



ISSN NO. 2320-5407

Journal homepage: <http://www.journalijar.com>

INTERNATIONAL JOURNAL
OF ADVANCED RESEARCH

RESEARCH ARTICLE

The Position Of The Village In The Terms Of The Constitutional Construction Of The Unitary State Of The Republic Of Indonesia In The Implementation Of The Regional Autonomy

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Manuscript Info

Manuscript History:

Received: 14 December 2013
Final Accepted: 19 January 2014
Published Online: February 2014

Key words:

Position of the village,
Constitutional construction, The
regional autonomy, NKRI

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Abstract

The position of the village is a forerunner to the formation of the state; however village is not region in the constitutional construction of the unitary state of the republic of Indonesia (NKRI). It is because the village did not receive the devolution of authority from the state, although the village is recognized as part of NKRI. Indeed, this is contrary to the implementation of the regional autonomy, which is puts the village as sub-systems of the local government of district/city, so it made implication for the less maximum of the implementation of the village autonomy based on the original rights of the village which recognized and respected by the state, because village is also implementing the autonomy given by the district/city.

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Introduction

Historically, the village is a forerunner to the formation of the political society and government in Indonesia, long before the state and the nation was formed. The village is an autonomous institution with tradition, customs, has own law and so is relatively self-contained (Widjaja, 2004:4-5).

According to Y Zakaria, actually, village is a small country, because as the legal community, the village has all of the tools as a country, such as territory, citizens, regulation and its government. This makes the village as an autonomous institution with traditions, customs, and its own law and relatively self contained (Zakaria, 2005:332). Based on this, the village should be understood as an integrated rural community which has its own right and power to regulating and managing the interest of its people to gain prospers. The right to organizing and managing the interest of the community is called the village autonomy (Widjaja, 2004:165).

The presence of the unitary state of the republic of Indonesia (NKRI) since the proclamation of independence on August 17, 1945, has an impact on the existence of the village. Whether as an autonomous institution or it is as a part of the organ of the government, which organizes the lowest administrative affairs of government.

These circumstance, it can be seen in the division of the territory or The NKRI's territorial as stipulated in Article 18 verse (2) of The 1945 State Constitution that :

The unitary state of the republic of Indonesia is divided into provincial regions and areas of the province is divided into districts and municipalities, which each province, district and city has a local government, which is regulated by law.

The provision is contains 2 (two) terms, namely : First, the deviation of the teritorial of NKRI consists of province, district/city. Second, for each region it has a local government respectively. This describe that the deviation of the teritory and governance in NKRI just construct to the district/city, meanwhile, the village does not have a clear position in the NKRI's constitution.

Furthermore, in the Article 200 verse (1) Law No. 32 Year 2004 which about Regional Government stated that :

In the local government of district/ city government has formed the village which is consist of village's government and village's consultative board.

Based on these condition, so it can be assumed that in the governance, the position of the village is sub system of the government under the regency/city. In other words, the government of the village is a part of The government's system of NKRI (The Unitary State of The Republic of Indonesia). This reinforce the dominance of state and government of the existence of the village in the Republic of Indonesia, so that according to oroginal composition and the original of the right to be difficult to achive for the recognantion of the independency and the autonomy of the village. Thus, the study aims to determine the position of the village in the construction of the Unitary Republic of Indonesia (Republic of Indonesia) and how the implementation of village autonomy in the implementation of regional autonomy in the Unitary Republic of Indonesia.

Methods

Types of Research

This research is a normative legal, with statutory approach and the conceptual approach

Types and Sources of Data

Types and sources of data are the primary legal materials and secondary legal materials. Primary legal materials are materials that are legal and binding authority, which consists of statutory, official records or minutes in the manufacture statutory, regulations. Secondary law is all writings or publications that are not official documents, which is a text books and dictionaries.

Data Collection Techniques

Data collection techniques using library research techniques, by studying various documents related to the object of research

Data analysis

Data analysis was carried out systematically on legal materials, which in turn made the identification of materials in accordance with the law and do interpretation problems to be analyzed in depth.

Result and Discussion

The Concept of the constitutional construction.

