

PRIORITY RIGHTS OF INDIGENOUS PEOPLE WITH RESPECT TO SUSTAINABLE TOURISM DEVELOPMENT

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Abstract

This research is aimed to find out and analyse priority rights of existing indigenous people in accordance with Article 19 Paragraph (2) of Act Number 10 of 2009 concerning Tourism. Significant tourism development could help increase the revenue of indigenous people. This research employed normative method where statute, conceptual and several other approaches were employed in the research. The legal research materials used involved Acts, books, glossaries, encyclopedia, and others. The result of the research reveals that the priority rights of indigenous people exist only to meet the need of materials as the right of workers, consignment agreement, and management while there are still some other rights in terms of religious values, cultural indigenous values, rights to preserve the environment and to preserve natural resources. On the other hand, the regulation in Article 19 Paragraph (2) is not supported by Article 53 and Article 54 stating that those in charge of managing tourism industries are those officially certified by the Department of tourism and business certification body. In other words, the priority rights have not been perceived by those as addressed, as the articles mentioned are regarded incomplete in terms of their norms (incompleteness of norm); there is no further explanation either in the government regulation or in other forms of regulation, leading to the urgency of legal interpretation to implement it.

Keywords: priority right, indigenous community, tourism.

1. Introduction

Development is often and mainly addressed to increasing economy of society, state revenue, and local revenue. This demand urges government to implement sustainable development. One of the development programs that could help grow the economic activities of the society is in tourism industry, which significantly helps improve the quality of indigenous communities. Tourism development accelerates the development of a country, increases economy of the society, and brings the welfare to the state and this development is expected to keep the state competitive among other countries.

It is recognised worldwide that tourism sector significantly helps improve the welfare of a country where the rights of indigenous communities have been respected since they are the former owners of the area where tourist destinations take place. Therefore, it is possible for their rights to be met as long as they are involved in the process of the development of tourism industry starting from planning, implementation, supervision and evaluation.

The recognition of indigenous people is stipulated in United Nations Declaration on the Rights of Indigenous People¹ Article 32 Paragraph (1):

Indigenous peoples have the rights to determine and develop priorities and strategies for the development or use of their land or territories and other resources”.

It is inevitable that every individual always expect to live a welfare life, and this expectation urges them to try their best to develop themselves to be free from poverty and to be able to use the existing natural resources.

National Development Plan must be executed in accordance with Article 2 of Act Number 25 of 2004 concerning National Development Plan Systems. It states that the objective of the national development plan is elaborated as follows:

- 1) National development is performed according to democracy and the principle of togetherness and justice. The development must also be sustainable, environmentally sound, and independent, all of which could be performed by keeping the balance of the national advancement and unity.
- 2) National Development must be performed systematically, according to plan, in integrated way, entirely, and responsive to change.

¹ Article 32 Paragraph (1) United Nations Declaration concerning Rights of Indigenous Peoples

- 3) The system of national development plan must be performed based on the general principles of state administration.¹
- 4) National Development System is aimed to:
 - a. back up the coordination among actors involved in the development;
 - b. guarantee the existence of integration, synchronisation, synergy among regions, spaces, time zones, governmental functions and among central and regional areas;²
 - c. guarantee the linkage and consistence of planning, budgeting, execution, and supervision;
 - d. optimise people participation;³ and
 - e. guarantee the achievement of efficient, effective, fair, and sustainable resources development”.

The primary principle of the sustainable development of tourism industries is to back up the performance of tourism based on the principles of: 1) merits; 2) kinship; 3) justice; 4) balance; 5) independence; 6) preservation; 7) participation; 8) sustainability; 9) democracy; 10) equality and 11) unity.

All state's components could contribute to support the rights of indigenous people to avoid any right violation that may be the consequence of the tourism development. Therefore, the government, private sectors and indigenous communities should work together for the sake of the national tourism development, including that taking place in the provincial area or in the regency/municipality.

Priority rights held by people is regulated in Article 19 Paragraph (2):

“Every individual living in the area of a tourist destination holds the following priority rights:

- a. right to become a worker/labour;
- b. right to do consignment agreement; and/or
- c. right to manage⁴

The Article asserts that priority rights are only given to indigenous people where not all people hold equal rights. They hold the right to become workers/labours, the right to be involved in a consignment agreement and to manage sustainable tourism. This should lead them to an access to proper job, better salary, and a better life. The opportunity to work given by the government or by private sectors shows that the government is still concerned with the development of indigenous people.

