

## Recognition Of Indigenous Legal Community For Indigenous Forest (A Legal Historical Review)

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### ABSTRACT

*This study aims to determine and described the legal history of forest management in Indonesia. For this study, regulation of the forest will be analysed in each period of Indonesia legal history, namely the early days of independence, the old order regime, the new order regime, and the reformation era. Method use in this study is normative study, by using statute approach and historical approach. Result of this study can be describe that the legal history of forest arrangement in Indonesia was dynamics, comprises: the control of state toward the land including the customary land/customary forest based on the the right of state to control as stipulated in the 1945 Constitution, and the recognition of the indigenous legal community toward their customary forest.*

**Keywords:** *customary fores; indigenous legal community; recognition.*

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### INTRODUCTION

All natural resources in Indonesia controlled by the state. This is enumerated in The Constitution of Republic Indonesia Year 1945. Forest as one of the natural resources shall use for the greatest prosperity for all of Indonesia people as mandated in article 33 The Constitution of Republic Indonesia Year 1945. This is the legal base for forest utilization.

The promulgation of law regarding forest start since Indonesia was under the Hindia Belanda. The government of Hindia-Belanda had enacted Forest Regalement

at September 10<sup>th</sup>1865. This regalement had amended several times until the enactment of Forest Ordonantie 1927. The title of the ordantie was *Regalement voor het beeher der Bossen van den lande op Java en Madura 1927*. This regalement acknowledge some rights for local community in utilization of forest. Some of those rights were took timber and other forest resources, herding and took grass, as long as it were not for commercialization.<sup>1</sup>

The rights of the indigenous legal community to the forest resources also recognized by international community. This recognition confirmed in the ILO Convention Number 169 year 1989 concerning Indigenous and Tribal People Convention. This convention put an obligation for all government to respect culture and spiritual value of indigenous and tribal people in their relationship with the land where they live or they occupy.

Forest with its wealth natural resources has a high economic value. This can be used as income for state and a capital for state development program. On the other hand management of forest resources conceived social conflict. All over the world forest has been a conflict arena for different parties with their own interest. Conflict in forest sector involved different parties, whether local parties, national parties and international parties. Furthermore, different status between the strong parties and the weak parties become predominate.<sup>2</sup>

In forest conflict, indigenous legal community is the party that oftentimes marginalized. Indeed there are number of human rights violation to those people. Based on KOMNAS HAM report, those human rights violation were:

1. Arbitrary takeover of customary forest / customary forest portion through the designation and /or designation as a forest area, designation of the function of conservation and issuance of its utilization rights to other parties for forest exploitation, plantation, mining, or transmigration;
2. Takeover of customary forest/part of customary forest without notification of the purpose and implications of its use and without the full agreement of the indigenous peoples concerned;
3. Discretionary behavior by police, military and government official toward indigenous legal community.<sup>3</sup>

Intense of conflict over natural resources in Indonesia caused by the unbalance of natural resources tenure between people who depend on natural resource-based economies (land, forest, plantation, environmental service, etc) with the business sector, particularly large scale industrial sector-plantation, forestry and mining. Moreover there are controls by the state which still negate the rights of indigenous people.

On the other hand, the position of of indigenous peoples is recognized and respected by the 1945 Constitution of the Republic of Indonesia. This is as confirmed in Article 18 paragraph B of the 1945 Constitution of the Republic of Indonesia. The recognition of indigenous peoples means that:

*“...indigenous and tribal peoples are recognized and protected as legal subjects and their traditional rights. Factually, this form of recognition is found in various government activities, especially activities related to the existence of indigenous and tribal peoples, including the rights of indigenous and tribal peoples in the utilization of natural resources in terms of forest management to obtain optimal benefits from forest and forest area for the welfare of rhe community.”<sup>4</sup>*

<sup>1</sup> Kph.menlhk. *Sejarah Pengelolaan Hutan*, kph.menlhk.go.id, [accessed at 20<sup>th</sup> September 2018].

<sup>2</sup> Yulia Cahya Wulan. Dkk. (2004). *Konflik Sektor Kehutanan di Indonesia, 1997-2003*, Jakarta: CIFOR, p. 1.