Terminologically, the word of construction has a meaning structure (model, layout) of a building. State administration has said terminological sense as affair (item/ subject) state structure/politic. Meanwhile, the state system is a set of basic principle that includes the composition of government regulation, state forms and so on, which the basic regulation of the. Thus, constitutional means subject matter or affair related to the basic principles regarding to the composition government regulation, state form and so on which are the basic for a country setting. (Kamus Bahasa Indonesia,2013)

Based on this, the conception of the constitutional construction can be interpreted as the basic principle regarding to the building of a state, which includes the composition of the government and the form of the state. According to Hestu Cipto Handoyo, to discuss about the building of state the criteria used include the structure or the composition of the state. In the terms of that case, related to the division and the power relation between the *central government* and the *local government*. Thus, it is known the building of state consist of the unitary state, state of the union (united of states) and the union of countries(Handoyo, 2003:87).

Nurtjahjo (2005:43) says that there is a form of state organization consisting of the union state, and there is a form where there is no unity the in the state that is the state.

Related to the composition of the state so that will have two possible forms of the composition of the state, namely (Soehino, 1998:224):

- a) Country that have a single structure, called the unitary state.
- b) Country that have plural structure, which is called federation.

The unitary state can also be called a *unitaris state*. In terms of its structure , it can be seen the it has singular structure or composition. This implies that the unitary state is a state that is not composed of a few

countries, but only made a country, so there is no state in the state. Thus, in the unitary state there is only one government that is the central government which has power and supreme authority in the areas of state government, as well as they implementing the state administration/government both at central and local level (Soehino, 1998:224).

The Village in the constitutional construction of the unitary state of republic of Indonesia.

The position of the village in NKRI after an amandemen of the constitution of 1945 still does not have clarity. Considering that the constitution of 1945 and so the provision of other legislation does not explicitly set the position of the village in NKRI. This can be seen in the Article 18 clause (1) in the Republic Indonesia constitution of 1945 which state that :

The Unitary State of the Republic of Indonesia is divided into provinces and regions of the province was divided into districts and city, which for each provinces, districts and city has a local government, which is regulated by law.

This arrangement shows that the existence of the village is not set in the provisions of Article 18 of the republic Indonesia Constitution of 1945. Which is set that the territorial division of The Unitary State of the Republic Indonesia only consisted by province and district/city.

Towards this reality, then the question that arises is how is the position of the unity of indigenous people or the indigenous village in the Republic of Indonesia.

According to Aristotle, the state occurred because of families merging into larger group, and then the group was joined to the village. Then the village join again and so resulting the state (Soehino, 1998: 24-25). Meanwhile, Mac Iver in his views on the process of state formation was explained that the state is formed by the development of a family. Where, in the family there are habits that have always embraced and in the family also have called leader or head of household. At the next level, the family will growing or will joining with another family and forming a larger family called clan. Their leader called *primus inter pares*(Soehino, 1998:130).

In the view of J. Stahl (Soehino, 1998:131) that the country due to the development of a patriarchal family which occupying an area that is based on equality of history, fate, and the needs that have been run through several phases, then gave birth to the nation, and of the nation the state is then formed. According to Busroh (2009:46), associated with the process occurrence of the primary (*Primaire Staats Wording*), a theory which is discusses about the formulation of the state that are not associated with pre-existing state. According to this theory, the development of the country primarily through four (4) phases, they are :

1) *Phase Genootshap (Genossenschaft)*

At this phase is a grouping of people who incorporate themselves for the common good, which is based on equality. This is motivated by the same goals and interests and the lection for the leadership here by *Primus Inter Pares* or prominent among the same. Here, which plays an important role is the element of nation.

2) *Phase Reich (Rijk)*

At this phase, there was awerness of groups of the peoples who join themselves and will have rights to land, so there will be a landowner and the peoples who rent land. This raises Feudalism system. The important thing of this phases is the element of area.

3) *Phase Staat*

At this phase, has emerged and awerness of civic life. People are awerness and realize that they are in group as statehood. This makes the seeds of the formation of a state, namely nation, region and government have been met at this phase.

It shows that the unity of the indigenous people called village contributed to the formation of the state, as the smallest territorial. But why hierarchically, in the regulation of the structure of the state as in the constitution of 1945 did not put the village in the structure of the unitary state of the republic of Indonesia?

Related to this, according to Jimly Asshiddiqie; the arrangements regarding the division of NKRI to the province and district/city shows that NKRI is divided on the composition of regions hierarchically bellow of it, which is divided into province, and provinces are subsided on the districts and cities in accordance with the principle of the vertical division of power by the local government that is set by the law.(2009:57).

