

Policy Paper

The Collective Right of Indigenous Women Should be Stipulated In The Law On Indigenous People



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by:

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I. BACKGROUND

The Bill on Indigenous Peoples as a legal product has long been awaited by many people, including encouraged by a coalition of civil society. Right now, the Bill has been included into the Parliament's National Legislative Program (Prolegnas) of 2021. Still, there is a rejection from a fraction of Parliament believing the Bill is not important. The Fraction of Golkar Party in the Parliament, for instance, also very relentlessly reject the Bill on Customary Law and the Bill on Protection of Domestic Workers to be included into Prolegnas of 2021. The Fraction of Golkar argue that both Bills are not urgent for a discussion.

Meanwhile in 2020, Chair of the Parliament's Working Committee (Panitia Kerja, Panja) of the Bill on Customary Law, Willy Aditya, conveyed some points put forth in harmonizing, completing and strengthening the conception of the Bill on Indigenous Peoples which was approved in Panja's Sessions with the initiators. Among them were improving definitions of 'Masyarakat Hukum Adat' (Indigenous Peoples, literally Customary Law Communities), 'Wilayah Adat' (Indigenous Areas), 'Hak Ulayat' (Customary Rights), and adding a definition of 'Tanah Ulayat' (Customary Lands) in General Provision (Chapter I Article 1). Meanwhile, some other points came to light, including the goal of Recognition, Protection, and Empowerment of Customary Law Communities in Article 3 point f, regarding Customary Law Communities as beneficiaries of management and utilization of natural resources, genetics resources and traditional knowledge. Willy informed the Bill on Indigenous Peoples consisted of 17 chapters and 58 articles. Based on the technical guidance on formulation and substance of a bill, he said, the Working Committee concluded that the Bill on Customary Law Communities could be submitted as a House-proposed initiative Bill.

Unfortunately, **draft of the Bill on Indigenous Peoples until now has not accommodated stipulations on recognition, protection, and respect towards collective right of**

indigenous women. If it remains, the goal of the Bill on Indigenous Peoples to realize full recognition on the status and rights of indigenous peoples as boasted¹ will not be achieved since only some members of communities get recognition of their status and rights.

Precisely for this purpose, PEREMPUAN AMAN prepare this policy paper. The paper is intended to be an introduction, and, as a general requirement in legal drafting, it needs more deliberative further study, for instance in the form of an academic text. The main points discussed in this policy paper include:

1. Definition of collective right of indigenous women
2. Rationale of stipulation on collective right of indigenous women
3. Recommendation on stipulation on collective right of indigenous women.

II. DEFINITION OF COLLECTIVE RIGHT OF INDIGENOUS WOMEN

The concept of collective right of indigenous women in this policy paper derives from the voices, experiences and knowledge of indigenous women of the archipelago recorded in the documents of Declaration of the National Meeting of Indigenous Women of the Archipelago, Congresses, field notes, and researches of PEREMPUAN AMAN.² **The collective right of indigenous women is a set of rights rooted in the knowledge of groups of women within customary law communities that closely related to management areas of indigenous women located in their indigenous areas. The collective right could be translated as an access to utilization, management, preservation, development, exchanges, and inter-generational sustainability of lands and natural resources available in an indigenous area.**³

The collective right of indigenous women are very closely related to distinct characteristics of indigenous women in terms of traditional knowledge, works, and certain roles within the indigenous people. In essence, respecting the collective right means indigenous women are

¹ Arimbi Heroepoetri and Dahniar Andriani (eds.), *Policy Brief RUU Masyarakat Adat*, ed. 2, (s.l.: Coalition to Guard Indigenous Peoples Bill, 2020), p. 1.

² For instance, the Declaration of the National Meeting of Indigenous Women of the Archipelago of 2012 and 2015 had explicitly declared that the Indigenous Women of the Archipelago gather and unite in fighting for the collective right of indigenous women. See PEREMPUAN AMAN, *The Journey of PEREMPUAN AMAN: An overview of Indigenous Women participation during five Congresses of the Indigenous Peoples of the Archipelago 1999-2017*, (Bogor: PEREMPUAN AMAN, 2017).