The priority rights given are to let the people use natural resources through tourism, which may deal with: a) tourist attractions; b) tourism areas; c) transportation services for tourists; d) tour services; e) food and beverage; f) accommodation availability; g) amusement and recreation; h) other tourism-related activities; i)

¹ General principles of State Administration comprise the following: 1. Legal certainty principle where the fundamental of laws and regulations, obedience, and justice in every policy of state administration are prioritised; 2. Principle of order required in state administration. This principle serves as a fundamental of order, uniformity, and equality in state administration control; 3. Common interest principle focuses on public welfare that is aspiring, accommodating, and selective; 4. Transparency principle gives access to people to gaining correct, honest, and non-discriminative information on state administration without overlooking protection for individual rights, community rights, and state confidentiality. 5. Proportionality principle prioritises equality between rights and obligations in state administration; 6. Professionalism principle deals with skills based on code of conduct and provision in laws and regulations; 7. Accountability principle suggests that all activities and results of state administrations must be accountable towards the people who hold the highest sovereignty of a state according to existing laws and regulations; 8. The development is conducted by central, provincial, local, and municipal governments, businesses, and people. The coordination of the development at the governmental level consists of development executors and planners

² Regional areas have certain administrative borders. Area is a space comprising land, sea, and air as a unity of a region where human and other forms of life live in, carry out activities, and survive. The time is defined as the period of development; the period can be annual, middle term, and long term. Such an intention demands development plan arranged based on the principle of sustainable and consistent development from period to period.

³ People is defined as a person, a community of people, including people themselves or legal entities responsible for the execution and the results of the development. People can serve as funders, actors, those who are benefitted, or those risked. Participation is to be involved in providing accommodation as needed in the process of development plan.

⁴ A) becoming a labour or a worker in the area of sustainable tourism industries is regarded as a priority right. B) Consignment is the right of individuals to obtain commodity which can be sold in tourism areas while the payment can be done later. C) Management is the right of every individual to manage the existing natural resources to be used to support tourism activities, such as providing transports at tourist spots to support the mobility of the visitors.

tourism information service; j) tour and travel consultant; k) tour guide service; l) water tourism; and m) spa.¹

The article does not mention anything related to the rights of the indigenous people, since they have different characteristics compared to the people in general and to the people living in the city. The people in general here are defined as immigrants from other regions and have decided to reside in particular areas. Indigenous people, on the other hand, are the native people born or at least have been in those particular areas for a long time ago even before the areas transform into tourist destinations. The idea of the transformation usually begins due to the fact that the areas are seen to have unique potential of tourism other regions do not.

The priority rights mentioned in Article 19 Paragraph (2) are restricted to labours/workers, consignment, and business or management, all of which are the basis to meet the daily needs but this article does not mention any guarantee for the people's priority rights to maintain religious values, to develop the cultural values, and to preserve the environment and its natural resources. In other words, this article bears the incompleteness of norm in terms of its implementation. The absence of values not mentioned in the article surely has impacts on the indigenous people.

Some articles are lack of norms, where there is no further explanation of the article. This lack limits the priority rights of indigenous people through existing complicated procedures and requirement.²

Overall, the incompleteness of norm is represented by the condition in which other priority rights involving religious values, indigenous culture, and clean and preserved environment, other natural resources and incompleteness of norm itself are not mentioned.

On one hand, the people hold priority rights/ primary rights to work, right to do consignment and to manage. On the other hand, Article 52 does not elaborate people empowerment initiated by the government and regional government as the exception to Article 53 and Article 54 stating that workers and managers in tourism industries must be officially certified.

Poverty can be seen as a social issue commonly found in societies. This condition has reached rural areas. However, the reality is that rural areas with wider spaces and lands usually have lower level of prosperity than suburban areas which are smaller.

All the issues mentioned earlier bring to following problem to solve: what is the legal implication caused by the incompleteness of norm on priority rights of indigenous people?

2. RESEARCH METHODS

Research method is defined as a methodology or a technique to give answer to the problem. The use of the methods should be relevant to what is needed by the researcher to minimise any obstacles that may get in the way of the research activity.