Power sharing can be done horizontally and vertically. According to Sri Soemantri, forms of the vertical division of power would give birth to the central goverment and the locel goverment that bear the rights of

decentralization (Moh Mafhud, 1999:186). Associated with the vertical division of power so, Friedrich (Juanda, 2004:41) used the term of territorial division of power. This kind of division can clearly has specified in both unitary state either federal or confederation. Meanwhile, according to Juanda (2004:16) thw vertical power sharing spawned the local governance.

The consequences of the division of power of the state at the level of provincial and district/city, is known as regional autonomy.

Sarundajang (2012:3) stated that the description of the concept of local government is based on a review of the etymological of local government found throughout whole the world. The analysis of the origins of some of the terms such as *koinotes* in Greek, *country* in United Stated, *commune* in France *gemeinde* in Germany, *gemeente* in The Netherlands, and *municipio* in Spain will give and understanding that the local government is an organizational unit of the government that is based on the specific geographic in a sovereign state; for example provinces or federation/ state of united as units between (*intermediate unit*) and city or district as the basic unit (*basic unit*).

The fact indicates that the village was not included as part of a regional arrangement vertically that give contribution to the formulation of The Unitary State of the Republic of Indonesia, as well as not getting power from the state as a result of the principle of division of power.

In this regard, then according to Article 1 paragraph 6 of Law No. 32 of 2004 that:

Autonomous region, here in after referred to or called as region is the unity of the legal community that has territorial and authorized to regulating and administrating the governmental affairs and interests of the local community based on their own initiative and according to the aspirations of the people within the system of the Unitary state of the republic of Indonesia.

Based on this, in order to be categorized as a region in the territory of the unitary state of the republic of Indonesia that is the region must organize government affairs which the authority granted by the state based on the right of autonomy as the consequence of the principle of the unitary state with the decentralized system. Thus the existence of the village, constitutionally, can be said that it is not one unit area or region as part of the structure of the unitary state.

According to Bagir Manan as quoted by Sarundajang an area as mention as the region if there has its own institution to implementing their matters (autonomy) that have been handed over to them by central government. In this context, the village can not be categorized as a region because the village does not perform autonomy over the affairs handed over by the state (2012:30). This position makes the construction of the Unitary State of the

Republic of Indonesia is only built by the regions, they are province and district/ city. The existence of the village in NKRI guaranteed in Article 18B paragraph (2) of the Constitution of 1945, states that :

The State recognizes and respects the unity of indigenous people and their traditional rights throughout still alive and in accordance with the development of the society and the principle of the Unitary State of The Republic of Indonesia, which is regulated by the law.

The arrangements show that there is assurance of recognition and respect for the unity of indigenous peoples and their traditional right.

According to the author, the element of recognition of the existence of the unity of indigenous people or village that directly as part of the state, which , the *de facto* village is an embryo of the formation of the state, all at once fully formed with the elements of the territory (area), the people and the government cultures that still preserved and maintained, then the state give recognition and respect for the existence of the unity of the indigenous by the law or *de jure*, by arrangement in the Constitution in article 18 B paragraph (2) of the Constitution of 1945 of Indonesia, which further stipulated in Article 2 paragraph 9 of Act. No. 32 of 2004, which states that:

The State recognizes and respects the unity of indigenous people and their traditional rights throughout still alive and in accordance with the development of the society and the principle of the Unitary State of The Republic of Indonesia,

Based on this, the existence of the unity of indigenous people in this case is a traditional village, which is recognized and respected in accordance with the right of their origin, including the presence of its territory, its people, and its government, which is considered as a small country. Its existence as a small country, should not be

regarded as the existence of state within the state, but remain subject to the authority of authority of the state government according to the principles of the unitary state, there is no state within the state.

Based on the various descriptions, the position of the village in the construction of the constitutional of the unitary State of the Republic of Indonesia is not included as a unified of territorial in the composition of the Unitary State of The Republic of Indonesia. However, the existence of the village is recognized and respected as a unified of indigenous people who live in accordance with the principles of the Unitary State of The Republic of Indonesia

The Basic Constitutional of the autonomy of the village.

Article 18 B paragraph (2) of the Indonesia constitution of 1945 state that:

The State recognizes and respects the unity of indigenous people and their traditional rights throughout still alive and in accordance with the development of the society and the principle of the Unitary State of The Republic of Indonesia, which is regulated by the law.

