

COMMEMORATING HARI NUSANTARA 2022: INDIGENOUS PEOPLES ON INDONESIAN LAW

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On 13th December 1957, Indonesia knit and reunited its vast territories and seas, merging into a unified whole and sovereign.¹ *Hari Nusantara* is an affirmation and reminder that Indonesia is the largest archipelagic country in the world. Indonesia's demographic condition as an archipelagic country is undeniably advantaging. This situation has caused the Nation to have much diversity with a great variety of cultures, ethnicity,² rich languages, and tribes.³ Diversity is acknowledged as an integral part of Indonesia and reflected in, *Bhinneka Tunggal Ika* (Unity in Diversity).⁴

This diversity can be reflected through the number of the Indigenous Peoples in Indonesia. It is noted that Indonesia is home to an estimated number of 50-70 million indigenous peoples.⁵ Indigenous Peoples are distinct social and cultural groups that share collective ancestral ties to the lands and natural resources where they live, occupy or from which they have been displaced.⁶ The Workshop on the Development of Indigenous Peoples' Legal Resources Concerning the Management of Natural Resources in Forest Areas, which was held on 25-29 May 1993 in Toraja, South Sulawesi,⁷ agreed on "adat people" as the translation of indigenous peoples, and formulated the definition of "indigenous peoples" as "groups of people who have their origins (hereditary) in a certain geographical area, and have their value system, ideology, politics, economy, socio-culture and region".⁸

Globally, despite the large number of the Indigenous Peoples, marginalisation and discrimination in countries' legal systems are still one of the challenges that they have to face, leaving them even more vulnerable to violence and abuse. Discrimination that occurs against indigenous peoples causes the need for legal protection to protect the rights of indigenous peoples. Under international law, arrangements regarding indigenous peoples are generally regulated in the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"). In general, UNDRIP is the most comprehensive instrument detailing the rights of indigenous peoples in international law and policy, containing minimum standards for the recognition, protection and promotion of these rights. It establishes a universal framework of minimum standards for the indigenous people's survival, dignity, well-being and rights.⁹

In Indonesia, nearly 20 million, out of a total of 268 million Indonesians, Indigenous Peoples are often being associated with "dirty, primitive, underdeveloped, alien, to forest encroacher." The stigma resulted in them being underrepresented, either economically, socially, politically, and culturally.¹⁰ The protection of the rights of indigenous peoples in Indonesia has been regulated in the state constitution, namely in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which states:

*"The State recognises and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law."*¹¹

This article shows that the State of Indonesia recognizes and respects indigenous peoples of origin in accordance with the principles of the Unitary State of the Republic of Indonesia.