This research is categorised into normative legal research with statute, conceptual, historical, philosophical, and environmental approaches. The materials needed were obtained from the existing literature.³

¹ More information on Article 14 of Act Number 10 of 2009 concerning Tourism is explained as follows: a) Tourist attraction involves cultural tourist attraction and artificial tourist attraction, b) Business in tourism is usually aimed to develop and/or manage the tourism industry of a certain area to meet the need of tourism, c) the provision of transportation service is where special transports for tourism are provided for the sake of the tourism activities, d) tour services are usually run by travel agencies. These services involve tour itinerary and tour service itself, including tours to holy lands for pilgrims. Travel agents involve accommodation and ticket reservation and travel documents services, e) food and beverage are provided by cafés, culinary service, bars, or restaurants where the business must also be supported by cooking utensils and food processors. F) Accommodation here involves inns, cottages, hotels, caravans or camping grounds built in the tourism areas. G) Amusement and recreation involve stage performance, karaoke, cinema, and other forms of recreational activities aimed for tourism, h) Other tourism-related activities involve meeting room service, incentive tour, conference room service, and exhibition. More specifically, this point assists group tour for staff or partners given as a reward by the office where they work for, exhibition conducted to disseminate information and to promote goods and services at national, regional, and international level, i) Tourism information service provides data, news, features, photographs, video, and research results on tourism distributed in the form of printed media and/or electronically, j) tour and travel consultant gives recommendation and suggestion on feasibility study, planning, business management, research, and marketing in tourism industries, k) tour guide serves as to give service and/ or coordinate tour guides to give information on tourist attractions to visitors, l) water tourism is related to water sports or tourism including their infrastructures. Water tourism usually takes place in water area such as sea, beaches, river, lakes, and dams, m) spa gives treatment to visitors, integrating water therapy, aroma therapy, massage service, spices, healthy food and drink, and physical activities aimed to balance body and soul according to the Indonesian tradition and culture.

² Article 52 of Act Number 10 of 2009 concerning Tourism

³ Ibid., p. 181 - 184

3. RESULTS AND DISCUSSION

3.1. The Principle of Priority Rights for Indigenous People

Priority can also be defined as primary, the primary rights supposedly obtained by indigenous people to manage tourism. These rights are mentioned in Article 19 Paragraph (2) of Act Number 10 of 2009 concerning Tourism. The rights only regulate things related to materials and economy, while they are not closely concerned with other forms of priority in terms of the life of the indigenous people.

The existence of indigenous people are crucial to not only help them cope with their economic need, but they play an essential role in maintaining the values which exist among the communities and in preserving the environment of the tourism industries. There are several things that are supposed to be regulated regarding priority rights of the indigenous people:

1. Religious values

Religious values surely give inner peace to the indigenous people and they encourage people to respect God more and make them more thankful to the Almighty. The government should facilitate them with prayer houses and the people should be given their freedom to follow certain religions they believe in. Religious values play an important role in giving recognition to the existence of a certain religion, its development, its contribution to the state, and its function for the indigenous people.

The study of the religious practices can be further explained in the following four principles¹: historical explanation is used to explain the existence of a religion since the day it was first born, since it was first developed to the next level. Secondly, structural explanation is required to explain the existence of a religion regarding the main actors involved in the growth of a religion. It explains crucial points serving as the basis that forms the community of a certain religion. Thirdly, explanation of cause is used to explain the existence of a religion in a community by referring to the condition of the people before the religion started to exist. Fourthly, functional explanation is to explain a condition aimed to run the religion in a community.

2. Cultural values

Cultural values of indigenous people need to be preserved through generations, as they represent the uniqueness of the areas. Tourist attractions need to be present to show the cultural values of the areas in addition to the existing tourist spots available. Cultural values serve as social sub-systems involving: substance (existing regulation), structure (organisation), culture, facilities and infrastructure, and the people per se as the legal subject. Maintaining the existing values will surely give beneficial contribution to tourism in Indonesia.