³ PEREMPUAN AMAN, "Belum Ada Peraturan Khusus yang Melindungi Hak-Hak Kolektif Perempuan Adat (There Is No Special Regulation Protecting The Collective Right of Indigenous Women)", <https://perempuan.aman.or.id/belum-ada-peraturan-khusus-yang-melindungi-hak-hak-kolektif-perempuan-adat/#:~:text=Hak%20kolektif%20perempuan%20dapat%20diterjemahkan,Nusantara%20jauh%20sebelum%20konstituen%20lahir> (accessed on 1 December 2020).

free from intrusions while managing and allocating natural resources based on their traditional knowledge and play their roles as:⁴

1. Guardians of knowledge of food and energy sovereignties within their families and communities.
2. Holders of authority of the survival and sources of livelihoods of families and communities.
3. Guardians of management areas of indigenous women in relation to sources of livelihoods to ensure the survival of indigenous peoples.

So far, such roles of indigenous women have been ignored and marginalized, even legally unprotected and criminalized, such as the practice of land cultivation which is often punished for land burning; knowledge of seedlings which is obstructed and harmed by intellectual property legal regime; and practice of forest products gathering hampered by conditional recognition based on the state law.⁵

Elements of Collective Right of Indigenous Women

At least there are **three aspects** defining collective right of indigenous women which should be protected, respected and accommodated, including:⁶

1. Management areas of indigenous women
2. Traditional knowledge of indigenous women
3. Authority of indigenous women in decision-making

The meaning of collective right of indigenous people is not based on control over “something” either in the forms of territory, things, or other cultural products in their communities.⁷ So, when it comes to analyzing the first and second aspects, the frame is not about property rights. Management areas of indigenous women in this article means a landscape as well as a certain cultural landscape belonging to main territories for indigenous

⁴ Arimbi Heroepoetri and Dahniar Andriani (eds.), *op.cit.*, p. 6.

⁵ See Devi Anggraini, “Pentingnya RUU Masyarakat Adat (The Importance of Indigenous Peoples Bill)”, *Ina Tana*, Ed. 1 No. 1 (October 2018), p. 40.

⁶ Arimbi Heroepoetri and Dahniar Andriani (eds.), *op.cit.*, p. 6.

⁷ *Supra note 4.*

women to live and depend upon for their daily life.⁸ **Regarding the first aspect**, as previously discussed, the collective right are related to utilization, management and preservation. Thus, legal connection between the collective right and the management areas is not about ownership. Referring to types of land tenure rights,⁹ the collective right can be identified in 2 (two) types of tenure in general:

1. Right to use; and
2. Right to *control*, meaning the right to make a decision of how the management areas should be utilized and to benefit from the utilization of natural resources in the management areas.

Regarding the second aspect, since the dimension is not about property rights (though also belonging to the right of indigenous people, yet outside of the scope of the collective right discussed in this policy paper), then the focus of protection against traditional knowledge, as stipulated in the first sentence of Article 31 of UN Declaration on the Rights of Indigenous Peoples (UNDRIP): "...to ***maintain, control, protect, and develop*** their cultural heritage, traditional knowledge, and traditional cultural expressions..." Although UNDRIP has not accommodated distinctive traditional knowledge possessed by indigenous women in the communities, its legal framework should still be adopted to develop a legal framework of protection of indigenous women's traditional knowledge.

Regarding the third aspect, the term of authority used here is closely related to the control over decision-making.¹⁰ Having the authority is measured by how strong the political power of indigenous women (viewed both in the internals of the communities and by third parties outside of the communities) to make a decision and/or influence a decision related to their bodies, identities, knowledge and experiences, and, in the context of collective right in this policy paper, management areas.

⁸ PEREMPUAN AMAN, *Tinjauan Umum Atas Situasi-Situasi Terkini Perempuan Adat (General Review on Updated Situation on Indigenous Women)*, (Bogor: PEREMPUAN AMAN, 2017), p. 1.