<sup>3</sup> Safrin Salam. (Agustus 2016). “Perlindungan Hukum Masyarakat Hukum Adat Atas Hutan Adat”, *Jurnal Hukum Novelty*, Volume 7, No.2, p. 211.

<sup>4</sup> *Ibid*, p. 210.

Based on description above, we interested in studying the recognition of the rights of indigenous legal community to forests in the perspective of legal history. The period of legal history in this article includes legal products relating to forestry during the old order, new order, and reformation era. The legal issue that will be analyzed in this article is the History of Customary Forest in Indonesia.

## **METHOD**

This research is normative research. Approach use in this study is statute approach that is an approach conducted by analyzing acts and regulation regarding the concern issue.<sup>5</sup> In addition this study uses historical approach.

Source of legal material in this study are from literature study. Types of legal material in this study are primary legal material, secondary legal material and tertiary legal material. The method of obtaining legal material is the study of documents. Approach uses in this study are statute approach, conceptual approach and legal historical approach. Analysis data is descriptive qualitative.

## **ANALYSIS AND DISCUSSION**

### **History of Mastery of Customary Forest in Indonesia**

#### ***Early Period of Independence***

Since Indonesia's independence until now, there have been three periods that influence legal system fundamentally, those are: early period of independence, Old Order Regime, New Order Regime, and Reformation era. In those three eras there are different views concerning forest issue that produce different forest law.

After Indonesia proclaimed independence on August 17, 1945, with reference to Article 33 paragraph (3) of the Republic of Indonesia Constitution year 1945, government began to enact law concerning forest management compatible with the condition of Indonesia as an independence state. Acknowledgment of indigenous legal community confirmed in article 18 of the Constitution of Republic Indonesia. State respect the standing of special regions and all of state's rules regarding those regions shall consider the origin rights of those regions.

Region that has origin rights is a special region. A region may define as special region when it has an original arrangement. The meaning of this original arrangement is *zelfbesturende landschaper* and *volksgemeenschappen* as exemplified in villages in Java, *nagari* in Minangkabau, hamlets and clans in Palembang. The term *zelfbesturende landschappen* can be interpreted as a community that has a self-management system or a indigeneous legal community<sup>6</sup>.

The principle of recognition of the community with the original arrangement is implicitly explained by AA GN Ari Dwipayana and Sutoro Eko that "recognition of the regions that have the original arrangement uses the principle of recognition". This principle is different from the principle known in the regional government system which includes the principles of concentration, decentralization and co-administration. If the principle of decentralization is based on the principle of the transfer of government authority by the government to autonomous regions to regulate and administer government affairs, then the principle of recognition is the recognition and respect of the state for traditional law community units and their traditional rights (community autonomy).<sup>7</sup>

<sup>5</sup> Mahmud Marzuki. (2005). *Penelitian Hukum*. Jakarta:Kencana Prenda Media Group. p.93-95.

<sup>6</sup> Arief Rahman, *Sejarah Hutan Adat Di Indonesia*, [www.academia.edu/24506390/SEJARAH\\_PENGATURAN\\_HUTAN\\_ADAT-DI-INDONESIA](http://www.academia.edu/24506390/SEJARAH_PENGATURAN_HUTAN_ADAT-DI-INDONESIA) [accessed at 8 February 2018]. p.9-1.

<sup>7</sup> *Ibid.*

However, there seems to be a contradiction in the 1945 Constitution. On the one hand Article 18 of the 1945 Constitution confirmed an automatic recognition of the state, of special regions and their original rights, but on the other hand the state is also developing new theoretical foundations for controlling customary land of indigenous legal community through Article 33 paragraph (3) of the 1945 Constitution which states: "The earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people". This article is the construction of the State's Right to Control (HMN), including land. At first glance this looks different from the principle *domein verklaring*. State have the ownership of land so that the state does not act as a ruler is confirmed in *domein verklaring*, whereas the State's right only confirmed "control" not ownership.

