

A COMPARATIVE STUDY ON THE RECOGNITION OF THE RELIGION IN THE INDIGENOUS PEOPLE COMMUNITY IN INDONESIA ACCORDING TO THE CONSTITUTIONAL COURT DECISIONS NUMBER 97/PUU-XIV/2016 AND 140/PUU-VII/2009

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Abstract

This article is intended to conduct a legal research on how the constitutional courts have interpreted the meaning of the religion in the constitution of Indonesia. The author has applied normative legal research method by compiling and analyzing the constitutional court decisions related to the issue of the religions in the indigenous community in Indonesia. Also, the author try to raise a statutory approach and legal reasonings in the constitutional court decision to analyse the legal issues. According to the result of this legal research, the author comes to the following conclusions; the constitutional court decisions has applied and used the historic interpretation method of a religion meaning in the constitution, but the constitutional courts have come to the different result of the religion meaning in the constitution. While the constitutional court decision number 140/PUU-VII/2009 excluded the meaning of the religion in the constitution, however, the constitutional court decision number 97/PUU-XIV/2016 embraced the meaning of the religion in the constitution.

Keywords: *Historic interpretation; Lex Posterior Derogat Legi Priori; Non-Discrimination; The Local Beliefs*

INTRODUCTION

Indonesia is a pluralistic society in term of religion, ethnicity, language etc

where the Constitution mentions Garuda Pancasila is a state symbol with unity and diversity.¹ In Indonesia the indigenous communities have also their own religions including language and culture.² Apparently there are the local religions in the indigenous communities in Indonesia such as Kaharinga Dayak Luwangan and Hayan Piungpang in the District of Barito Selatan South Borneo, Ugamo Malin in Tapanuli North Sumatera, Uis Neno in Middle Timor, and other local religions in Indonesia.

According to the explanation of Article 1 Law Number 1/PNPS/1965 the government only recognizes six (6) official religions including Islam, Christian (Protestant and Catholic), Hindu, Budha, Confuciusm, but the government does not recognize the local religions yet. Even according to the explanation of Article 1 Law Number 1/PNPS/1965, the local religions are guided to “the healthy mind” and “single God”. Ministry of Religion Affairs provides the following minimum elements of a religion ; single god, having a prophet, having a holy book, having the followers having a system of the follow-

ers.³ The limitation of the religion meaning has triggered the local religions in the indigenous communities unrecognized by the government.⁴ The government does not provide a proper room for a discussion on the local religion with the indigenous communities. Few rooms for an open debate of the local religions in the indigenous communities have been provided in term of advocacy levels merely.

The indigenous people who have their own religion are treated discriminatory in term of civil, political, social and economic rights.⁵ Absence of the state recognition on the local religions makes the violation of civil, political, economic and social rights violation in Indonesia. Futhermore, the state has issued the Residency Law Number 23 Year 2006, amended by Law Number 14 Year 2013 subsequently. According to article 64 paragraph (1) and article 61 paragraph (1) Law Number 23 Year 2006 the column of religion on the identity card for the religions which are not recognized by the state is empty.

¹ Article 36 A The Second Amandment of the 1945 Constitution

² Directorate General for Belief and Cultural Ministry of National Education, *The Encyclopedia of The Religion In Indigenous Community*, Jakarta: Directorate General For Belief and Culture, 2006, P. 76-371.

³ Soelistyowati Irianto et al, *Not A Middle Way: Public Examination On the Constitutional Court Decision of Law Number 1/PNPS/1965 Religious Defamation*, (Jakarta: ILRC, 2010), P. 4.

⁴ *Ibid.*

⁵ Muhammad Isnur Et al, *Religion, State and Human Rights (the Trial Process of Law Number 1/PNPS/1965 before the Constitutional Court)*, (Jakarta: LBH Jakarta, 2012), P. 104.

The Constitutional court has decided Article 61 paragraph (1) and Article 64 paragraph (1) Residenship Law Number 23 Year 2006 unconstitutional against the second amendment of the 1945 constitution.⁶ Meanwhile the constitutional court has decided Law Number 1/PNPS/1965 constitutional against the 1945 Constitution.⁷ The constitutional court decision Number 97/PUU-XI/2016 says the religions in the indigenous communities are part of the religion meaning in the 1945 Constitution, but in the same time the constitutional court decision Number 140/PUU-VII/2009 says the religions in the indigenous communities are not part of the religion meaning in the 1945 Constitution.