⁹ FAO, "What is Land Tenure", <http://www.fao.org/3/y4307e/y4307e05.htm>.

¹⁰ Tam O'Neil and Pilar Domingo, *The Power to Decide: Women, Decision-Making and Gender Equality*.

III. WHY REGULATING THEM?

1. Violence Against The Rights of Indigenous Women

Indigenous women in all corners of the archipelago are still suffering from various kinds of exclusion and violence in either domestic or public domains, as well as by the state. (see Tsing of 1998, National Commission on Women of 2013 & 2015). The data documented by PEREMPUAN AMAN show that injustice and suppression suffered by indigenous women in relation with their management areas, knowledge, and authority, among others are:¹¹

- 1) Vulnerabilities related to indigenous areas
 - a. Vulnerabilities related to control of management areas caused by expropriation of management areas, either by corporations or by government.
 - b. Vulnerabilities in relations of production. The problems, among others, are introduction of indigenous peoples' agriculture and farming into global commodities and global market system, the change of livelihood from subsistence farmers to workers, unequal relations of production within the community itself due to patriarchal view leading to differentiation of social classes, for instance, the men hold financial control because they have an authority to sell farm products while the women have more burdens of works, and altering indigenous women's works into informal ones.
 - c. Vulnerabilities in access and control over lands in relation to social exclusion due to patriarchal view in the society, for instance in terms of system of control and ownership which are not in favor of indigenous women, land inheritance preserving gender injustice, and the sale of land without consent from indigenous women.
 - d. Degradation of sustainability of nature's service due to environmental destruction and introduction of chemicals. In effect, indigenous women lose their knowledge and skills.
- 2) Vulnerabilities in relation to social relationship and social organizations
 - a. Indigenous women are not involved in decision-making in the development
 - b. Indigenous women are not involved in decision-making in organizations

¹¹ *Supra note 9.*

- c. Unequal division of labor
- d. Various stigmas and violence against indigenous women

2. Lack of Regulations About Indigenous Women's Collective Right At Either National or International Levels

So far there has been no regulation at either national or international levels protecting collective right of women. Sectoral regulation on indigenous peoples still consider them as a single entity, ignoring the fact that within a community itself there are social layers and power relations. Even in international legal framework of human rights, when it comes to discussing about the rights of indigenous peoples and the rights of women as individuals, the rights of indigenous women are still included in the rights of indigenous peoples. The newest document of the UN Special Rapporteur on the Rights of Indigenous Peoples also still consider those rights of indigenous women as the rights of indigenous peoples in general as well as the rights of women as an individual.¹²

3. Lack of Intersectional Perspective in Discussing the Rights of Indigenous Women

Developed first by Kimberlé Crenshaw, the term intersectionality theorizes oppression against minorities does not act in isolation, but meets in intersections when more than one categories of minority fit in one person. It applies to indigenous women who have double minority identities as part of indigenous peoples and as women. **Another important thing in this theory is** that intersectionality assumes oppression suffered by indigenous women is not the same as those experienced by indigenous peoples and by women, as well as **not merely cumulative violence suffered by indigenous peoples and women**. There are distinct experiences suffered only by indigenous women because of intersection of identities.

The failure to use the intersectional perspective is obvious, for instance in some sectoral regulations about indigenous peoples so far. The specific rights of indigenous women and other vulnerable groups in the indigenous communities are

¹² A/HRC/30/41 (2015).

packed into just one category: indigenous people.¹³ At the same time, international framework of human rights also sees indigenous women's rights are generalized into two categories: rights of indigenous people and rights of women.¹⁴ It is often assumed that any sufferings of indigenous women will be over if the rights of indigenous peoples are enjoyed, or the rights of women themselves. In reality, they are not.