3. Preserving environment

Preserving environment is crucial for healthier and cleaner environment. This is one of aspects that could make tourists feel at home when they visit their destinations in Indonesia and it certainly gives benefits to indigenous people. Indigenous people must be responsible for the preservation of the environment and for keeping them from irresponsible individuals. With their priority right to manage and keep their environment, it is expected that they feel the sense of belonging to the nature. Managing natural resources must be based on noble values clinging on to the indigenous people. The main objectives of environment preservation² are to: a) protect Indonesia from pollution and/or environmental damage; b) provide security, health, and life of human being; c) guarantee life and ecosystem sustainability; d) maintain the environmental sustainability and its functions; e) achieve balance of environment; f) guarantee the justice for present generation and future generation; g) guarantee the recognition and protection of environment-related rights as part of human rights; h) control the appropriate use of natural resources; i) achieve sustainable development; and j) anticipate the issue of global environment.

4. Other environmental values

The values also exist in other forms of natural resources preservation such as protecting coral reefs from irresponsible parties. This needs urgent attention since the impact may violate the satisfaction of tourists expecting to enjoy the coral reefs as valuable natural resources. Spring water also needs to be preserved from aridity and wild animals from poaching.

Priority rights need further explanation since there is still incompleteness of norm in the article mentioned earlier.

3.2. Legal Implication on the incompleteness of Norm

The incompleteness of norm is caused by the incompleteness of substance in Article 19 Paragraph (2)

¹ Ketut Wirata, *Kebijakan Pengelolaan Wisata Ekoreligi Berkelanjutan Berbasis Masyarakat Hukum Adat Bali*, Surya Pena Gemilang Publishing, 2015. p. 26.

² Article 3 of Act Number 32 of 2009 concerning Environmental Protection and Management

which mainly regulates priority rights restricted to the rights as workers, rights to be involved in consignment agreement, and rights to manage tourism. However, Article 53 and 54 suggest that those deserving job in tourism industries must be officially certified as tourism managers. Unfortunately, indigenous people residing in the areas of tourism are not eligible to work due to the requirement they have not fulfilled.

Legal interpretation is required in order to find out the clarity of norms in Acts made by the members of the House of Representatives, and studying the incompleteness of norm takes the observation of law making process in the House of Representatives.

The making of Acts concerning tourism is believed to always refer to previous scientific research or academic papers used as the basis of making law from article to article. The incompleteness of norm is caused by the fact that those articles are left unexplained in government regulations concerning the definition of the articles. This leads to subjective interpretation by some individuals. In the law making, aspects like conflict of norm, vacuum of norm, and vagueness of norm and even incompleteness of norms need to be taken into account.

3.3. Legal Interpretation used as an Explanation in terms of Incompleteness of Norm

Indonesia is a state of law (*Rechtsstaat*), not a state of mere power (*Machtstaat*). All actions taken must be based on law not on power of or arbitrarily by the state or state officials. The law is also provided to protect human rights of the state.

Law provides protection for human rights. However, it sometimes exists to restrict or even violate the human rights in a legal system. Therefore, regulations and acts are prioritised.

Legal interpretation according to Bagir Manan comprises:¹ 1) understanding meaning, principle, or legal method, 2) bridging legal facts and legal methods, 3) appropriately, fairly, and correctly executing implementation and enforcement of law, 4) connecting legal methods to social changes to keep the legal methods actual and to meet the expectation and the dynamic of the people.

Legal interpretation is used by judges as an instrument to develop the revision of law by looking at the phenomena existing in the societies. Judges always consider the change in social dynamic of communities when doing interpretation.

Interpretation only takes place when what is stated in the law is not in line with what takes place in reality, so law enforcers manage to find out the existing reality before a decision is made. The decision made serves as the basis of jurisprudence in which the former decision of previous case can be the basis of the incoming decision of the same case.

The interpretation of law in book should be able to make law. The articles with the incompleteness of norm are to be interpreted by judges to provide clearer meaning of the articles given. Therefore, judicial power represents the state power which is independent to execute the law and justice according to *Pancasila* and the 1945 Indonesian Constitution for the sake of the state of law of Indonesia.²

All rules made will change in societies. It is the responsibility of the judges to carry out the interpretation to gain the relevance to the regulations.

Several legal interpretations in legal studies in regard to the incompleteness of norm in Article 19 Paragraph (2) in connection to Article 52, 53, and 54 of Act concerning Tourism are explained as follows:

1. Grammatical Interpretation of Law

Grammatical interpretation is carried out by the judges in which a linguist is involved to interpret terms in an Act. The judge or a linguist delivers the explanation regarding the terms appropriately and correctly according to their competence. In other words, grammatical interpretation is to understand an Act that mainly refers to the accepted terms or phrases to be used.³

Grammatical interpretation is aimed to interpret texts or laws and regulations according to the daily use of a language that can be easily understood. Interpretation method involves etymological and terminological interpretation, both of which represent the simplest way of interpreting a text.

