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The Essentials of the Protection of Constitutional Rights of Indigenous Legal Community in the Management of Customary Forests in South Sulawesi Province, Indonesia

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Abstract:

According to the 1945 Constitution, Indonesia is stated as a Unitary State (eenheidsstaat) which is based on law (rechtstaat) rather than power (machstaat). Then, it is divided into several autonomous regions (streekandlocale rechtsgemeenschappen) with the division of their respective affairs or authorities which are further regulated in the relevant law, in accordance with Article 18 paragraph (7) of the 1945 Constitution of the Republic of Indonesia concerning the structure and procedures for administering regional government are regulated in Law. Changes in the pattern of agrarian policy arrangements and including the forestry sector in Indonesia are also strongly influenced by historical factors in the political journey of the agrarian and forestry laws in this country, which certainly has an impact on agrarian policies in Indonesia, as we can look at the agrarian politics journey from the Dutch East Indies era which began with the issuance of agrarisch Wet on April 9, 1870, with the issuance of this law, the owners of foreign capital, the Dutch and other Europeans had great opportunities to conduct business in plantation and forestry. The profits obtained by the owners of private capital were very large from the export of plantation products and forestry, although, on the contrary, the Indonesian people were suffering, because their lands, as a source of livelihood, have been controlled by the colonial government. This agrarian law gave birth to a term or provision known as Domein Verklaring that all lands which were not proven to have eigendom rights overtaken by other people were on the state domain. This agrarian political thinking in the colonial period has influenced the dynamics of policies in the land sector including forestry in Indonesia, resulted in conflicts over the control of forest areas between the indigenous communities who have a history of origins with their existence with State power legitimized by legal products based on the right to control the country (HMN), which was wrongly interpreted by some State Organizations. The author was highly interested in conducting an in-depth study through the research process on how the role of the State or government in an effort to protect the constitutional rights of indigenous communities related to customary forests, which have caused many conflicts over the control of natural resources, including forests within the customary law.

Keywords: Protection, rights, management, custom, forest, constitutional

1. Introduction

Forest is one of the gifts from by God to humans and other living beings, to be protected and managed in order to preserve forest resources and to provide benefits for the survival of His creatures, including humans.

As explained in the holy Quran, the way God created a universe including the forest for its creatures on this earth: "And the earth - We spread it out and cast therein firmly set mountains and made grow therein [something] of every beautiful kind,". (SurahQaf 50:7)

Natural resources, including forests, are entrusted by God to humans to preserve in order to fulfil their and other creatures' needs. Humans are the only creature given reasoning by God, which makes them different from other creatures. With the ability of reasoning, humans can understand something that has not been known, or can understand more deeply something that he already knows both about himself and the nature and the secrets contained therein. The role of humans is clearly significant in efforts to protect and manage the environment, including forest, for the sustainability of today's and future generations.

The great benefits of forest in the life of humans and of other living things need optimal efforts to protect and manage the available forest resources with local wisdom that is owned by indigenous communities who have been living for a long time in and around forest areas, and also require state policies that can regulate the use and protection of forests in a fair and sustainable manner in Indonesia, in order to realize prosperity or welfare for the people. .

This shows the authority given to local governments based on their authority by considering the conditions of their respective regions, including matters in the forestry sector.

The definition of customary forest causes controversies and raises conflicts for forest tenure between the State (government) and indigenous legal communities as forest owners. With this constitutional court ruling, the status of the forest is divided into State forests and private forests, so that customary forests are categorized as owned forests (private forests). On the other hand, it states that customary forests are no longer part of state forests, but are of private forests (Article 5 paragraph (1)).

The verdict of the constitutional court is certainly based on the examination of law number 41 of 1999 concerning forestry with article 18B paragraph (2) of the 1945 constitution states that:

"The State recognizes and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law".

The constitutional court firmly views that several articles contained in law number 41 of 1999 concerning forestry are very contradictory to the 1945 Constitution, so that there is a need to change the law to be able to provide justice for indigenous peoples to use customary forests.

