

# Contestation of Concepts, Legislation and Institutions Governing Indigenous Peoples in Indonesia and its Impact on the Fulfillment of Their Constitutional Rights

Triyanto, Rima Vien Permata Hartanto

**Abstract:** *The existence of indigenous peoples in Indonesia has been regulated in several regulations. Currently, there are no specific regulations on indigenous peoples in Indonesia. Indigenous peoples and their traditional rights have been governed by the highest to the lowest provisions. However, the rules often do not match each other. As a result, there is uncertainty about the definition of indigenous peoples. This article discusses the contestation of concepts, rules, and institutions governing indigenous peoples in Indonesia. A large number of regulations on indigenous peoples has created a situation of irregularity and raises many interpretations of the position of indigenous peoples. This uncertainty raises barriers to fulfill the constitutional rights of indigenous peoples. This article is the result of theoretical library research. This study is also a bibliographic study with regulatory and conceptual approaches.*

**Index Terms:** *Contestation; Indigenous Peoples; Constitutional Rights.*

## I. INTRODUCTION

Indonesia is known as an archipelagic country. Country diverse ethnicities, cultures, and beliefs. Indigenous peoples are one form of diversity. The Indigenous peoples' population in Indonesia is estimated at around 40-50 million, more than 10,000 ethnic and sub-ethnic groups spread throughout Indonesia.

Quantitatively, there have been many laws and regulations governing Indigenous Peoples, although, there is no special law on Indigenous Peoples in Indonesia to date. Starting from the constitutional norms, rules, ministerial regulations to local regulations has regulated the Indigenous Peoples as well as their traditional rights[1]. However, among the various laws and laws are not aligned with each other. The current regulatory characteristics are sectoral, causing different interpretations that lead to confusion of concepts and norms that have implications for the misconception in assessing who is meant by Indigenous Peoples. Until now, debates on the terms and definitions of indigenous peoples are still ongoing. There are various terms used from the terms Indigenous Peoples, Community Customary Law, The Unity of Indigenous Peoples, Traditional Communities, Remote

Indigenous Communities, Remote Indigenous Peoples, Traditional Villages or other names. This paper analyzes the juridical terms, definitions, and criteria of Indigenous Peoples which are regulated in various laws and regulations in Indonesia.

## II. LITERATURE REVIEW

The 1945 Constitution (UUD 1945) uses the term Unity of Customary Law Community[2]. Article 18B paragraph (2) states: "The State acknowledges and respects the Unity of Customary Law community and its traditional rights as long as it is alive and by the development of society and the principle of the Unitary State of the Republic of Indonesia governed by law." Also, there is also the term Traditional Society as mentioned in Article 28I paragraph (3) of the 1945 Constitution: "Cultural identity and the rights of Traditional Communities are respected in harmony with the times and civilizations[3][4]." However, the 1945 Constitution does not specify whether the term "Unity of Customary Law Community and Traditional Society" is the same concept or not. More about the term, the definition of Indigenous Peoples in various Indonesian laws and regulations can be seen in table I.

**Table I.** Terms, Definitions of Indigenous Peoples in Various Legislation in Indonesia

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**Triyanto**, Civic Education Department, Sebelas Maret University, Indonesia, try\_uns@yahoo.com

