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Participation of Women From Indigenous Peoples in the Formation of National Law

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Abstract

Introduction: *Discrimination against women from Indigenous Peoples in various ways of life including in the formation of national laws. This is due to the presence of a patriarchal culture which is reflected in laws and regulations both at the national and regional levels, thus showing injustice and inequality between men and women.*

Purposes of the Research: *The purpose of this writing is to explain the importance of the participation of indigenous and tribal women in the formation of national law. The importance of this participation will contribute to the thought of a legal substance that provides equality and justice*

Methods of the Research: *This paper uses doctrinal research methods using a feminist legal theory approach.*

Results of the Research: *The results and findings in this paper include, First, the voices and experiences of indigenous and tribal women are required in feminist legal theory to influence non-discriminatory legal norms in the formation of national law. Second, the participation of indigenous and tribal women as part of the Indonesian nation has a strategic position guaranteed by the constitution to carry out their role in forming national law. This is a prerequisite and a representation of the realization of democratic government and one of the other principles of good governance that is consistent and committed to prioritizing the interests of the nation and the State.*

1. INTRODUCTION

Law and culture are 2 (two) things that cannot be separated. Law reflects the existing culture in society, or culture is a determinant factor of law.[1] Data shows that in the formation of national law through legislation many are gender biased, discriminatory, contain gender inequality and injustice due to various factors. One of the important factors is the existence of a patriarchal culture in systems and structures or social practices that give authority to men to dominate, suppress and exploit women. The domination of men over women occurs in their bodies, sexuality, work, roles and status in the family and society. It is this patriarchal culture that produces social, legal and moral norms that favor men over women,

[1] Sulistyowati Irianto, *Mempersoalkan "Netralitas" Dan "Objektivitas" Hukum: Sebuah Pengalaman Perempuan, dalam Perempuan & Hukum Menuju Hukum Yang berperspektif Kesetaraan dan Keadilan* (Jakarta: Yayasan Obor Indonesia, 2005), p. 36.

so that women are subordinated or marginalized.[2] The need for women to participate in development is very large in this modern era, especially when the established model is community-based development. [3]

Debate over the issues of human rights, equality and gender justice also occurs in the context of indigenous and tribal peoples. Weaknesses of women, including indigenous and tribal women who have been in the spotlight, are the impacts of existing social construction, including: [4] there are still many low status and position of women in society, there are cultural barriers for women to play an active role in development, there are material barriers in the form of the low level of education and skills of most women, the wide range of positions of women (and children) in society, so that if the community is poor, it is women and children who bear the brunt of the consequences and low access/opportunities and control of women in various fields of life.

There are several articles as offered by Djaka Soehendra in his article "Observing the Position of Women in Customary Law, An Alternative Perspective".[5] Sulistyowati Irianto (2000) in her book Women Among Various Legal Choices (A Study of Batak Toba Women's Strategies to Gain Access to Inheritance Through the Dispute Resolution Process), and Kunthi Tridewiyanti (2014) in her research "The Position and Role of Indigenous Women Today – A Study on the Karuhun Urang Cigugur, Kuningan and Ngata Toro Indigenous Peoples in Central Sulawesi".

The studies mentioned above show that so far there has been a lack of female reviewers who are interested in Customary Law compared to male reviewers. Besides that, many studies on customary law use a positivistic approach compared to a critical approach as used by feminist legal theory. In addition, the voices and experiences of indigenous women are almost inaudible compared to the voices of indigenous male. Therefore, it is important that living laws also take into account the position of indigenous women to fulfill demands for respect for human rights, non-discrimination, gender equality and justice.

2. METHOD

This study is a study of doctrinal law, which sees law as abstract norms in the form of principles, ideas and ideals (*ius contituendum*). To answer the above problems, secondary data is needed. This secondary data was obtained from a literature review that originates from primary legal materials (such as laws and regulations), secondary legal materials (such as study results) and tertiary legal materials (such as legal dictionaries). This secondary data is then processed and analyzed descriptively – qualitatively.

3. RESULTS AND DISCUSSION

3.1 Women's Voices and Experiences of Women in Indigenous Peoples Influence Legal Norms

Feminist Legal Theory that develops in line with Critical Legal Theory tries to deconstruct (law) to dismantle another meaning from the formulation of a rule and

[2] Jamal Ma'mur, *Rezim Gender di NU*, (Yogyakarta: Pustaka Pelajar, 2015), p.3.
[3] Sedarmayanti. *Good Governance "Kepemerintahan Yang baik"*. (Bandung: Mandar Maju, 2012), p.144.
[4] *Ibid*., p. 144-145.
[5] Sulistyowatii Irianto, *op. cit*.