The lands belonging to indigenous communities, including their forests, which were considered to be unable to prove their ownership rights, were automatically controlled or owned by the colonial government. However, the Agrarisch Wet policy was sharply criticized by the Dutch law scientists, including Prof. Cornelis Van Vollenhoven, said that the actions of the colonial government which considered people's agricultural land to be abandoned (after being used for farming) as "State lands" were an injustice and violation of rights.

This reality has finally aroused the indigenous legal communities and AMAN (Alliance of Indigenous Communities of the Archipelago) as an institution that has been working to assist indigenous communities, applying for judicial review to the Constitutional Court (MK) against Law Number 41 of 1999 concerning forestry which is considered not provide a sense of legal justice to indigenous communities related to control over customary territories and their customary forests which the State has claimed as State Forests.

With the decision of the Constitutional Court number 35, according to the author as a deconstruction of legal thought for the world of law in this country, where indigenous communities become one of the legal subjects in legal relationship in this country, then also as people with rights means that indigenous communities have basic relationship with their customary territories and because of that basic relationship, they have the status of people with rights. In this case, the Constitutional Court decided to shift the position of "customary forest" from the "state forest" group and include the "customary forest" as part of the "private forest" group. This is a very basic correction in the amendment to Law Number 41 of 1999 concerning Forestry.

2. Literature Review

2.1. Constitutional Rights Protection

Constitutional rights can be interpreted as human rights which have been explicitly stated in the 1945 Constitution, so that they have also officially become the constitutional rights for every citizen. The difference between constitutional rights and legal rights is that constitutional rights are rights stated in and by the 1945 Constitution, while legal rights arise based on the warrant under the subordinate legislations.¹

Then, the definition of forest can also be based on an emphasis on legal status according to existing laws or regulations. For example, Law No. 5 of 1967 concerning the Basic Provisions of Forestry, it is explained that the forest is a plot of land with trees which is a partnership of living natural life and its natural environment and which is determined by the Government as a forest. Meanwhile, Law Number 41 of 1999 concerning Forestry, states that forest is an ecosystem unit in the form of a plot of land containing biological natural resources which is dominated by trees in the fellowship of the natural environment, which is inseparable from one another.

The implementation of forestry affairs in government control is regulated based on its authority, as be seen in the following diagram:

¹Jimly Asshidiqie, Pengantar Ilmu Hukum Tata Negara Jilid 2, Jakarta, Konstitusi Press, 2006, hlm. 134.