**Rima Vien Permata Hartanto**, Civic Education Department, Sebelas Maret University, Indonesia

Legislation	Term used	Definition
UUD 1945	Unity of Customary Law Community Traditional Society	
Law No. 5 of 1960 (UU Nomor 5 Tahun 1960) on the Basic Regulations of Agrarian Principles	Community Customary Law	
Law No. 41 of 1999 (UU Nomor 41 Tahun 1999) on Forestry	Indigenous Forest  Community Customary Law	Indigenous forest is a forest within the territory of Indigenous People Its existence recognizes the customary law community if it fulfills the following elements: a. The community is still in the form of <i>society</i> ( <i>rechtsgemeenschap</i> ); b. There is an institution in the type of its traditional ruling device; c. The existence of clear customary law areas; d. There are institutions and legal instruments, especially conventional justice, which is still adhered to, and e. Still collecting forest products in the surrounding forest areas for the fulfillment of daily living needs
Law No. 39 of 1999 on Human Rights	Community Customary Law	
Presidential Decree (Keppres) No. 111/1999 on Remote Indigenous Community Social Welfare Development	Remote Indigenous Communities	Remote Indigenous Communities are socio-cultural groups that are local and scattered and are less or less visible in social and economic, as well as political and social networks and services.
Law No. 20 of 2003 (UU Nomor 20 Tahun 2003) on National Education System	Cultural Community	
Law No. 24 of 2003 (UU Nomor 24 Tahun 2003) on the Constitutional Court	Unity of Customary Law Community	
Law No. 7 of 2004 (UU Nomor 7 Tahun 2004) on Water Resources	Community Customary Law and Customary Rights	
Law Number 2009 (UU Nomor Tahun 2009) on the Amendment of Law Number 15 of 2007 (UU Nomor 15 Tahun 2007) on Transmigration	Customs	
Law No. 32 of 2009 (UU Nomor 32 Tahun 2009) on Environmental Protection and Management	Community Customary Law	The customary law community is a group of people who have traditionally settled in some geographical regions because of the ties to the ancestral origins, the existence of strong relations with the environment, and the value system that determines the economic, political, social and legal order.
Law No. 39 of 2014 (UU Nomor 39 Tahun 2014) on Plantations	Community Customary Law	The customary law community is a group of people who have traditionally settled in some geographical regions of the Unitary State of the Republic of Indonesia because of ties to ancestral origins, strong relationships with land, territory, natural resources, which have customary governance and customary law in the territory custom.
Law No. 1 of 2014 (UU Nomor 1 Tahun 2014) on Amendment to Law No. 27 of 2007 (UU Nomor 27 Tahun 2007) on the Management of Coastal Areas and Small Islands	Traditional Society but later replaced with Customary Law Community	The customary law community is a group of people from generation to generation residing in a particular geographical area in the Unitary State of the Republic of Indonesia (NKRI) due to a bond to the ancestral origins, strong relationships with land, territory, natural resources, customary government institutions and customary law in the region custom in accordance with the provisions of legislation.
Law No. 23 of 2014 (UU Nomor 23 Tahun 2014) on Regional Government	Indigenous Village	Indigenous Village or other so-called name, is the legal community unity that has the territorial boundaries to administer and administer government affairs, the interests of the local community based on community initiatives, the rights of origin and / or traditional rights recognized and respected within the system of government of the Unitary State Republic of Indonesia (NKRI).
Law No. 6 of 2014 (UU Nomor 6 Tahun 2014) on Village	Indigenous Village	Indigenous Village or another so-called name, is a legal community unity that has territorial boundaries to administer and administer government affairs, the interests of local communities based on community initiatives, rights of origin, and traditional rights recognized and respected in the system of state government Unity of the Republic of Indonesia.
Presidential Regulation No. 186 of 2014 on Social Empowerment of Remote Indigenous Communities	Remote Indigenous Communities	Remote Indigenous Communities are groups of people who are linked by geographic, economic, and or cultural entities and are poor, isolated, and socioeconomically vulnerable.

Source: Safitri and Arizona, 2013, with some changes

### III. METHODOLOGY

This research used a normative juridical perspective with a type of library research based on literature or based on library, focusing on reading and analysis of the primary and secondary materials and combined with bibliographic research that focuses on ideas contained in theory. This research used a statutory approach (statue approach) and concept approach [5][6]. The legislative procedure is carried out the examine various laws and regulations ranging from the constitution to different legal rules governing indigenous peoples.

### IV. RESULTS AND FINDINGS

Based on the table, it is known that some rules only mention the term but do not explain the definition precisely. The term Traditional Society is used in Article 28I paragraph (3) of the 1945 Constitution and is also used in the Law on the Management of Coastal Areas and Small Islands. In this law, Traditional Society is defined as a traditional fishery society that is still recognized its traditional right in conducting fishing activities or other legitimate activities in certain areas which are in archipelagic waters by the rules of international maritime law[7][8].

The Ministry of Social Affairs uses the term Remote Indigenous Community for the development of welfare programs for Remote Indigenous Communities. In Presidential Regulation No. 186 of 2014 on Social Empowerment of Remote Indigenous Communities, Remote Indigenous Communities are defined as groups of people linked by geographic, economic, and or cultural entities, and poor, remote, and socioeconomic.

The term Indigenous Village is known from Law No. 23 of 2014 (UU Nomor 23 Tahun 2014) on Regional Government and Law No. 6 of 2014 (UU Nomor 6 Tahun 2014) on the Village. Indigenous Village referred to in the Village Law is a unitary customary law community which in addition to exercising the rights of its origin, is also authorized to run the affairs of government administration. Indigenous Village referred to in the Village Law is a unitary customary law community which in addition to exercising the rights of its origin, is also authorized to run the affairs of government administration[9].