Implicitly there is a different decision from the constitutional court regarding whether the religions in the indigenous communities are part of the religion meaning in the 1945 Constitution.

Analizing the Legal Issues;

Legal Issues

According to the previous part of this paper, clearly there are legal issues in interpreting the meaning of the religion in the 1945 Constitution differently where

two (2) Constitutional Court decisions have decided the same legal issue but they have different result. Accordingly there are 3 following legal issues ;

- Why does the state have to recognize the religions in the indigenous communities;
- What are the consequences of law if the state fails to recognize the religions in the indigenous communities;
- How should the state regulate the recognition of the religions in the indigenous communities in the future.

Research Methodology

A legal normative research is used for this research with statutory approach, and case studies. The author will elaborate and analyze the meaning of the religion in the 1945 Constitution according to Law Number 1/PNPS/1965 and Administrative Residenship Law Number 32 Year 2006 (amended by Law Number 24 Year 2013 subsequently). Also, the author will analyze the constitutional court decisions related to the legal issues. Particularly the author will analyse legal reasonings which have been used by the constitutional court to decide the meaning of the religion in the 1945 Constitution. The author will also use of the principles of rule of law, non-discrimination, and equality before the law. Furthermore, the author will use of

⁶ Indonesia, Constitutional Court Decision Number 97/PUU-XIX/2016

⁷ Indonesia, Constitutional Court Number 140/PUU-VII/2009.

the following legal theories ; legal progressive and responsive, law and society, and legal pluralism.

DISCUSSION

1. Legal Pluralism

According to John Grifitts there are two (2) kinds of legal pluralism as follows ;

- Strong legal pluralism;
In a situation where there is no superior legal system higher than any other legal systems in a country. The existing legal systems are equal
- Weak legal pluralism.
In a situation where there is a superior legal system higher than any othe legal systems. Individual or groups has used of the legal system because of presurre.⁸

A legal pluralism problem appeared in the colonialism and post-colonialism era. In the colonialism era, a legal pluralism appeared once transplanted laws which was made in the colonizing country applied in the colonized country where such laws conflicted with the community laws (cultural conflicts/gaps) such as in

⁸ John Gruffits, *Understanding Legal Pluralism: A Conceptual Description*, in *Legal Pluralism: Interdisciplinary Approach*, (Jakarta: Huma & Ford Foundation, 2005), P. 118.

Indonesia where the dutch government in the colonialism era applied such transplanted laws.⁹ Post-colonialism, the vision of nationality for uniting Indonesia politically and governmentally denied the existence of “the folk laws”. Futhermore, post-colonialism era in Indonesia codification and unification of the laws effected to change the folk laws with the nationalistic laws apply from the city of Sabang to the city of Merauke, from the Miangas Island to the Rote Island¹⁰ Soetandyo Wigjosoebroto uses of the folk law as a translation of Volkrecht which exists in the collective memories and customs of the people.¹¹ But in the recent development of Adat law, the State has accepted and recognized Adat Law and the community justice like in Minangkabau.¹²

I Nyoman Nurjaya argues legal pluralism is the following elements : according to legal antropology law is not only the state-made regulations, but also local customs referring to customary laws including self-regulation or inner order mechanism as a tool of social control in

⁹ Soetandyo Wigjosoebroto, *Legal Pluralism Problems In the National Thought and Legal Policy : The Indonesian Experience*, in *For What Is Legal Pluralism ? Concept, Regulation, and the Agrarian Conflict in Indonesia*, (Jakarta: Huma, 2011), P. 24-27.

¹⁰ *Ibid*, P. 26.