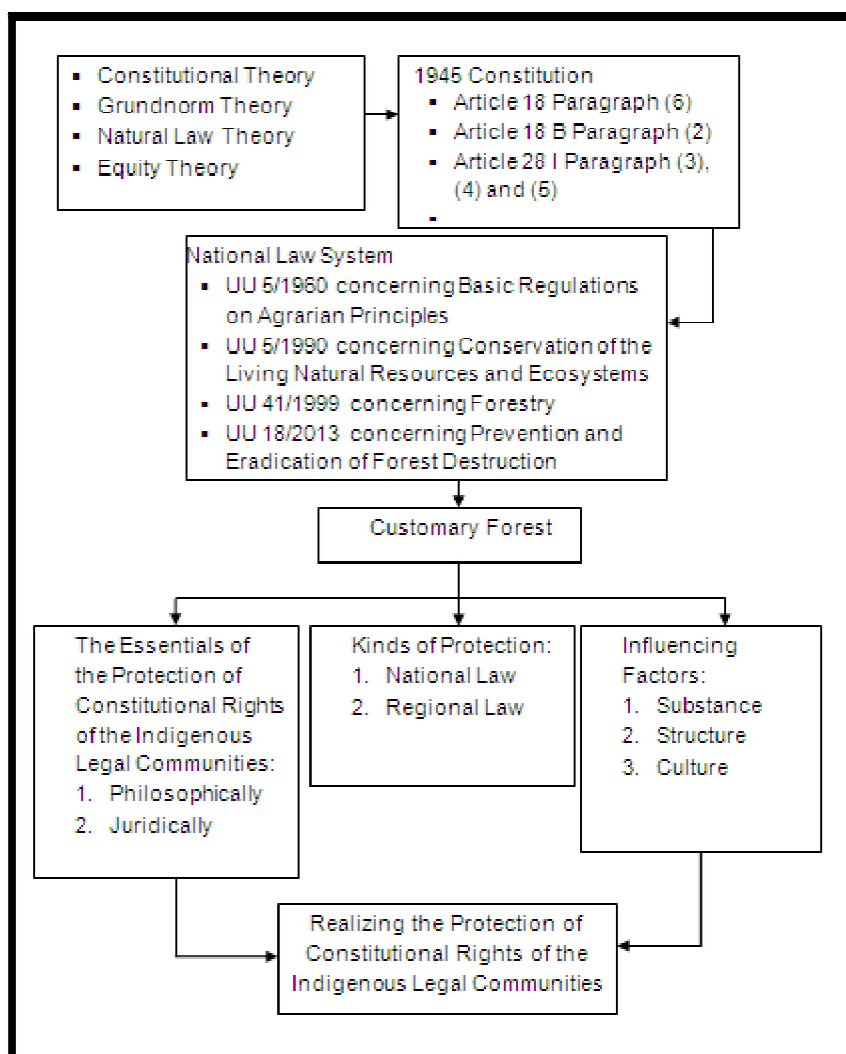


Figure 1: Conceptual Diagram

3. Research Method

The approach used in legal research is an empirical juridical approach or empirical normative. In the book by Abdul Kadir Muhammad, it is said that: "applied law research is a study of the implementation of research or in action on any particular legal event that occurs in society. Implementation in action is an empirical fact and useful for achieving goals determined by the State or by the parties in the contract. Implementation in action is expected to take place perfectly if the formulation of normative legal provisions is clear and firm as well as complete".

This research used descriptive analytical specifications, namely research that seeks to describe legal problems, legal systems, and study or analyze them according to the needs of the research.

4. Results and Discussion

In law No.41 of 1999 on Forestry, it is also explicitly stated that forests are divided based on their status, namely State Forests and Private Forests, and also divided according to their functions, for example protected forests, production forests, conservation forests and others, of which definition will be different according to their respective functions.

In Law No.41 of 1999 concerning Forestry, Article 5 states that, based on their status, forests consist of State forests and Private forests, while customary forests are included in private forests. The term forest law is a translation of *Boswezen Recht* (Netherlands). According to Old English, forest law is "The System or body of old law relating to the royal forest" (Black, 1979:584).²

Idris Sarong Al Mar (1993), said that forest law is a set of rules/norms (unwritten) and regulations (written) that live and are maintained in matters of forests and forestry. Then, the Bureau of Law and Organization, the Ministry of Forestry, formulates that forest law is a collection (set) of both written and unwritten regulations to forest-related activities and management (1992).³

Legislation in the forestry sector in Indonesia has undergone several processes of amendment, as shown in the following table:

²Salim, H.S.S.H.,M.S., Dasar-Dasar Hukum Kehutanan, 2003

³Salim, H.S.S.H., M.S., Dasar-Dasar Hukum Kehutanan, 2003

Year	Achievement/Process
1967	Issuance of Law No. 5 of 1967
1990	Various parties consider the need to revise the main forestry law by holding various discussions, seminars and workshops.
1993	The Minister of Forestry submitted an academic text on the Forestry Bill that just replaced Law No.5 of 1967.
1993	The proposal was received by the President.
1993 - 1998	Preparation of the draft Forestry Bill by considering input from various community groups. For a period of five years (1993-1998) there were no less than 11 concepts of forestry bill made.
1998 - 1999	Inter-Department Meeting was held to finalize the draft of Forestry Bill.
April 1999	The Forestry Bill was received by the President and submitted to DPR (House of Representatives)
April – September 1999	The process of discussion in the DPR (House of Representatives)
30 September 1999	The issuance and ratification of Law No. 41 of 1999 concerning forestry

Table 1

There are some principles in the implementation of forestry law, as follows⁴

4.1. Principle of Benefits

This principle means that the implementation of forestry must provide the maximum benefit for the prosperity of the people, as explained in our constitution, Article 33 of the 1945 Constitution, that the earth and water and the natural resources contained therein are controlled by the State and used as much as possible for the people's prosperity.