SAS, 29(2) 2023: 268-275
P-ISSN: 1693-0061, E-ISSN: 2614-2961

reconstruct it to be understood with a new meaning, of course, feminists will criticize the unjust legal doctrine and continue to strive to create a just law.

The voices of women and the experiences of indigenous women regarding inequality and injustice have so far not been heard either within indigenous people itself or among legislators. Therefore, the reproduction of the values of inequality and injustice continues to occur and is included in the formation of laws and regulations, for example, legal norms which regulate differentiation, exclusion and limitation of women's (including girls') rights related to their reproductive health. Many people, including the legislators and policymakers, are not aware that arrangements related to female circumcision, marriage with girls, sexual violence including rape, prostitution, forced marriages, forced abortions (abortion) or forced birth of sons in certain communities, and women are considered property or property by their husbands, families, deprivation of the use of natural resources (including water and forests), and society and so on as a discriminatory arrangement and action that creates inequality and injustice for indigenous women.

As in the formation of laws and regulations, it is necessary for the former to understand the Feminist Legal Theory approach which listens to the voices and experiences of women including indigenous women and influences them in determining legal norms/rules. Legal norms/rules according to Jimly Assiddiqie are usually described in 3 (three) types, namely: obligatre, prohibere and permittere. Or according to Hazairin, viewing norms consists of 5 (five) types, namely: halal or mubah (permittere), sunnah, makruh, obligatory (obligatre) and unlawful (prohibere). These matters will be related to law which is the product of decision-making stipulated by the functions of state power which binds legal subjects with legal rights and obligations. Decisions can be general and abstract in nature and are usually regeling, while those that are individual and concrete can be decisions that are or contain administrative decisions (beschikking) or decisions in the form of a judge's verdict which is commonly referred to as decision term. [6]

Furthermore, according to Eugen Erhlich, that good positive law is effective when it is applied in the community/nation's environment, namely law that is in accordance with the law that lives in society (living law). The living law itself originates from the volkgeist (the soul of the nation). And according to Friedrich Carl von Savigny that every society is proud to have their own volkgeist.

Therefore, in the condition that Indonesia has a pluralistic society, it is not possible to have uniformity of living laws. Because uniformity will certainly give rise to a sense of injustice. While Eugen Erhlich's opinion has a point, it is also important to understand that living law is also not static and can change. In relation to the important legal norms for gender equality and justice, it can be seen that there is a guarantee for these claims that have actually been regulated in the formation of laws and regulations, specifically stated in Article 6 paragraph 1 of Law Number 12 of 2011 concerning Formation of Legislation, that the content material Legislation must reflect the principles of: protection; humanity; nationality; kinship; archipelago; Unity in Diversity; justice; equal position in law and government; law order and certainty; and/or balance, harmony, and alignment.

These principles should be able to influence legal norms that are made to provide equality and justice for indigenous women. For example, so far customary law has not provided broad space for indigenous women to participate in various fields of life,

[6] Jimly Ashiddiqie, *Perihal Undang-Undang*. (Jakarta: Rajawali, 2006), p. 2

especially in the public sphere. Therefore, important future efforts are of concern to indigenous women and indigenous people reviewers to continue to echo women's voices and experiences, especially related to inequality and injustice, including documenting them so that they can become the basis for forming laws and regulations in the future.

Several articles suggest that indigenous women still experience discrimination, inequality and injustice. For example, Law Number 5 of 1960 concerning Basic Agrarian Regulations. De jure, the law states that women and men have rights over land. But de facto is not the case. Sulisyowati Irianto's dissertation (2000), related to the inheritance of the Toba Batak Community, that Batak Toba women are not heirs so that land rights will not be given to women. Therefore, the State Court is the choice of law for Batak Toba women seeking justice. [7]