¹¹ *Ibid*, P. 44

¹² Sulistyowati Irianto, *Legal Plurlism In the Global Perspective*, in *the Running Law of Legal Antropology*, (Jakarta: Yayasan Obor Indonesia, 2009), P. 17.

the community.¹³ In Indonesia there are customary laws regulating their own beliefs/religions. There is the Tolotang which is a local belief/religion in South Celebes, also the Parmalin in North Sumatra, and the Kaharingan in Borneo. Many members of the Tolotang community live at Ambarita in the district of Sindereng Rapang South Celebes province. They believe in their own religious leader “I Pabbere” who brought their religious teachings from the god of Seuwae.¹⁴ Indigenous community of Tolotang has the following their own religious tradition; their own ritual tradition, religious leader of Uwata, non-social stratification, the concept of mediation (musyawarah) and working together (gotong royong), monotheism (God of Suewae), the holy book of Ulona Batara Guru, Ritebanna Walenrenge and Tagilin-na¹⁵ Tolotang is not recognized as an official religion by the state, and in practice the members of Tolotang have to choose one of the state official religions in Indonesia.¹⁶

¹³ I Nyoman Nurjaya, *Understanding Standing and Capacity of Customary Law In the National Politics*, In Perspective Journal Volume XIV Number 4 Year 2011, (Surabaya, Wijaya Kusuma Law School, 2011), P. 238.

¹⁴ Heru Prasetya, *Cross-Border Identity: Position and Articulation of Tolotang Indigenous Community*, in Multiculturalism of Minority Rights and Dilemma of State-Nation, (Jakarta: Interseksi Foundation, 2007), P. 79-81.

¹⁵ Ibid, P. 85.

¹⁶ Ibid, P. 75.

In North Tapanuli there is Ugamo Malin, and often called as Parmalin. They have their own following religious tradition; holy book as the Pustaka Habonaron, and monotheism.¹⁷ Parmalin is not recognized as an official religion by the state so that the members of the Parmalin should follow one of the official religions once they meet public services.¹⁸ In the district of Sumba West Timor there is the Marapu which has their own religious ritual tradition, believing in god, but the Marapu is not recognized by the state.¹⁹ Therefore, the members of the Marapu cannot access to public services which are provided by the government.²⁰ In Borneo there is indigenous community so-called Dayak having their religions called as the Kaharingan.²¹ The Kaharingan has their own religious tradition and belief system as follows : believing in god, own their religious customary law.

According to above-mentioned explanations there are discriminatory practices against the members of the indigenous religious community in public services. Also, in the indigenous commu-

¹⁷ Directorate General For Art and Culture, Op.Cit., P. 391.

¹⁸ Constitutional Court Decision Number 97/PUU-XIV/2016, P. 7-9.

¹⁹ Ibid, P. 5-6

²⁰ Ibid

²¹ The Higher Council of The Kaharingan, *The Constitution of Kaharingan*, (Palangkaraya: Majelis Rusmahurgan, 2011), P. 1-2.

nities they have their own belief systems, and the customary laws. Griffiths has mentioned weak pluralism will appear once a law is superior against the other laws, and the community/individual is forced to follow the superior law. Griffiths's argument is true if we see the position of the Law Number 11/PNPS/1965 is higher than the community belief laws. Even in a certain situation the indigenous communities are forced to follow one of the official religions.

The government has used the explanation of Article 1 Law Number 11/PNPS/1965 to determine whether or not a belief system is religion in Indonesia.²² Previously Soetandyo Wigjosoebroto mentions the theory of legal transplancy where this theory is relevant to see Law Number 1/PNPS/1965 has been used against the indigenous belief laws/communities. Though not in the context of the colonialism era, but the transpalancy law exists. Also, Soetandyo Wigjosoebroto mentions the following theory of ethnoculturalism :

“ the former of the colonial areas has not been united for a unification of the law by the same language and culture but united

by based on same history and fate so that the national intregation has been existed”²³

Therefore, it is true what Soetandyo Wigjosoebroto mentions Law Number 1/PNPS/1965 is not a progressive law because the law does not humanize the members of the indegenous religions. Nonet and Selznick also mentions a responsive law where a good law is made by the aspiration of the communities based on democracy corridor, and the process of law making is not top-bottom approach but based on bottom up approach.²⁴ The indegenous religion members have not been participated in the process of Law Number 1/PNPS/1965 making in the context of public participation in a democracy era. Nonet and Selznick also mentions re-fresive law where the law is made by the interest of the regime and ignored the ligitimacy of the people.²⁵ Therefore Law Number 1/PNPS/1965 can be said is a re-fresive law where the law was made for responding to the the development of the indegenous religions before 1965.²⁶

2. The Constitutional Court's Interpretation On the meaning of the religion in the 1945 Constitution.

²² Explanation of Article 1 Law Number 1/PNPS/1965 has been interpreted by the Constitutional Court Decision Number 140/PUU-VII/2009 mentioning the religion recognition is not limited by the government.