Therefore, it can be concluded that norms consisted in The Constitution of The Republic Indonesia Year 1945 are:<sup>8</sup>

- a) Continuing the norms of colonial law laws which provide direct recognition of the existence of indigenous peoples and their rights, including the rights to customary land;
- b) The right of origin carries the implication of automatic recognition by the state of the customary law community unit based on the principle of recognition.
- c) The Constitution of The Republic Indonesia Year 1945 also continues the principle of *domein verklaring* by introducing the construction of the Right to Control from the State (HMN) through Article 33 paragraph 3.

### **New Order Regim (1945-1965)**

At this time, the law which greatly influences the dynamic of management of customary rights is Act Number 5 Year 1960 Concerning Agrarian Principles Rules (UUPA). Actually at this time, there are number of regulations concerning agrarian. After proclamation of freedom, there is a demand over the government to produce new national agrarian law, replace the colonial law which was not accommodated but even detriment the interest of Indonesia people.

Act Number 5 year 1960 Regarding Agrarian Principles Rules (UUPA) recognized the customary rights as stipulated in:

bearing in mind the provisions in Articles 1 and 2 of the exercise of customary rights and similar rights from the customary law community, as long as in reality they still exist, must be such that they are in accordance with national and state interests, which are based on national unity and may not be contrary to other laws and regulations which are higher

However this can be construed that based on government discretion, someday the existence of customary legal community may declared no longer exist or no nevermore meet the qualification as a customary legal community. This condition is an oddity due to the process of forming customary legal community is different from the establishment of institution or other legal entities. There was never any intention that at some point in the future the customary legal community would be dissolve.<sup>9</sup>

Aside to the conditionality of the recognition of the existence of customary rights and its holder, The Agrarian Principles Act also carries the spirit of legal unification. This spirit is expressed in the preamble and the memory of Agrarian Principles Act (UUPA) explanation that stated the following:

*"The spirit of legal unification stipulated by the LoGA severed the norm of legal dualism that was imposed in the colonial period. Marcheche Wet 1870 did not negate the enactment of customary law together with the enactment of customary law together with the enactment*

<sup>8</sup> *Ibid.*, p.12

<sup>9</sup> *Ibid.*, p.11-12

of Western laws.”<sup>10</sup>

The Agrarian Principles Act (UUPA) also regulates in more detail implementation of State-Owned Forest. The memory of the Agrarian Principles Act (UUPA) explanation states the following:

“to achieve what is stipulated in article 33 paragraph 3 of the Basic Law, it is neither necessary nor appropriate, that the Indonesian people or the State acting as landowners are more appropriate if the State, as the power organization of all the people (nation), acts as the Agency Ruler. “Mastered” in this article does not mean “owned”, but rather is understanding, which authorizes the State, as the organization of power of the Indonesian Nation, to the highest level.

- a. Manage and administer allotment, utilization, inventory and preservation.
- b. Determine and regulate the entitled rights over (part of) the earth, water and outer space.
- c. Determining and regulate legal relationship between people and legal actions concerning earth, water and space.

Norms contained in Agrarian Principles Act are as following:<sup>11</sup>

- a. Creating conditionality in the state’s recognition of customary rights and their holders, so as to terminate the automatic recognition using the principle of recognition as regulated by colonial law and passed on by the 1945 Constitution.
- b. Unifying the law, customary law is no longer valid and there is only national agrarian law. This norm terminated the norm of legal dualism carried by colonial law.
- c. Revoke the validity of *domein verklaring* and clarify the technical implementation of State’s mastery rights. it is emphasized that State’s mastery right is different from *domein verklaring*. If *domein verklaring* is “ownership by the state”, “state’s mastery rights” is “control by the state”. However, the state’s right to control, in the memory of the UUPA’s explanation, remains superior and can defeat the ownership of customary rights. The State can marginalized the State can marginalized the rights of other parties, particularly customary rights, in the name of national interest.