Regulations that specifically do not mention the position of indigenous women, for example Law Number 1 of 1974 concerning Marriage (Marriage Law). In fact, the law does not provide a definite position for traditional marriages at all, because Article 2 of the Marriage Law states that marriages are valid based on "each religion and belief". So if an indigenous woman has no religion, among others, as 6 (six) are recognized by the State in Law Number 1 PNPS Year 1965 concerning Prevention of Misuse and Blasphemy of Religion, namely Islam, Christianity, Catholicism, Hinduism, Buddhism, Confucianism, then her marriage considered invalid and cannot be recorded in the Civil Registry. As a result, the marriage does not have a marriage certificate, the two are not considered husband and wife and children from their marriage are considered illegitimate children because the parents' marriage is illegitimate and only has a relationship with the mother in the birth certificate. Even though there was a breakthrough with the existence of Law Number 23 of 2006 concerning Population Administration, which recognizes the recognition of adherent groups and adherent marriages. However, this regulation can only be implemented for groups of followers who are organized as stated in Government Regulation Number 37 of 2007 concerning the Implementation of Law Number 23 of 2006 concerning Population Administration.

That is why it is important that the voices of indigenous peoples, including indigenous women, participate in the implementation and formation of laws and regulations. The current efforts of the State to carry out codification/unification or modification in the formation of laws and regulations and draft laws and regulations need constant attention and monitoring.

Law Number 7 of 2014 concerning Handling of Social Conflicts. The law includes one way of solving social conflicts with customary institutions. How do customary institutions resolve conflicts that contain elements of violence against women both in the personal/household and community spheres? Has the settlement with traditional institutions/customary courts been fair to indigenous women? Are cases such as adultery, rape or other violence against women. Is it enough to be resolved according to customary institutions or customary courts in society? Law Number 6 of 2014 concerning Villages. How can the Law governing this Traditional Village accommodate the position of indigenous women in its implementation? The draft amendment to the Marriage Law should accommodate marriages of indigenous people who are according to customary law and who have religions and beliefs such as adherent groups, for example Sunda Wiwitan in

[7] Sulistyowatii Irianto, *op. cit*.

West Java and Kaharingan in Central Kalimantan. Because the existing Marriage Law is still being interpreted as valid according to the religions and beliefs recognized by the State as stipulated in Law no. 1 PNPS 1965. Draft Law on Indigenous Peoples which has been prepared and discussed in several periods of the House of Representatives and also the Regional Representatives Council. Will the bill accommodate the position and interests of indigenous women? For example, related to issues of community development, marriage and customary inheritance.

The draft of Criminal Law Code which incorporates the idea of "law that lives in society and additional punishment". It is important to criticize this in relation to living laws, including customary law. However, it needs to be underlined that customary offenses and customary law settlements in customary courts have accommodated the interests of indigenous women and are not discriminatory as previously regulated in customary law. The Land Law Draft, which was included in the 2015-2019 National Legislation Program. Will this bill also accommodate the position and interests of indigenous women? These examples show that it is important that the norms contained in laws and regulations and draft laws and regulations accommodate the interests of indigenous women.

3.2 Participation of Women in the Customary Law Community in Forming Legislation in Good Governance

Democracy requires people's sovereignty. Community participation in the formation of laws is a representation of the realization of the formation of democratic laws. In society there are various kinds of representation which are very different from the representation in the DPR, representation in society in the form of political representation, territorial representation and representation of ideas. In political representation, people's representation is realized physically, namely by the election of a representative who sits in the membership of the Representative Body (DPR), while territorial representation is realized by the existence of the Regional Representatives Council (DPD). Meanwhile, for the representation of ideas, people can still voice their aspirations. [8]

General welfare is the aim of the Indonesian state, in the concept of a human welfare state not only seen as individuals but as members and society collectively. In this context the state becomes "active" The government must provide services to the community. [9] To serve the community, it is important to create conditions that enable each member of the community to develop their abilities and creativity in order to achieve common goals.

One of the principles of good governance is that in making policies it involves community participation, including in the process of forming statutory regulations. Samuel P Huntington and Joan Nelson define public participation as follows "Political Participation as activity by private citizens designed to influence government decision making". Community participation is the activity of citizens in influencing decision making in government. [10]

Indigenous women's participation in the formation of laws is a constitutional right and a reflection of people's sovereignty as stipulated in Article 1 paragraph (2) of the 1945

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[8] Pataniari Siahaan, *Politik Hukum Pembentukan Undang-Undang Pasca amandemen UUD 1945* (Jakarta: KONPRESS, 2012). p. 428.

[9] Joko Widodo *Good Governance Telaah dari Dimensi: Akuntabilitas dan Kontrol Birokrasi Pada Era Desentralisasi dan Otonomi Daerah,* (Surabaya: Insan Cendikia, 2001), p.1.