IV. WHAT TO REGULATE

1. Who Are The Holders of Obligations

As discussed above, violations against the rights of indigenous women are conducted by three actors: (1) the state; (2) corporations; and (3) internal actors within their indigenous communities.¹⁵

2. What Are the Scope of Responsibilities

Based on the matters previously described, the main problems of each actor can be identified as follows:

- 1) The State and/or Corporations
 - a. Expropriation of management areas due to concessions grant and development program of the government.
 - b. Indigenous women are not involved in and/or asked for approval in the planning and implementation of development program
 - c. Criminalization against traditional knowledge of indigenous women.
- 2) Actors within the Communities
 - a. Indigenous women are not involved in decision-making process
 - b. Unequal relations of production and division of labor
 - c. Stigma and violence against indigenous women
 - d. Vulnerabilities in access and control over land with reference to social exclusion, for instance inheritance system and land control and ownership

¹³ Ina Tana, 1st Edition (2018).

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¹⁵ PEREMPUAN AMAN, *Presenting the Rights of Indigenous Women in the Academic Text of Indigenous Peoples Bill*, (Jakarta: PEREMPUAN AMAN, 2016).

that are not in favor of indigenous women, and the sale of land without consent from indigenous women.

3. Efforts to Strengthen the Movement To Be Included as the State's Positive Obligation

Materials compiled by PEREMPUAN AMAN show that strengthening indigenous women would happen when they organize themselves and claim strategic positions in decision-making, at the levels of community, village, or other social organizations. Thus, support of the state towards indigenous women's organization is needed. In human rights framework, it is not enough for the state just to respect and protect the rights, but also to realize to their maximum fulfillment. The support towards indigenous women's organization at the community level might be added into the scope of obligation.

V. CONSTRAINTS IN FORMULATING A REGULATION SO FAR

There are some constraints in formulating norms on collective right of women, including:

1. Definition of Indigenous Women

Indigenous women in a community are not merely a single entity, but divided into some social layers. When we talk about the voices of indigenous women, the question is which indigenous women? Is it those indigenous women belonging to an elite group in the community due to hereditary, marriage, financial, or social aspects? Or indigenous women not belonging to this elite group but financially and socially having access to land use right? Or those women lacking such access?¹⁶

2. How To Obtain Consent From Indigenous Women

One of the obligations potentially protecting collective right of indigenous women is the implementation of principle of free, prior, informed consent (FPIC), under which indigenous women shall be asked for their approval in a decision-making process about a plan having impacts on their rights and management areas. However, as

¹⁶ "Penguatan Peran dan Kapasitas Perempuan Adat dalam Pengelolaan dan Perlindungan Wilayah Adat (Strengthening Roles and Capacities of Indigenous Women in Managing and Protection of Indigenous Areas)", presented by Lidwina Inge Nurtjahyo (13 October 2020).

experiences shown, there is technical difficulty in determining an indicator of what condition constitutes the consent having been given?¹⁷ For instance, it is difficult to determine how many percent of indigenous women needed to give consent? Or, in terms of consent given by representatives of indigenous women, how to guarantee that the representatives legitimately represent the interest of indigenous women, not representing the interest of the elite discussed above?

3. Not All Can Be An Imperative Norm

The third problem is when we try to formulate the fight against gender injustice, especially in terms of exclusion undergoing within the community itself, into a legal norm. Regarding a regulation, the content of a legal norm essentially has three types: order, prohibition, and permission.¹⁸ When a certain norm contains an order or prohibition for a community or an elite group in a community not to preserve gender injustice, the norm should be imperative. The imperative legal norm must be obeyed and has imperative force.¹⁹ One of the characteristics of imperative force in law is when an order or prohibition is not obeyed there will be a legal consequence, often in the form of sanction.

The problem is, in terms of exclusion due to strong patriarchal view in the communities, not all action deserve to be regulated as an imperative norm. It is different from, for instance, harmful cultural practices, such as sexual violence against indigenous women, which should be, and have been, accommodated in criminal law regime, even though it should still be improved such as by pushing Bill on Elimination of Sexual Violence especially on rehabilitation of victims. However, in the matter of lack of involvement of women in indigenous forum or meeting, or their multiple burdens of works due to unequal relations of production, how can it be translated into an order or a prohibition to become imperative in a regulation? Is it decent that chair of indigenous people be penalized for not involving indigenous women in a

¹⁷ Emil Ola Kleden, "Urgensi Kejelasan Unit Sosial dalam Pelaksanaan *Free, Prior, and Informed Consent (FPIC)* (Urgency of Clarity of Social Units in Implementation of *Free, Prior, and Informed Consent (FPIC)*", in Yance Arizona (ed.), *Proceeding of Symposium on Indigenous Peoples*, (Jakarta: HuMa and Epistema, 2014), p. 234.

