions in Article 15 regarding the mechanism for submitting objections and Article 16, which establishes the process for re-verification to address those objections. These two articles, however, do not clearly define the number of verification processes that can be conducted. This lack of clarity could impact legal certainty for Indigenous communities attempting to undergo the data collection process. Moreover, the government must also provide a protection mechanism for Indigenous communities that fail to undergo verification due to limitations in the proof process, whether or not there are objections to the process. Regardless, this consideration cannot be separated

from the Indigenous communities' autochthonous nature and the declaratory recognition that should be granted by the government.

Fifth, the substance of the Indigenous Peoples Bill (RUU MA) should not contradict other existing laws in Indonesia. In this regard, the government needs to ensure that the indicators outlined in Article 5 do not conflict with the principle of recognizing Indigenous communities as enshrined in Article 28 I, paragraph (3) of the Constitution. Based on this provision, it can be said that the Constitution guarantees the recognition of cultural identities and traditional rights of Indigenous communities to be respected, while also taking into account their alignment with the development of time and civilization. The alignment with the development of time could impact aspects that were once possessed by Indigenous communities but are no longer relevant. The dynamics of modern life may gradually erode some of the characteristics of Indigenous communities as defined in Article 5 of the Indigenous Peoples Bill. A re-examination is necessary to ensure that the indicators in Article 5 will not obstruct the recognition of Indigenous communities as guaranteed by Article 28 I, paragraph (3) of the 1945 Constitution.

Sixth, the government must not impose requirements that are impossible for the legal subjects of the rules to fulfill. In this case, the analysis will specifically focus on the indicators that Indigenous communities must meet in the identification process. The formulation of these indicators is quite definitive, which then leads to a narrow interpretation of customary law, meaning a system of social order with sanctions and legal institutions. In several studies discussing the definition of Indigenous communities, it has been stated that the government must be sensitive to the characteristics of Indigenous communities living in the country. Customary law, in a broad sense, can be understood as rituals or living habits. Therefore, before enacting the Indigenous Peoples Bill (RUU MA), the government must ensure whether the requirement for Indigenous communities to have legal institutions and customary law bodies is a component that exists in every Indigenous community living in Indonesia.

According to data from AMAN, there are at least 3,000 Indigenous communities. This number is significant when we consider that each Indigenous community has its own distinct culture. Therefore, there needs to be a more in-depth study of the characteristics of all Indigenous communities, at least those under the umbrella of AMAN. This is necessary to ensure that the government does not impose requirements that are impossible for Indigenous communities to meet. Once again, this relates to the autochthonous nature of Indigenous communities, which are born out of the communities themselves. We must ensure that these requirements do not force Indigenous communities to "invent" traditions they do not have in order to receive protection from the government.

Seventh, the principle that must be met by the Indigenous communities relates to the resilience of the substance of the draft Indigenous Peoples Bill (RUU MA) so that it does not change frequently. Therefore, a review needs to be conducted on Article 5, which contains indicators to define Indigenous communities, as well as Articles 15 and 16, which are related to the data verification process. This is important to ensure that the substance of the RUU MA can help Indigenous communities secure the rights that have been inherent to them since before Indonesia's independence.

Finally, the government must ensure that the law enforcement process functions effectively. Looking at the conflicts and human rights violations that have occurred against Indigenous communities, despite fulfilling the elements of constitutional recognition and legal protection for their customary land rights, it is still possible that violations could occur after the RUU MA is enacted. Therefore, the government must ensure that violations of the rights of Indigenous communities, which are guaranteed in the enacted RUU MA, can be addressed based on the sanctions stipulated in Articles 41, 42, and 46. This analysis shows that there are still several aspects that the government needs to review in order for the substance of the RUU MA to be fully utilized to protect the rights and identity of Indigenous communities.

CONCLUSION

The government has formulated the draft Indigenous Peoples Bill (RUU MA) as an effort to protect the identity and strengthen the protection of Indigenous communities. However, several aspects still need to be reconsidered to ensure that the substance of this legal framework is effective in achieving its intended purpose. Key areas that require adjustment include the indicators used by the government to identify an Indigenous community, the limits on raising objections, and the verification process. Additionally, the government must ensure that legal protection applies comprehensively and is not limited to Indigenous communities that are able to meet the recognition process. This relates to the government's ability to ensure that the recognition mechanism is declaratory, so as not to undermine the ancestral rights that Indigenous communities have historically possessed, along with their autochthonous nature. Based on this review, as seen in the analysis of Fuller's indicators, the formulation of the Indigenous Peoples Law should be revisited, particularly concerning the requirements for the recognition of the legal status of Indigenous communities.

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