The term Indigenous Peoples is used in the Law on the Management of Coastal Zones and Small Islands[10]. The definition of Indigenous Peoples in this law is in line with the explanation by AMAN (The Indigenous Peoples Alliance of Nusantara) in 1999, which identifies Indigenous Peoples as a group of Coastal Communities who have traditionally settled in some geographical regions due to ties to ancestral origins, with strong coastal resources and small islands, as well as a value system that determines economic, political, social and legal institutions. This term is widely used by groups of social group movements that fight for their rights to the land and also the resistance to discrimination experienced since the Orde Baru. However, since the amendment of the Law on Coastal and Small Islands Management with the enactment of Law No. 1 of 2014, the term Indigenous People was changed to the name Customary Law Community.

The term Customary Law Community is used in the Basic Agrarian Law, the Law on Forestry, the Law on Plantations, the Law on Human Rights, the Law on Regional Government, the Law on the Management and Protection of the

Environment. The customary law community in the sharing of laws and regulations is defined as a group of people who have traditionally settled in specific geographical regions of the Unitary State of the Republic of Indonesia (NKRI) because of ties to ancestral origins, strong relationships with land, territories, natural resources, customary government and customary law arrangement in its custom territory.

From the various terms described above, the most widely used word is the term "Customary Law Community." The customary law community is used as a form of the category of community grouping called Legal Community (rechtsgemeenschappen), a society where all members of the community are bound as a unit based on the law used, that is customary law. This term is a translation of the term Adat Rechtsgemeenschappen popularized by Van Vollenhoven (1987) and Ter Haar (1962). Van Vollenhoven himself did not elaborate on what he meant by rechtsgemeenschappen. J.F. Holleman, a lawyer who compiles and edits the works of Van Vollenhoven, states that although Van Vollenhoven does not explain in detail and make strict definitions of the rechtsgemeenschappen, it is clear what he means from consistent use of the term.

Holleman (1981) therefore refers to Van Vollenhoven's rechtsgemeenschappen as an organized social unit of indigenous society with special and autonomous arrangements for the life of the people due to two factors: 1) the existence of a unique representation of local authority (customary leadership); 2) the presence of communal property, primarily land, which allows the community to run its arrangements. The following table outlines the different concepts of Indigenous and Tribal People.

**Table II.** Different Concepts of Indigenous Peoples and Indigenous Peoples

Element	Community Customary Law	Indigenous Peoples
Use	Used by the Colonial Government to refer to a legal subject of the original composition of the indigenous community	Non-governmental organizations are used to refer to village people who hold firm traditions but are victims of the New Order's development
Time of Occurrence	In the late 19th and early 20th centuries	In the decade 1980-1990s
First Goal	Used by law scholars and colonial authorities to indirect rule and show that there is uniqueness in indigenous communities	Movement of land restoration and resistance to discrimination
Originator and Developer	Spoken by Dutch law scholars and developed through post-independence research, teaching, and policy	Triggered by social changes by activists and academics. Developed in popular resistance movements.
Dominant Form Factor	Formed from the results of colonial anthropological research	Built by inspiration from international indigenous peoples' movements

Source: Arizona, 2014.

However, the term Customary Law Community contains a confusion between "Indigenous People" and "Customary Law

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Community." One emphasizes law-society as a legal subject compatible with a legal body while the other emphasizes customary law. As a fair society (*rechtsgemeenschappen*), the Customary Law Community is a legal subject different from the natural person (naturalist person) and legal entity (*rechtsperson*) which is known in legal studies. As legal subjects, the Customary Law Community has the capability as a person with rights and obligations in legitimate traffic. On the other hand, those who object to the use of the term "Indigenous People", especially the Indigenous Peoples movement incorporated in AMAN argue that "Customary Law Community" only reduces Indigenous Peoples in a single dimension, namely law, whereas Indigenous Peoples are not just tied to aspects of law, but also other elements such as social, political, cultural, religious, economic and ecological (Arizona, 2016)[12][13]. In the end, the term Customary Law Community is increasingly being used because it approaches the existing condition in the 1945 Constitution, namely the name of Unity of Customary Law Community. The validity of the use of the name Customary Law Community seems to suggest that this term is the most valid and conforming to the constitution. Whereas in the 1945 Constitution (UUD 1945), there is also the term Traditional Society outlined in Article 28I paragraph (3). If examined more closely, primarily when it is associated with field practice, in the context of Indonesian laws and regulations, the term Indigenous Peoples and Customary Law Community is used for the common interest of development, not for the recognition of Indigenous rights [14].

Different agencies and different approaches support the various terms and definitions because of Indigenous Peoples. This indicates that when we talk about Indigenous Peoples, it is talking about the contestation of concepts, legislation and sectoral institutions governing Indigenous Peoples [15][16]. The following table shows the contestation of Indigenous rules, institutions, and dimensions.