¹⁸ Purnadi Purbacaraka and Soerjono Soekanto, *Perihal Kaedah Hukum (On Legal Norms)*, (Bandung: Citra Aditya Bakti, 1993), p. 34.

¹⁹ Sudikno Mertokusumo, *Mengenal Hukum (Introducing Law)*, (Yogyakarta: Liberty, 2005), p. 32.

customary meeting? Or, with regard to multiple burdens of works, who should be penalized?

4. Who Are The Holders of Obligations and Liabilities Regarding Exclusion In A Community

As discussed above, many violations and gender injustice also keep continuing within the communities themselves. Yet the obstacles in accommodating them into a regulation include:

- a. Gender injustice within the communities rooted in patriarchal view, so it could not be identified as an individual case whose wrongdoer is clear and held liable.
- b. Difficulty in identifying which actor is the most responsible ones in preserving gender injustice. Is it the chief of custom? Is it an elite group of economy? And how far is the liabilities?

VI. PROPOSED FORMULATION

Considering the abovementioned constraints, the proposed norms so far are still limited to **the state's obligations, and do not regulate duties related to injustice undergoing within the internals of the communities**. Based on the discussion above, the proposed formulation of articles to be included in the Bill on Indigenous Peoples with respect to collective right of indigenous women are as follows:

CHAPTER I

GENERAL PROVISIONS

Article 1

In this Act referred to as:

...

xx. The collective right of indigenous women is a set of rights deriving from the knowledge of a group of women within customary law communities that closely related to the management areas of those customary law communities in the forms of access to utilization,

management, preservation, development, exchanges, and inter-generational sustainability over land and natural resources available in an indigenous area.

...

CHAPTER Z

THE COLLECTIVE RIGHT OF INDIGENOUS WOMEN

Part One

Scope

Article X1

The government, indigenous people, and third parties shall value, respect, and realize the fulfillment of the collective right of indigenous women, including:

- a. The right to self-determination for indigenous women;
- b. The right to participate in decision-making for indigenous women in a contingent of indigenous peoples;
- c. The right to organize, manage, utilize, and preserve management areas of indigenous women inside the indigenous areas; and
- d. The right to utilize, control, preserve, and develop the traditional knowledge possessed by indigenous women.

Part Two

Obligations of the State

Article X2

The scope of obligations of the state towards the collective right of indigenous women includes:

- a. An obligation to respect the collective right of indigenous women by not causing intrusions to the indigenous women enjoying and benefiting from the right;
- b. An obligation to protect indigenous women from intrusions of third parties towards the indigenous women's collective right;

- c. An obligation to realize the fulfillment of collective right of indigenous women by ensuring that the indigenous women shall enjoy the right to the fullest.

Article X3

Indigenous women shall not be penalized for benefiting from their traditional knowledge as long as in accordance with human rights.


Article X4


- (1) A state administrative official shall not issue a state administrative decision, including a permit, that has an impact to management areas of indigenous women unless first obtaining free, prior, informed consent from the group of indigenous women within the community in question.
- (2) The state administrative decision that violates provision stipulated in paragraph (1) shall be declared null and void.


Article X5


- (1) The government is required to facilitate indigenous women organizations at indigenous community level in the forms of finance, access, empowerment, and other facilities.
- (2) National Committee on Indigenous People is required to form Special Rapporteurs in charge of reporting and handling complaints related to the rights of indigenous women, and monitor the acts of government in relation to facilitation as stipulated in paragraph (1)
- (3) Further provisions on facilitation by the Government and National Committee as stipulated in paragraphs (1) and (2) shall be stipulated further in Government Regulation.



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