In according to Syafrudin and Suprin Na'a (2010:44) that the norm of the article 18 B paragraph (2) of the Indonesia Constitution of 1945 can be understood as the principle to recognizing and regarding the legal community and their traditional rights. The purpose of the formulation of indigenous people is the legal community (*rechts-gemeenschap*) which is based on customary law or custom, such as villages, clans, *nagari*, *kampong*, *meunasah*, *huta*, *negroji*, and others.

Thus, the provisions of article 18 B paragraph (2) of the Indonesia Constitution of 1945 in relation to the provision of article 1 point 12 of Law No. 32 of 2004, it can be seen that the unity of indigenous people under article 18 B paragraph (2) of the Indonesia Constitution of 1945 have the same or identical meaning as same as village by Act No. 32 of 2004, which regulates the recognition of the state to the authorities of the village in implementing self government (autonomy) based on their custom fit rights of its origins.

The Implementation of The Village autonomy

The development of the existence of the village with its autonomy in Indonesia can be found in Article 1 paragraph 12 of Law No 32 of 2004, that :

Village or called by another name, hereinafter referred to as the village is the unified of the legal community which has boundaries of territory that are authorized to manage and to arrange of the interests of the local community , based on the origin and the local customs that are recognized and respected in the system of the government of the Republic of Indonesia.

Further setting of the village under article 200 paragraph (1) of The Local Government's Law which state that: In local government district/ city formed the village which consists of the village government and the village consultative institution.

An arrangement of the village in Act No. 32 of 2004 is putting the village in two (2) positions which are on the one side the village is referred to as the unity of legal community with its boundaries and its authority to regulate and manage the interest of its society based on the rights of its origins. Meanwhile, on the other hand, the village is placed as a subordinate of local government district/city.

The village in that position, in according to Hanif Nurcholis shown obscurity. It is linked to Article 18 B paragraph (2) of the Indonesia Constitution of 1945 that only regulate the recognition and respect for the unity of indigenous people who still live with their traditional rights (2011:225). Under such arrangements, the existence of the unity of indigenous people or village (indigenous) with their traditional rights which is autonomous, and there have been and maintained, recognized, and respected by the state.

Based on this, the village autonomy can not be equated with regional autonomy. Village autonomy is born because of there is the recognition of the right of the origin and it has an innate right. The innate right of the village as the original construction is including the rights of the territory (lands rights), social's organization system (leadership mechanism), and also rule and mechanism of rule making that is regulating the existing residents in the village's area (Zakaria, 2005:337:338).

Meanwhile, the local autonomy comes from the delegation of authority from the state to the local called decentralization. According to Koesoemahatmadja as quoted by Sumaryadi (2005:32) that typically divided into two kinds namely:

Firstly, deconcentration (*deconcentratie*) or *ambtelijke decentralisatie*, is the devolution of power from the higher level equipment of the state to his subordinates. Secondly, decentralization of constitutional (*staatskundige decentralisatie*) or political decentralization is devolution of the power of legislation and government (*regelende en bestuurende bevoegheid*) to the autonomous regions in its area. Decentralization of the constitutional or the state administration is further divided into two parts, that are The Territorial Decentralization (*territoriale decentralisatie*), is the devolution of the power to arrange and organize the household of each region (autonomous) and The Functional Decentralization (*functionale decentralisatie*), is the devolution of the power to arrange and organize something or some interest.

It shows that the highest power is in the hands of the state as top-level equipment, and then the state share the power to the regional countries as subordinates in order to carry out the government duties. Based on that process, it will give birth the rights of the local government to organize their government and manage their own household independently without any interference and interventions from other parties are called local autonomy.

The Practice in the unitary state (*unitarisme*) showed that the regional autonomy granted by the central government, while the local government just took delivery of the central government. It shows that in the unitary state the tendency of the powerful authority in the central government's hand. Therefore, the local government in the unitary state for the example in Indonesia, more heavily dependent their autonomy rely on the political will of the central government, i.e. to the extent that the central government has the intension or goodwill to empowering local government through granting greater authority (Sarundajang, 2002:32).

Based on these, the right of the autonomy that owned by village is different with the right of autonomy that owned by regional. The difference is in the source or the origin of the authority that is obtained. Regional government gain the authority from their superior governance namely the state, while the autonomy rights that owned by the village come from the village.

The reality that happens in the NKRI shows that in the implementation of the village's government, the village was placed as a sub-system of the regional governance, and also obtained and held government affairs that submitted by the region. This can be seen in The article 200 paragraph (1) The law of Local Government which states that:

In the local government of district/city are formed village governments that are consisting of the village government and the consultative institution of the village.