**Table III.** Rules, Scopes, and Institutional Dimensions Governing Indigenous Peoples

Rules	Institute	Dimension
Article 18B paragraph (3) of the 1945 Constitution, the Law on Regional Government, the Village Law	Ministry of Home Affairs, Ministry of Village	Governance and Community Empowerment
Article 28I Paragraph (3) of the 1945 Constitution, Human Rights Law	Ministry of Justice and Human Rights, National Commission on Human Rights	Human Rights
Article 32 Paragraph (1) of the 1945 Constitution	Ministry of Tourism and Creative Economy	Culture
Forestry Law, Environmental Protection and Management Act	Ministry of Environment and Forestry	The existence of Indigenous Peoples
Water Resource Law (already repealed by the Constitutional Court)	Directorate General of Water Resources, Ministry of Public Works	Management of water resources and the existence of Indigenous Peoples.
Directorate General of Plantation, Ministry of Agriculture	Directorate General of Plantation, Ministry of Agriculture	Land compensation for Indigenous Peoples
The Law on the Management of Coastal Areas and Small Islands	Marine and Fisheries Ministry	Management of coastal areas and small islands

Social Welfare Law, Presidential Regulation Number 186/2014	Ministry of Social Affairs	Access to basic services
Law on Basic Regulations on Agrarian Principles, Land Acquisition Law	National Land Agency	Indigenous Peoples Relations with the land

Source: Arizona, 2016.

This is also conveyed by Mirza Satria Buana in the International Journal of Indonesian Studies: "There are controversial definitions of indigenous peoples, with both international and national organizations have provided ...." (2016).

Differences in the use of such terms and definitions lead to uncertainty and consequently the existence of Indigenous Peoples. Because in addition to the issue of terms and definitions, the current legal framework also determines that the presence of Indigenous Peoples must meet some requirements. Article 18B paragraph (2) of the 1945 Constitution stipulates that the presence of Customary Law Community must fulfill (a) as long as it is alive; (b) in accordance with the development of the times; (c) in accordance with the principle of the Unitary State of the Republic of Indonesia; and (d) further stipulated by law. Even the recognition of the existence of Customary Law Community should be done in the form of local legal products either by local regulations or regional head decisions. This form of recognition is undoubtedly burdensome for Indigenous Peoples because to exist as legal subjects they must meet formal procedures that are not easy. And the most fundamental of this condition has apparently shifted the position of Indigenous Peoples which previously was the subject of natural law that was formed because of the right of origin whose existence is recognized and respected based on the 1945 Constitution (UUD 1945) and which actually existed even before the Unitary State of the Republic of Indonesia (NKRI) lived, became the subject of formal law the existence of official legal documents largely determines its presence. This situation indicates a situation of irregularities that raises many interpretations of the position of indigenous peoples that may impede the fulfillment of the constitutional rights of Indigenous Peoples. Conflict and violence experienced by Indigenous Peoples are increased, especially those related to natural resource management conflicts. Weak legal protection has left at least 217 members of the Indigenous Peoples criminalized until 2015 (AMAN, 2015).

## V. CONCLUSION

Up until now, the regulation on Indigenous Peoples has spread in various laws and regulations. Multiple terms and definitions in legislation, which are also supported by different agencies and different approaches in viewing the Indigenous Peoples, point to a situation of irregularity which raises many interpretations of who and how the position of Indigenous Peoples. There is no agreement on the terms and



definitions and institutions governing Indigenous Peoples in Indonesia. Thus, discussing Indigenous Peoples issues in Indonesia are talking about the contestation of concepts, legislation, and sectoral agencies administering Indigenous Peoples. This contestation is an obstacle to the fulfillment of the constitutional rights of Indigenous Peoples in Indonesia. Therefore, the future arrangement should consolidate various sectoral regulations to be viewed in their entirety to reduce the interpretations in their implementation that would impede the fulfillment of the constitutional rights of Indigenous Peoples. The way to solve it, one of them by establishing a special law on Indigenous Peoples. This is particularly important because with the rules that specifically regulate the Indigenous Peoples are expected to address the problems facing Indigenous Peoples in defending, fighting for, restoring their rights and to addressing the issue of the confusion of rules on Indigenous Peoples. Institutional construction also needs to be done on two sides, namely from the institutional side of the state, which is the government body responsible for carrying out the constitutional mandate to promote, protect and the constitutional rights of Indigenous Peoples. Second is the institutional capacity of Indigenous Peoples to establish good institutional governance.

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