### **New Order Regime (1966-1998)**

During the new order, the land reform project launched in the reform of agrarian law also stopped. The new regime began, with full power and land hunger with full power and land hunger. The Suharto government in its two year tenure had created new regulations to open the economy through investments for large corporations.<sup>12</sup>

During the new order regime the forestry policy was to prioritize forests as the main means of raising the economic level. The concept of forest in this era was an industrial-scale forest for controlling land and forest resources. In order to secure this process, through Law No. 5 of 1967 concerning Basic Forestry Provisions, the government continued the negative image of the colonial system in which all forest land was claimed to be property of the state and had to be managed with a system controlled by the government.

### **Reformation Era (1998-Now)**

The reformation era began the issuance of MPR Decree Number 9 of 2001, which orders agrarian reform to be carried out, refers to the Agrarian Principles Rules Act of 1960. During the reform period, there are some legislation that disagreed with the reformation spirit been

<sup>10</sup> *Ibid*

<sup>11</sup> *Ibid.*, p. 15

<sup>12</sup> Hilman Hadikusuma,(2003), *Pengantar Hukum Adat*, cetakan ke 2.Bandung:Mandar Maju. p. 103-104.

revoked, therefore many regulations in the new order period were replaced and adjusted to the spirit of reform, one of which was the revocation of Law No. 5 of 1967 concerning Basic Forestry Provisions, which was replaced by Law Number 41 of 1999 concerning Forestry (UUK). In this law, the State even reiterates its authority over forests through article 5 paragraph (1) "Forests based on their status consist of: a. State forest and b. Forest rights ". Furthermore, in paragraph (2) "State Forest as referred to in paragraph (1) letter a, can be in the form of customary forest". The state phrase added through this law has also become one of the problems that has increasingly wrapped around the indigenous and tribal peoples who inhabit these forest in recent years.

In the Forest Act Number 41 Year 1999 consideration, explaining the legal reasons for the formation of the Act, on the one hand the Act was formed with the spirit of awareness of environmental sustainability and world wide view, and on the other hand, this Act also shall accommodate the dynamics of aspirations and community participation, customs and culture and community values. The existence of this Act shows partiality towards the Indigenous legal community with all its local wisdom.

In Forest Act Number 41 of 1999 regulates Indigenous Legal Communities and customary forest. The Act defines customary forest as The State forest within the territory of Indigenous Legal Community. Thesis rules seem to provide recognition of the existence of customary forest, but this recognition contains pitfalls due to the existence of these customary forests is recognized as the state forest that exist within the territory of indigenous legal community.<sup>13</sup>

Differentiating customary and customary law can be seen from the rules that live in the community and are given sanction for those who violate these rules. According to Malinowski the different between customary and law is based on two criteria, namely the source of sanctions and their implementation. Considering as the habit is the source of sanctions and their application to a centralized force or certain bodies in society.<sup>14</sup> Customary law aims to create peace and promote prosperity for the community. While community rights in customary law comprised both individual and communal rights. One of the communal rights contained in the Agrarian Principles Act is communal land rights (territory) to appoint the land which is the area of the relevant legal environment.<sup>15</sup>

Among the laws in the field of land and other natural resources, Law No. 41 of 1999 concerning forestry (UUK) which was most frequently tested to the Constitutional Court seven times with the position granted three times, twice rejected and twice not accepted, this shows that there are still many constitutional issues contained in the Forestry Law due to the time its formation (1999) was carried out before the amendment of the 1945 Constitution (1999-2002). So it is not surprising that much of the substance of the Forest Act Number 41 of 1999 is not in line and in tune with with the new constitution post amendment. So that the Alliance of Indigenous Peoples of the Archipelago (AMAN) and two indigenous communities namely "Kenegerian Kuntu" and "Kesepuhan" submitted a petition for judicial review of Law Number 41 of 1999 concerning forestry, so that the Constitutional Court granted the request for judicial review through the Constitutional Court Decision N0.35 / PUU -IX / 2012. In principle, the Constitutional Court Decision No. 35 / PUU-X / 2012 concerns two constitutional issues, first regarding customary forests and second regarding conditional recognition of the existence of

<sup>13</sup> Wahyu Nurgorocho.(2014)."Kontitusional Hak Masyarakat Hukum Adat dalam Mengelola Hukum Adat: Fakta Empiris Legalisasi Perizinan", *Jurnal Konstitusi* Volume 11, Nomor 1, Maret 2014, p. 112.