[10] Pataniari, *Op.cit.*

SASI, 29(2) 2023: 268-275
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Constitution of the Republic of Indonesia ", then Article 28 C paragraph (2) of the 1945 Constitution of the Republic of Indonesia gives every citizen the right to advance himself in fighting for their rights collectively to develop their society, nation and state. Article 22 A of the 1945 Constitution of the Republic of Indonesia delegates further arrangements for the formation of laws to the Law. 12 of 2011 concerning the Formation of Legislation as amended several times until the last by Law no. 3 of 2022 concerning the second amendment to Law no. 12 of 2011 concerning Formation of Laws and Regulations in Article 96 provides space for public participation in the formation of laws and regulations. Doctrinally, public participation in lawmaking aims to create a strong collective intelligence that can provide better analysis of potential impact and wider consideration in the legislative process for higher overall quality outcomes and increased understanding (improved understanding) regarding the role of parliament and members of parliament by citizens; as well as providing opportunities for citizens to communicate their interests. [11]

Community participation needs to be carried out meaningfully (meaningful participation) at least fulfilling three prerequisites, including: the right to have their opinions heard (right to be heard); the right to have their opinion considered (right to be considered); and the right to obtain an explanation or answer for the opinion given (right to be explained). This public participation is primarily intended for community groups that are directly affected or have concern (concern) about the draft law being discussed.

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Formally, the process for realizing responsive laws through the form of community participation is already possible. However, acceptance of the aspirations of the people in substance by legislators to create responsive laws is highly dependent on the attitudes and perspectives of legislators with various interests in them. In order to realize the formation of responsive laws and regulations, especially concerning the realization of the formation of laws and regulations towards an Indonesian welfare state, the formation of laws and regulations in Indonesia must comply with Articles 5 and Article 6 UUP3 regarding the formation of laws and adhere to the principles the principle of forming good laws and regulations. [12]

Participation requires openness as a formal principle in the formation of laws and regulations. "Principle of openness" as one of the principles in the formation of good laws and regulations, namely starting from planning, drafting, discussing, ratifying or stipulating, and promulgation is transparent and open. Thus, all layers of society including indigenous women have the widest possible opportunity to participate in the Formation of Legislation.

The state should provide space for indigenous women to participate in the formation of laws and regulations that are related to the interests of indigenous, especially related to

[11] Indonesia. Constitutional Court Decision Number 91/PUU-XVIII/2020, p. 392, accessed September 1, 2022, http://putusan3.mahkamahagung.go.id.

[12] Laurensius Arliman.S, "Partisipasi Masyarakat Dalam Pembentukan Perundang-Undang Untuk Mewujudkan Negara Kesejahteraan Indonesia" *Jurnal Politik Pemerintahan* 10, no. 1 (2017): 71.

issues of indigenous women and children that provide justice and equality. Good governance will provide opportunities for both men and women in their efforts to improve and maintain their quality of life. Therefore, every law that is formulated, stipulated and implemented must always be known by the general public, and have the opportunity to evaluate it. The formation of laws and regulations at the regional level such as regional regulations is a consequence of the implementation of the decentralization system in Indonesia. Practical and substantive reasons for the important participation of indigenous women in the formation of laws and regulations, namely experience and mastery of knowledge from a human rights and gender perspective in the formation of laws and regulations.

The involvement of indigenous women is urgently needed so that effective and efficient legislation can be produced. This is similar to what was done by the Women's Council of the Indigenous Peoples Alliance of the Archipelago (AMAN) which began in 1999 and was reinforced at the 2012 AMAN Women's Congress. (DPR-RI version 2014-2019) or Indigenous Peoples Rights Protection Draft (DPD-RI version 2014-2019), Draft Land Law (DPR-RI version 2014-2109), Amendments to the Criminal Code, Amendments Marriage Law and other regulations at the regional level.

The formation process that involves the participation of indigenous women will be able to provide more information to policy makers (DPR/D and the Government) regarding legal requirements empirically as well as the formation of regulations capable of detecting potential problems that could arise for indigenous women by issuing a product of legislation.

4. CONCLUSION

This study shows that the importance of the participation of MHA women in the formation of national law so that there will no longer be inequality and injustice in all areas of life and legislation. The importance of the participation of MHA women in the formation of legislation using feminist legal theory will accommodate their voices and experiences. And the Feminist Legal Theory can also influence the legal norms of the formation of laws and regulations, so that MHA women also experience gender equality and justice regarding access, participation, control and benefits from the development of national law.

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