²³ Insur et all, Op.Cit, P. 122.

²⁴ Nonet & Selznick, *Responsive Law*, (Bandung: Nusa Media, 2015), P. 83-85.

²⁵ Ibid, P. 33.

²⁶ Uli Parulian Sihombing et all, *Challlanging the Bakor Pakem*, (Jakarta, ILRC: 2008), P. 28.

The Constitutional Court has held Article 61 paragraph 1 and Article 64 paragraph 1 Population Administration Law unconstitutional violating the following 1945 Constitution articles ; rule of law (Article 1 paragraph 1), non-discriminatory principle (article 28 D paragraph (1)), and legal certainty (article 27 paragraph). The Author tries to elaborate legal reasonings of the Constitutional Court decision Number 97/PUU-XIV/2016 as follows :

1. Article 61 paragraph 1 and article 64 paragraph 1 of the Population Act which orders the members of the indigenous religion community's religion column in the ID card should be empty violate the principle of rule of law according to article 1 paragraph 3 of the 1945 Constitution. One of the rule of law principle is the protection of human rights where right to freedom of religion and belief is a natural right and not given to the citizens by the state so that the government should be responsible to ensure everyone can enjoy human rights²⁷;
2. The Constitutional Court considers Article 61 paragraph 1 and article 64 paragraph 1 of the Population Act violates equality before the law and le-

gal certainty (article 27 paragraph 1 of the 1945 Constitution) because the articles excludes the members of the indigenous religions in the terminology of the religion so that the members of the indigenous religion cannot receive recognition, guarantee, protection, fair legal certainty and equity before the law.²⁸ The indigenous religions cannot obtain state recognition because the indigenous religions is not part of the official religions.²⁹

3. Constitutional Court considers Article 61 paragraph 1 and Article 64 paragraph 1 of the Population Administration Act are discriminatory because there is a different treatment where the different thing has been treated samely in this sense where the element of citizenship has been put in ID card with different treatment between the members of the indigenous religion and the members of the official religions;³⁰

The author considers the Constitutional Court Decision Number 97/PUU-XVI/2016 makes a more progress than the Constitutional Court Number 140/PUU-VII/2009. According to the former the in-

²⁷ Constitutional Court Decision Number 97/PUU-XIV/2016, P. 150.

²⁸ Ibid, P. 151.

²⁹ Ibid.

³⁰ Ibid., P. 152.

indigenous religions are part of the religion definition but the latter viewed the indigenous religions are not part of the religion definition. The author elaborates how the Constitutional Court sees the indigenous religion as a part of the religion definition in the 1945 Constitution. According to the legal reasoning of the Constitutional Court Verdict Number 97/PUU-XIV/2016 the Constitutional Court uses of legal history interpretation to find the meaning of the religion in the 1945 Constitution. Once drafting article 28 E paragraph 1 and paragraph 2 of the Constitution, the drafter put the word of religions and belief in the second amendment of the 1945 Constitution separately.³¹

In the case, the Constitutional Court referred to the discussion of Article 28 E paragraph 1 and paragraph 2 of the 1945 Constitution drafting in 2000.³² Also, the legal issue in this case is on the matter of human rights whether right to freedom of religion and belief of the indigenous religion members are violated by the articles of the Population Act that why the Constitutional Court considers more on the application of Article 28 E Paragraph 1 and 2 of the second amendment of the 1945

Constitution than article 29 Paragraph 1 of the 1945 Constitution.³³

A historic interpretation method is one of the legal interpretation methods. According to Pitlo and Sudikno Mertokusumo, historic interpretation is the explanation of the Act history which has two kinds of legal interpretations; legal history and act history.³⁴ Legal A legal history interpretation is to understand the Act in the whole of legal history context, while an Act history interpretation is to find the meaning of the Act as the drafters viewed the bill once they drafted the Bill.³⁵ An Act interpretation is mentioned as a subjective interpretation because the interpreter puts subjective views on the Bill drafting himself/herself.³⁶

Legal history interpretation is related to the original intent of the drafter. Kent Greenawalt argues "Original intent is judges can infer from the decision something about what the member of the legislative branch thought, and even they can more confidently infer what administrative officials believed at enactment"³⁷ The Constitutional Court in the case uses of

³³ Ibid.