4.2. Principle of Sustainability

The principle of sustainability means that forestry management must pay attention to its sustainability aspects, taking into account the economic, social and ecological aspects. So that forests can continue to provide benefits for today's and future generations.

The objectives of the principle of sustainability of the forest are: (1) to avoid decline or production gap of commercial tree species in the following cutting cycle, and so on, (2) to conserve soil and water, and (3) to protect the nature.⁵

4.3. Principle of People

This principle requires, in the process of implementing forestry, to involve the community, because the community is one of the subjects of forestry law. It has become the mandate or constitutional right of the community to be actively involved in the organization of forestry, for the realization of a just and prosperous society. The process of involving the community in forestry management should start from planning, implementation and supervision, so that there will be synergy built between the parties in forestry management.

4.4. Principle of Equity

This principle focuses on efforts to equity and without a monopoly in the management of forestry, so that there is no inequality or injustice in the process of forest management and protection.

4.5. Principle of Togetherness, Disclosure, and Integration

This principle seeks to establish a partnership between stakeholders in forestry management, while maintaining the principles of justice and transparency. And in forestry management, it is also necessary to pay attention to aspects of integration, where the administration of forestry is also supposed to pay attention to local, national and even international interests.

Article 3 of Law Number 41 of 1999 concerning Forestry, it is explained that Forestry is aimed at maximizing the people's prosperity that is just and sustainable by: a. giving warrant on the existence of forests with sufficient area and proportional distribution; b. optimizing various functions of the forest which include conservation, protection, and production to achieve balanced and sustainable environmental, social, cultural and economic benefits; c. increasing carrying capacity of watersheds; d. improving the ability to develop community capacity and empowerment in a participatory, equitable, and environmentally sound manner so as to create social and economic resilience and resilience to the consequences of external change; and e. giving warrant on equitable and sustainable distribution of benefits.

State forest control is clearly stated in Law Number 41 of 1999 concerning Forestry, in Article 4 Paragraph (1), that All forests within the territory of the Republic of Indonesia including natural resources contained therein shall be controlled by the State for the greatest prosperity of the people. (2) Forest control by the State as referred to in paragraph

⁴Agung Ferdiansyah, Politik Hukum Perundang-undangan kehutanan ditinjau dari dari konfigurasi politik dan karakter produk hukum berkaitan perizinan penggunaan kawasan hutan dalam kegiatan pertambangan.

⁵Salim, H.S.S.H.,M.S., Dasar-Dasar Hukum Kehutanan, 2003

(1) authorizes the government to: a. regulate and manage everything related to forests, forest areas, and forest products; b. determine the status of certain areas as forest areas or non-forest areas; and c. regulate and establish legal relationship between the people and forests, and regulate legal actions regarding forestry. (3) Forest control by the State has to pay attention to the rights of indigenous legal communities, insofar as they are still in existence and recognized, and to avoid conflict with national interests.

Examining this article, it is very clear that the control of the State related to forestry is only limited to regulation, coordination and cooperation in the process of organizing forestry, so there is no element of monopoly in forestry affairs.

4.6. Customary Forest

Law number 41 of 1999 concerning forestry clearly states in Article 1 Point 2 that:

"Forest is an ecosystem unit in the form of a plot of land containing biological natural resources which is dominated by trees in the fellowship of their natural environment, which is inseparable from one another."

This shows the forest is integrated with other ecosystems and supports one another.

Then, as explained in Article 1 Point 6, customary forest is defined as follow:

"Customary forests are state forests that are within the territory of indigenous communities."

The definition of customary forest in Article 1 Point 6 has been amended after issuance of the decision of the Constitutional Court (MK) number 35 of 2012, where the word "State" was abolished because it was considered to be a source of conflict over the status of forest areas, and was considered contrary to law or the 1945 Constitution, Article 18B, states:

"The State recognizes and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law."