1. As the manifestation of the Djoeanda Declaration, which Ir. H. Djoeanda first coined on the 13th of December 1957 at Jakarta, Indonesia has simultaneously been celebrating "Archipelago Day" or Hari Nusantara on the same date every year since 2001. This declaration affirms that the Republic of Indonesia has complete sovereignty over inter-island waters. Djoeanda Declaration was recognized by the United Nations since it was uttered by Prime Minister Ir. H. Djoeanda, but being recognized by the international community on 16 November 1994 after 60 countries ratified that declaration. The inauguration of Archipelago Day was established through Presidential Decree No. 126 of 2001 concerning Archipelago Day. The purpose of holding Archipelago Day is to increase the awareness of the Indonesian towards its heritage and future as maritime nation living in an archipelagic country and to implement an integrated cross-sector accelerated development model in the regions.
2. Ethnicity can be interpreted as a grouping or classification of people who have one descendant; characterised by their similarity in culture, language, religion, behaviour or biological characteristics. See, Direktorat Kemendikbud SMP, "Indahnya Keberagaman dan Pentingnya Toleransi di Indonesia", accessed on <https://ditsmp.kemdikbud.go.id/indahya-keberagaman-dan-pentingnya-toleransi-di-indonesia/> dated 10 December 2022.
3. There are over 1,300 ethnic groups in Indonesia, of which 200 are of Native Indonesian ancestry. See, Badan Pusat Statistik, "Mengulik Data Suku di Indonesia", accessed through <https://www.bps.go.id/news/2015/11/18/127/mengulik-data-suku-di-indonesia.html> on 19th December 2022. The term of "Unity in Diversity" was derived from the story of Sutasoma by Mpu Tantular. The phrase *Bhinneka Tunggal Ika* was published in an article entitled *Verspreide Geschriften* which was written by a Dutch linguist orientalist Johan Hendrik Casper Kern. Kern's writings were later read by Mohammad Yamin, who then brought the phrase to the first Investigating Committee for Preparatory Work for Independence (BPUPK) session, between 29th May to 1st June 1945. This motto is used to describe the unity and integrity of the Nation and the Unitary State of the Republic of Indonesia which consists of various cultures, regional languages, races, ethnicities, religions, and beliefs. See, I Nyoman Pursika, "Kajian Analitik Terhadap Semboyan 'Bhinneka Tunggal Ika'", *Jurnal Pendidikan dan Pengajaran*, Vol. 42, No. 1, April 2009, page 15. See also, Rizal Mustansyir, "Bhinneka Tunggal Ika dalam Perspektif Filsafat Analitik", *Jurnal Filsafat*, Vol. 1, No. 1, pp. 46-58.
4. IWGIA, "Indigenous Peoples in Indonesia", accessed through <https://www.iwgia.org/en/indonesia.html> on 19th December 2022.
5. The World Bank, "Indigenous Peoples", accessed on <https://www.worldbank.org/en/topic/indigenouspeoples#:~:text=Indigenous%20Peoples%20are%20distinct%20social,which%20they%20have%20been%20displaced.> dated 10 December 2022.
6. Adam Dean Tyson, "The Politics of Decentralisation and Indigenous Revivalism in Sulawesi, Indonesia", Thesis, University of Leeds, School of Politics and International Studies, August 2008, accessed through https://etheses.whiterose.ac.uk/964/1/uk_bl_ethos_493597.pdf on 19th December 2022.
7. M. Hatta Roma Tampubolon, "Indigenous Peoples Conception and The Problematic of Admission and Protection", *Risalah Hukum Fakultas Hukum Unmul*, December 2010, page 73.
8. Office of the High Commissioner for Human Rights, "UN Declaration on the Rights of Indigenous Peoples OHCHR and indigenous peoples" accessed on <https://www.ohchr.org/en/indigenous-peoples/un-declaration-rights-indigenous-peoples> dated 10 December 2022.
9. Fidelis Eka Satriastanti, "After 75 years of independence, Indigenous Peoples in Indonesia still struggling for equality", accessed on <https://theconversation.com/after-75-years-of-independence-indigenous-peoples-in-indonesia-still-struggling-for-equality-143186> dated 14 December 2022.
11. "Negara mengakui dan menghormati kesatuan-kesatuan masyarakat hukum adat beserta hak-hak tradisionalnya sepanjang masih hidup dan sesuai dengan perkembangan masyarakat dan prinsip negara Kesatuan Republik Indonesia yang diatur dalam undang-undang".

COMMEMORATING HARI NUSANTARA 2022: INDIGENOUS PEOPLES ON INDONESIAN LAW

Furthermore, in Indonesia, there is also a Draft Law on Indigenous Peoples ("Bill Indigenous Peoples"). The Indigenous Peoples Bill defines that Customary Law Communities, hereinafter referred to as Indigenous Peoples, are a group of people who live for generations in a certain geographical area, have ancestral origins and/or the same place of residence, cultural identity, customary law, a strong relationship with the land and environment, as well as the value system that determines economic, political, social, cultural and legal institutions. Recognition, Protection and Empowerment of Indigenous Peoples regulated in the Indigenous Peoples Bill aims to:

- a. provide legal certainty for the position and existence of Indigenous Peoples so that they can grow and develop in accordance with their dignity;
- b. provide guarantees to Indigenous Peoples in exercising their rights in accordance with their traditions and customs;
- c. provide space for participation in political, economic, educational, health, social, and cultural aspects;
- d. preserving their traditions and customs as local wisdom and part of the national culture; and
- e. increasing socio-cultural resilience as part of national security.