³⁴ Sudikno Mertokusumo & A.Pitlo, *Legal Finding Chapters*, (Jakarta: PT Citra Aditya Bakti, 1993), P. 17-18.

³⁵ Ibid.

³⁶ Sudikno Mertokusumo, *An Introduction To Law*, (Yogyakarta: Liberty, 2008), P. 173.

³⁷ Kent Greenawalt, *Legislation : Statutory Interpretation : 20 Questions*, (New York: New York Foundation, 1999), P. 234.

³¹ Ibid, P. 144.

³² Ibid, P. 143.

legal history interpretation because the justices considers the original intent once the drafters of the second amendment of the 1945 Constitution discussed the terminology of the religion during the second amendment discussion at People's Council Representative (the MPR) in 2009. The Justice finds original intent from the members of the MPR in the meeting records of Commission A of the MPR in 2000

The Constitutional Court decisions number 140/PUU-VII/2009, and number 97/PUU-XIV/2016 have same legal issue on whether the religion in indigenous community is a part of the religion definition in the 1945 Constitution. But such two Constitutional Court decisions have a different answer on the same legal issue. The constitutional court decision number 140/PUU-VII/2009 held the religion in indigenous community is not part of the religion definition according to Article 29 paragraph 2 of the 1945 Constitution, while the constitutional court decision number 97/PUU-XIV/2016 held the religion in indigenous community is part of the religion definition according to Article 28 paragraph 1 D and E of the 1945 Constitution.

Both the Constitutional Court decisions number 140/PUU-VII/2009 and

number 97/PUU-XIV/2016 have used legal history interpretation particularly legal history on the 1945 Constitution and its amendment drafting. The Constitutional Court decision number 140/PUU-VII/2009 focuses on the legal history of Article 29 paragraph 2 of the 1945 Constitution. But the Constitutional Court decision number 97/PUU-XIV/2016 focuses on the legal history interpretation of Article 28 E paragraph 1 and 2 of the second amendment of the 1945 Constitution. As the result of the decisions is different where the Constitutional Court decision number 97/PUU-XIV/2016 says the drafter putting different position between the religion and the belief in Article 28 E paragraph 1 and 2 of the second amendment of the 1945 Constitution. A consequence of the different position between Article 28 E paragraph 1 and 2 the belief is part of the religion definition that why the religion column on the ID card should not be filled by the belief (the Penghayat Kepercayaan) to those who are members/followers of the religions in indigenous community.

In a civil law system there is a law principle namely "Lex Posterior Legi Priori" to determine the conflict of the existing laws. Lex Posterior Legi Priori means the current law is more prevalent than the

previous law.³⁸ The law principle can be applied in a case if there are two laws on the same issue and hierarchy so that the current law is more prevailant than the previous law.³⁹ The Author can argue the Constitutional Court decision has same level with the laws/acts that why the current Constitutional Court decision number 97/PUU-XIV/2016 is prevailed to determine whether the religion in indigenous community is part of the religion definition in the 1945 Constitution.

CONCLUSION

- a. The Constitutional Court decisions number 140/PUU-VII/2009 and number 97/PUU-XIV/2016 has used legal history interpretation to find a solution whether the religion in indigenous community is part of religion definition in the 1945 Constitution, but those decisions have different result;
- b. The Constitutional Court decision number 140/PUU-VII/2009 focuses on the the legal history interpretation of Article 28 D paragraph 1 and 2 of the 1945 Constitution, while the Constitutional Court decision number 97/PUU-XIV/2016 focuses on the le-

gal history interpretation of Article 29 paragraph 2 of the 1945 Constitution;

- c. According to the legal principle of Lex Posteriori Derogat Legi Priori the Constitutional Court decision number 97/PUU-XIV/2016 is more prevailant than the Constitutional Court decision number 140/PUU-VII/2009.

Recommendations

- a. The Government and the House of Representative shall consider to review the Act Number 1/PNPS/1965 related to the issue of whether the religion in indigenous community is part of the religion definition in the 1945 Constitution;
- b. There must be a socio-legal research on the implementation of the Constitutional Court decision number 97/PUU-XIV/2016.

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