<sup>14</sup> Husen Alting. "Penguasaan Tanah Masyarakat Hukum Adat (Suatu Kajian Terhadap Masyarakat Hukum Adat Ternate)", *Jurnal Dinamika Hukum*, p. 9.

<sup>15</sup> *Ibid*

indigenous peoples. The decision granted the request relating to customary forest, but refused the request to abolish the conditions for recognition of the existence of indigenous peoples, which are contained in the Forestry Law. The decision of the Constitutional Court 35 / PUU-X / 2012 contained several points including:<sup>16</sup>

- a. The Constitutional Court affirmation that the Forestry Law which has included customary forests as part of state forests is a form of neglect of indigenous peoples' rights and constitutes a violation of the constitution. The Constitutional Court in its decision stated that: "placing customary forest as part of state forest is a neglect of the rights of indigenous and tribal peoples" (Decision of the Constitutional Court 35 / PUU-X / 2012. Pp. 173-174). This affirmation should the government more aware of restoring the rights of indigenous peoples who have been deprived or ignored.
- b. Customary forest were excluded from being previously part of state forests and then included as part of the private forest category. This is a consequence of the amendment to Article 1 number 6 of the Forestry Law.<sup>17</sup>

With regard to customary forest, state authority is limited by the extent of the content of the authority included in the customary forest. This customary forest is within the scope of customary rights in the territorial unity (territorial unity) of customary law communities. In its decision, The Constitutional Court overturned a number of words and verses in the Forestry Law. For example, the Constitutional Court abolished the word "state" in Article 1 number 6 of the Forestry Law, so Article 1 number 6 of the Forestry Law became "Customary forest is forest that is within the territory of indigenous and tribal peoples. The Court also interpreted the conditional Article 5 paragraph (1) of the Forestry Law as long as it does not mean "State forest as referred to in paragraph (1) letter a, does not include customary forest" and removes the phrase "and paragraph (2)" in Article 5 paragraph (3).

Article 4 paragraph (3) of the Forestry Law contradicts the 1945 Constitution and does not have binding legal force insofar as it is not interpreted as "forest control by the state, taking into account the rights of indigenous peoples, as long as it is still alive and in accordance with the development of the community and the principles of the unitary state of the Republic of Indonesia which regulated in the Law."<sup>18</sup>

## CONCLUSION

The policy on mastery of customary land/customary forest has existed since the early days of Indonesian independence, with a different system and application based on existing regulation. In the early days of independence, that based on Article 33 paragraph 3 of the 1945 Constitution before the amendment that recognizing the forest under Right to Control from the State. This also applied to the communal land of the indigenous legal community. During the old order regime with the presence of the Agrarian Principles Act, the right to dominate the state was still enforced as confirmed in the explanation of the Act. State's Right to control remaining superior. It defeats the ownership of customary rights. During the New Order era, the concept of forests was industrial-scale forests for controlling land and forest resources. All forest land is claimed to be the property of the state and must be managed by a system controlled by the government, solely for economic purposes. During the forest reform era it was no longer the monopoly of state power, but also the recognition of the rights of indigenous

<sup>16</sup>[https://www.academia.edu/35157974/ANALISA\\_PUTUSAN\\_MK\\_NO\\_35\\_PUU\\_IX\\_2012\\_SENGKETA\\_TANAH\\_ADAT](https://www.academia.edu/35157974/ANALISA_PUTUSAN_MK_NO_35_PUU_IX_2012_SENGKETA_TANAH_ADAT). [accessed at 20 September 2018]

<sup>17</sup> *Ibid.*

<sup>18</sup> <https://www.hukumonline.com/berita/baca/lt5194c9568b9f7/mk-tegaskan-hutan-adat-bukan-milik-negara>. [accessed at 20 September 2018]

peoples. This is as confirmed in the Decision of the Constitutional Court in the Constitutional decision No. 35 / PUU-X / 2012 that customary forests are forests that are in indigenous territories and are no longer.

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