The Indigenous Peoples Bill states that indigenous peoples have rights to customary territories, rights to natural resources, development rights, rights to spirituality and culture, and rights to the environment. These rights are regulated to provide a legal basis for indigenous peoples to obtain the rights they should have, especially in the territory of Indonesia. Before the Indigenous Peoples Bill's existence, there were already regulations governing the rights of indigenous peoples, in particular regarding rights to traditional territories, which were regulated in Law Number 5 of 1960 concerning Basic Agrarian Regulations ("UU 5/1960"). *Aliansi Masyarakat Adat Nusantara* ("AMAN"), together with other stakeholders, has been campaigning for the acceleration of the passage of a bill on the recognition and protection of Indigenous and tribal peoples in Indonesia.¹²

Before the Indigenous Peoples Bill's existence, there were already regulations governing the rights of indigenous peoples, in particular regarding rights to traditional territories, which were regulated in Law Number 5 of 1960 concerning Basic Agrarian Regulations ("Law 5/1960"). Arrangements related to land rights are listed in Article 3 of Law 5/1960.

In this article, the terminology used is customary rights. *Ulayat* rights are authorities, which according to customary law, are owned by customary law communities over certain areas, which are the environment of their citizens. The land is called *ulayat* land, and indigenous peoples have the authority to benefit from natural resources, including land, in the area for their survival. Provisions regarding customary rights have been regulated in Law 5/1960.

Based on Law 5/1960 recognizes *ulayat* right, indigenous people can exercise their existing conditional *ulayat* right and any right similar to it.¹³ In customary law literature, *ulayat* right was known as *beschikkingrecht* or ancient (*purba*) right. According to Bosco, scope of *ulayat* right embraces land, water, and natural resources contained therein.¹⁴ *Ulayat* right has tight relation with customary law and indigenous people. *Ulayat* right can not be separated from the existence of indigenous people because *ulayat* right is practiced through the customary law within the jurisdiction of indigenous people's territory.¹⁵

The existence of general arrangements to protect the rights of indigenous peoples in Indonesia shows that Indonesian law cares about indigenous peoples' existence. Moreover, the Indigenous Peoples Bill is currently being drafted, a special arrangement given by Indonesian law to indigenous peoples. Therefore, the rights of indigenous peoples in Indonesia at least have a legal basis that can protect the existence of indigenous peoples in Indonesia. (SPU, SFA)

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12. Australian Human Rights Institute, "Indigenous peoples of Indonesia: Calling for recognition and respect", accessed on <https://www.humanrights.unsw.edu.au/research/commentary/indigenous-peoples-indonesia-recognition-respect> dated 14 December 2022. Aliansi Masyarakat Adat Nusantara (AMAN) is an independent community organisation with a vision to create a just and prosperous life for all Indigenous peoples in Indonesia, with political sovereignty, economic independence and cultural dignity. AMAN works at local, national and international levels to represent and advocate for Indigenous peoples' issues. AMAN.

13. Sartika Intaning Pradhani, "Traditional Rights of Indigenous People in Indonesia", *Jambe Law Journal*, Vol.1 No.2, 2018, page 182.

14. Rafael Edy Bosko, "Reconsidering the Inalienability of Communal Ulayat Rights: Theoretical Review", article presented at the 19th ALIN Expert Forum Land Rights on

15. Asian Countries conducted at Faculty of Law, Universitas Gadjah Mada, Yogyakarta on 12 June 2014, page 17.

Darwin Ginting, "Politik Hukum Agraria terhadap Hak Ulayat Masyarakat Hukum Adat di Indonesia", *Jurnal Hukum dan Pembangunan*, Vol. 42, No. 1, 2012, page 40.