The priority rights in Article 19 Paragraph (2) are defined as follows: priority rights are primary and fundamental, the most essential rights in tourism.

Priority rights are held by indigenous people, which should allow them to be directly or indirectly involved in tourism. Indigenous people should also have their right to be involved in consignment agreement regarding storing goods to be sold in tourist areas and they hold the right to manage the tourism.

These rights give them wider access to acting based on their priority rights. It can also be understood that priority rights do not belong to those outside the tourism areas. The only issue is that indigenous people have no experience, are not well educated, and have no money to start a business. This condition has diverted

¹ M. Natsir Asnawi, *Hermeneutical Putusan Hakim pendekatan multidisipliner dalam memahami putusan peradilan perdata*, Yogyakarta: UII Press, 2014, p. 20.

² Act Number 48 of 2009 concerning Judicial Power of the Republic of Indonesia

³ Chainur Arrasjid, *Dasar-Dasar Ilmu Hukum*, Jakarta: Sinar Grafika. 2001. p. 88.

the opportunity to more qualified outsiders.

Despite the fact that Law has regulated priority rights for indigenous people, there are still several impeding factors faced, bringing the rights even further away from indigenous people. The responsibility of the central and local governments to tackle priority rights-related problems must be performed especially concerning their education and empowerment, or the welfare for the people will be slowly achieved.

2. Historical Interpretation of Law

Historical interpretation of a law is inseparable from academic articles based on philosophical, sociological, juridical, and historical principles in line with the regulations that apply. The historical interpretation is carried out by studying and observing the objectives of law making and all that are related to the sessions in the House of Representatives. The historical interpretation is broken down into two as follows:

1) The interpretation of the history of law (*rechtshistorische interpretatie*) is defined as a legal interpretation carried out by probing into the history of how law is formed up to how the law develops. Historical interpretation is considered wide as it involves the stipulation of law ranging from the legal system that is no longer effective to that that takes into effect. This interpretation could also consider how the law is fundamentally formed so that it can be clearly and more profoundly understood.

Still regarding the historical interpretation, Act Number 10 of 2009 is formed before the Act Number 9 of 1990 concerning Tourism was made. The Act did not cover the aspects of life of the people including their priority rights. Seeing that revenue from tourism keeps increasing and that the tourism in several countries develops, the House of the Representatives of Indonesia amended Act Number 9 of 1990 to Act Number 10 of 2009 concerning Tourism.

2) Historical interpretation of the stipulation of Act (*wetshiorische interpretatie*) is an interpretation based on the provision of Act but it brings only narrow scope of interpretation, where the process how the law is made is observed in order to figure out the intention and objective of the law making. This interpretation is performed by probing into the history that shapes the related regulation in which legal principles in the regulation are considered. This interpretation is aimed to find out the intention and objective of the law making in the legal studies as a legal drafting which takes philosophical, sociological, historical, and juridical bases in bill. This is to give clues to judges about the intention of law making.¹

Act Number 10 of 2009 concerning Tourism must be profoundly studied by means of historical interpretation to find out the process of how act is made along with its articles. This initiates the Article 19 Paragraph (2) and Article 52, 53, and 54. The law making is mainly focused on the relevance of articles. It is aimed to prevent any misinterpretation of law as elaborated earlier. This also allows us to probe more profoundly into the inconsistency or consistency of regulations.

3. Sociological Interpretation of Law

This is an interpretation aimed to find out the intention and objective of the law making. When the implementation of law is not relevant to the existing pattern of the life people live, sociological interpretation is required. This interpretation, also known as teleological interpretation, refers to objective or social expectation, meaning that this interpretation not only looks at the legal texts from the law book. This interpretation gives soul to the law made so that it is in line with the growth of the people (law in action). Therefore, the out-dated law is relevant to the social growth at present time (up to date).

Sociological interpretation is required for the development of societies to take the regulation as a binding law to the people. This interpretation looks more into the interests of indigenous people and the benefits given. It is expected that no more misinterpretation of the articles takes place.