Meanwhile, article 206 of the Law of the local Government states that:

The government affairs which is under the authority of the village are includes:

- a) Existing of government affairs based on the origin rights of the village.
- b) The government affairs that become the authority of the district/city which submitted to the village maintenance/setting.
- c) Co-administration of government, provincial government and/ or government of district/ city.
- d) Other administrative affairs by laws and regulations submitted to the village.

The arrangement showed that there was recognition for the village government as part or sub-system of the local government.

According to the authors, the existence of the village government as a sub-system of the district/city government is not in accordance with the principle of recognition and protection of the existence of the indigenous people's unity. Based on the principle of recognition, then neither *de facto* (fact) nor *de jure* (legal), the existence of the unity of the indigenous people's rights is recognized along with its origins based on the customary law, include the system of government, so the placement of the village government (the unity of indigenous people) as part of the system of the state administration showed inconsistency of the principle of recognition as *de facto* nor and *de jure* because however the village still maintain their traditional values.

Meanwhile, with regard to the authority of the village that includes government affairs, local government, district/ city that the setting is handover to the village in relation with the principle of decentralization, that is the devolution of the authority from superior to subordinate. Thus, there should be a hierarchical relationship between the district/city with the village.

Based on the previous description, it can be seen that there is no hierarchical relationship among district/city with the village, the existence of the village is only recognized in the state, but not be a part of the the structure of the state which is divided into provincial, and district/city. Based on this, the submission of the

government affairs which is the authority of district/city to be arranged by the village was not in accordance with the principle of decentralization, i.e. the devolution of government authority from the superior to the subordinate.

Moreover, the village authority derived from the authority of the district/city government is not in accordance with the principle of local autonomy. According to Sarundajang (2002:34) the essence of the local autonomy is:

- 1) The right to take care of its own household for an autonomous region.
- 2) One region/area can not run its right and its authority of autonomy beyond the boundaries of the region/area.
- 3) Region should not interfere with the right of organize and maintain of other.
- 4) Autonomy does not supervise other regional autonomy.

Thus, the presence or the existence of the village with its authority based on its origin rights has indicated the recognition of the autonomy of the village. It shows that the village is also an area which has autonomy as stipulated in Article 1 number 12 of The local Government's Law.

Based on this, so it can be assumed that the village and region (provincial, district/city) are equal as the autonomous regions. The difference is the village does not have the authority to regulate their administration affairs from the state. But is a rights that they have since the village was formed. If it connected with the essence of the local autonomy as mention by S.H. Sarundajang, so it can be said that as an autonomous region, the village is not a subordinate of the district/city that are also an autonomous region. Therefore the existence of the village which is placed as part of district/ city is not in accordance with nature of the regional autonomy.

Thus, the implementation of autonomy at the village level is not subordinate of district/ city. It shows that the village's authority derived from the authority of the district/city that are handover to the village is incompatible with the nature of the regional autonomy.

Various descriptions show that the existence of village autonomy based on the local government laws is in accordance with the principle of recognition of the existence of the unity of indigenous people, in this case the village who still has and maintain its owns traditional values, can not be implemented maximally.

Based on this, the existence of the village in the implementation of the regional autonomy is placed as part or one of the autonomous regions, so the relationship of the village with the district/city as same as in placed as the relationship among provincial and district/ city. Where, there is no relationship to each charge and to interfere in organizing their own domestic affairs between the autonomous regions, but the situation that will awaken is coordinating among the district/city and the villages.

Conclusion

The position of the village in the constitutional construction of the Unitary State of the republic of Indonesia is not part of the regional structure or the area that make up NKRI because the village is not a region which not getting the delegation of the authority from the state. Meanwhile, the implementation of the village autonomy can not be implemented to the maximum because the village was placed as a subordinate of the local government district/city so that the implementation of the village autonomy based on the rights of the origin still remains disputed with the autonomy from the state. Therefore the implementation of the village autonomy must be adapted with the policy of regional autonomy.

Thus, the need for special arrangements governing the village (indigenous) separate from local government, in order to give more recognition and guarantee of the unity of existence of indigenous people or village (customary).

Thus, it will necessary to a special arrangements that organizing about the village (indigenous) that separated from local government, in order to give more recognition and guarantee for the existence of the unity of the indigenous people or the village (customary).

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