With the results of testing the law number 41 of 1999 concerning forestry by the Constitutional Court, Article 1 number 6 has been amended as:

"Customary forests are forests that are within the territory of indigenous peoples."

The word "State" in terms of customary forest has been deleted because it is considered ambiguous, where the government recognizes the existence of customary forests but on the other hand also considers customary forests to be a part of State forests.

After the decision of the Constitutional Court regarding customary forests, it can be interpreted that customary forests are forests owned by indigenous legal communities, because they grow on customary lands which are governed by customary laws, which are used as sources of livelihood, culture and also have religious values for indigenous people.

5. Conclusions

Based on the description of the results of the research and analysis presented above, there are some conclusions drawn as follows:

- There are several principles in the implementation of forestry law, as follows: (i) Principle of Benefits, (ii) Principle of Sustainability, (iii) Principle of People, (iv) Principle of Equity, (v) Principle of Togetherness, Disclosure and Integration.
- Law Number 5 of 1967 concerning Basic Provisions of Forestry, explains that a forest is a plot of land with trees which as a whole is a partnership of living natural life and its natural environment and which is determined by the Government as a forest.
- Customary forests can be interpreted as means that forests owned by indigenous legal communities, because they grow on customary lands which are governed by customary laws, which are used as sources of livelihood, culture and also have religious values for indigenous people.

6. References

- i. Achmad Ali, 2002, *Menguak Tabir Hukum*. PT. Toko Gunung Agung, Tbk
- ii. B.F. Sihombing, 2005, *Evolusi Kebijakan Pertanahan Dalam Hukum Tanah Indonesia*, PT. Toko Gunung Agung, Jakarta.
- iii. Dominikus Rato, 2016, *Hukum Benda dan Harta Kekayaan Adat*, LaksbangPressindo, Yogyakarta.
- iv. Hambali Thalib, Syamsuddin Pasamai, 2009, *Sejarah Hukum (Dalam Dinamika Ilmu Hukum)*, PT. Umitoha Ukhuwah Grafika, Makassar.
- v. Hamza Baharuddin, 2012, *Bunga Rampai Hukum Dalam Kontroversi Isu*, Pustaka Refleksi, Makassar.
- vi. Mohammad Askin, 2010, *Seluk Beluk Hukum Lingkungan*, Nekamtra, Jakarta.
- vii. Noer Fauzi Rachman, (2012), *Land Reform Dari Masa ke Masa*, Sekolah Tinggi Pertanahan Nasional, Yogyakarta.
- viii. Ridwan HR. 2010, *Hukum Administrasi Negara*, Raja Grafindo, Jakarta
- ix. Syamsuddin Pasamai, 2009, *Sosiologi dan Sosiologi Hukum*, PT. Umitoha Ukhuwah Grafika.
- x. Said Sampara, La Ode Husen, 2016, *Metode Penelitian Hukum*, Kretapuka print, Makassar.
- xi. Abdul Rahman Nur, 2018, *Penyelesaian konflik dalam conflict system melalui skema scyut dengan enam sub kategori*, Meraja journal Vol 1 No 1, <https://merajajournal.merajamedia.com/index.php/mrj/article/view/29> [accessed on January 3, 2019]

- xii. Mukmin Muhammad,2018,General Principles of Good Governance in State Civil Apparatus Law, IJIRD Vol 7, issue 7, July 2018,
- xiii. http://www.internationaljournalcorner.com/index.php/ijird_ojs/article/view/137024 ,[diakses tanggal 26 Desember 2018]
- xiv. Nurdin,2018,Kebijakan pembangunan hukum dalam rumusan normatif mengenai negara hukum yang berdasarkan kedaulatanrakyat, Meraja journal Vol 1 No 1
- xv. <https://merajajournal.merajamedia.com/index.php/mrj/article/view/11>
- xvi. [accessed on December 25,2018]
- xvii. 1945 Constitution of the Republic of Indonesia
- xviii. Law Number 23 Year 2014 concerning Regional Government
- xix. Law Number 41 of 1999 concerning Forestry
- xx. Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles
- xxi. Law Number 5 of 1990 concerning Conservation of the Living Natural Resources and Ecosystems