4. Hermeneutical Interpretation of Law

Etymologically, hermeneutical is derived from Greek 'hermeneuein' meaning 'to interpret'. Hermeneutical is as a guideline or a method of understanding and interpreting authoritative texts.²

Interpretation, according to legal experts, has parallel meaning to 'hermeneutical' itself. Hermeneutical is generally defined as an interpretation of existing texts.³ It is related to language, the language we speak, the language we write, the language we understand. This interpretation is delivered in a more understandable way, which carries objective. Interpretation of law is always related to the substance of the law per se, which has two implied and explicit meaning of the phrases or sentences of the law and the spirit of law. Therefore,

¹ M.Natsir Asnawi, Loc. Cit. p. 22.

² Richard E. Palmer, *Hermenutika: Teori Baru Mengenai Interpretasi di Indonesia* oleh Musnur Hery dan Damanhury Muhammed, Yogyakarta: Pustaka Pelajar, 2005. p. 14.

³ E.Fernando M. Manulang, *Korporatisme dan Undang-Undang Dasar 1945*, Bandung: CV. Nuansa Aulia, 2010. p.23

language is seen important in terms of its consistency of understanding (*suntilitas intelligendi*) and consistence of subtleties (*subtilitas ekplicandi*) for legal texts and legal documents.

When the vagueness of norm is found when one tries to understand a regulation, hermeneutical interpretation is needed. According to Schleiermacher (1768-1834)¹ hermeneutical is an art of understanding the misunderstanding of information in a text or a document by means of methods. This approach is needed when vague meaning of a text is found. Hermeneutical is about how a law is appropriately and correctly interpreted and it may lead to a new interpretation from what has been interpreted.

Hermeneutical is used in three different ways: 1) to say, 2) to explain, 3) to translate.² To say is based on reality and to explain is emphasised more on rationale to make something identified in words clearer. To translate is a specific form of fundamental interpretation process applied to make something more understood.

Hermeneutical is also regarded as an interpretation dimension, meaning that spoken words must be accepted with common sense (a reasonable explanation), and can be clearly understood (translation from another language).

The legal hermeneutical scope is related to understanding or a method of interpreting legal texts, legal facts, legal papers, legal documents, legal doctrine, and jurisprudence, all of which are holistically and contextually interpreted.

Hermeneutical interpretation is to firstly understand a situation. It can be described as a condition when a person has understood something, that is the point when interpretation has already taken place. Hermeneutical is the construction of meaning of texts by describing the desire of a creator in the forms of mind, feeling, and intention.

When Article 19 Paragraph (2) concerning priority rights to become workers/labours, to be involved in consignment agreement and /or management is hermeneutically interpreted, this article is inseparable from the three meanings just mentioned in the previous paragraph which involves to say, to explain, and to translate. As a consequence, the meaning of the sentences written in the Article can be entirely understood as a hermeneutical interpretation, such as the phrases: the people residing in and around the tourism areas, the people having priority rights or primary rights, the rights that only fit to indigenous people. Understanding the whole context is essential to help reveal the words that are difficult to understand.

The integration between understanding texts through the three dimensions and elaborating the sentences to something more understandable and as relevant to the reality will bring clearer understanding of the meaning of a sentence that is interpreted. It is expected that readers could understand how the sentences in the Article are aimed to inform.

Hermeneutical interpretation is performed to help understand articles to articles so that the regulations aimed can be well understood, and its connection to reality is clearly accepted, and it then leads to the truth because it is properly translated so that it does not require any further interpretation.

4. Conclusion

The issue discussed in this research brings legal implication where indigenous people cannot meet the requirements as stated in Article 19 Paragraph (2) mentioning preservation of religious values, cultural values, environment and its natural resources due to the incompleteness of norm. In comparison to Article 52 concerning education and training as part of people empowerment, Article 53 and 54 imply that rights to get a job and manage tourism industries are restricted to those officially certified. Therefore, the incompleteness of norm surely fails to guarantee the priority rights of indigenous people. Tourism plays an essential role in improving the welfare of the indigenous communities but it seems that the existing regulation is not in line with the objective of achieving welfare.

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¹ In Joko Siswanto, *Horizon Hermeneutical*, Yogyakarta: Gajah Mada University Press, 2017, p. 5

² *Ibid* p. 7

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