

# The Position of Customary Forests in Indonesia after Constitutional Court's Decision No. 35/PUU-X/2012

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# The Position of Customary Forests in Indonesia after Constitutional Court's Decision No. 35/PUU-X/2012

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Forests in Indonesia based on their tenure status consist of State Forests and Private Forests. So far, based on Law No. 41 of 2019, Customary Forests are included in State Forests. As it is considered to violate the constitutional rights of indigenous and tribal peoples, Law No. 41 of 1999 concerning Forestry was submitted by the Judicial Review to the Constitutional Court (MK). The research method uses a normative legal approach with secondary data. Data analysis was carried out in a qualitative descriptive method. Based on the decision of the Constitutional Court Number 35 / PUU-X / 2012 against Judgment of Law No. 41 of 1999 Concerning Forestry, Indigenous Forests are no longer a part of State Forests but are placed in the category of private forests. As a follow up to the decision of the Constitutional Court Number 35 / PUU-X / 2012, the Ministry of Environment and Forestry of the Republic of Indonesia issued Ministerial Regulation Number: P.32 / Menlhk-Setjen / 2015 on private forests. The regulation outlines that the stipulation of customary forests into private forests is carried out in two stages : (1) Recognition of the existence of indigenous peoples or customary rights through Regional Regulations (Perda). (2) Determination of the Minister of Environment and Forestry over customary forests into private forests. There are several provinces in Indonesia that have established Indigenous Forests including the Provinces of Jambi, Lampung, West Kalimantan, Central Kalimantan, Central Sulawesi, Southeast Sulawesi and South Sulawesi. Therefore, other provinces that have customary forests must be proactive to immediately make a local regulation about the existence of customary law communities or rights, which is one of the conditions for establishing customary forests.

**Key words:** *Position, Customary Forest, Private Forest.*



## **Introduction**

The existence of indigenous peoples and their rights have been guaranteed by the 1945 Constitution of the Republic of Indonesia which is the Republic of Indonesia's Constitution. Therefore, the customary law community has a constitutional position in the Unitary State of the Republic of Indonesia. This is confirmed in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia which states that: "The state recognizes and respects the customary law community units along with their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, regulated by Law " (The 1945 Constitution of the Republic of Indonesia).

Apart from the 1945 Constitution of the Republic of Indonesia, the customary law community is also recognized in the Decree of the People's Consultative Assembly of the Republic of Indonesia, which is affirmed in MPR Decree Number IX / MPR / 2001 Article 5 letter J which states that agrarian reform and natural resource management must be based on the following principles: "Recognizing and respecting the rights of indigenous and tribal peoples and the cultural diversity of the nation over agrarian and natural resources" (Decree of the People's Consultative Assembly of the Republic of Indonesia Number IX / MPR / 2001).

Customary law communities are also recognized in Basic Agrarian Law, as affirmed in Article 5 which states that: "The agrarian law that applies to land, water and space is customary, as long as it does not conflict with national and state interests, which are based on national unity, with Indonesian socialism and with the regulations contained in this law and with other laws and regulations, everything by heeding elements that rely on religious law" (Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles).

Customary rights as traditional rights of law communities are the authority according to customary law owned by certain law communities over certain areas which constitute the environment of their citizens in order to take advantage of natural resources, including land for their survival and life, which arose from external and internal relations between generations and uninterrupted between the customary law community and the area concerned (Regulation of the Ministry of Agrarian Affairs / Head of the National Land Agency Number 5 of 1999). Until now, land ownership by humans gave birth to the concept of customary land ownership, namely ownership of land with the nuances of local community habits that continue to apply from descendants for subsequent generations to the birth of local regulations called traditional land (Sarkawi, 2014). Customary forests are part of the territory of indigenous and tribal peoples. The rights possessed by indigenous and tribal peoples to



manage forests are derived from the delegation of authority to control the state granted by the state (Abdul, 2011).

The 1945 Constitution of the Republic of Indonesia, which has regulated the rights of indigenous and tribal peoples to forests, is a general guideline. Technical implementation is regulated by the regulations below. The decline in the spirit of the constitution into the laws below became problematic. Law Number 41 of 1999 concerning Forestry has been considered to be challenging by several parties as it shows that there is a wrong mindset in carrying out the constitutional mandate to guarantee the rights of indigenous and tribal peoples over Customary Forests.

Many customary territories which are customary forests are recognized by the government as a unilateral forest area and subsequently cause overlapping recognition that causes conflicts, including human rights violations. The rights of indigenous and tribal peoples are clearly protected as human rights, as affirmed in Law Number 39 of 1999 concerning Basic Human Rights Provisions. In Article 6 paragraph (1) it is stated that: "In the context of upholding human rights, differences and needs for indigenous and tribal peoples must be considered and protected by law, the community and the government." Paragraph (2) maintains that: "Cultural identity of indigenous and tribal peoples, including rights to customary land is protected, in harmony with the times" (Law Number 39 of 1999).

As it is considered to violate the constitutional rights, the customary law community submitted a judicial review of Law Number 41 of 1999 concerning Forestry to the Constitutional Court. Judicial review of Law Number 41 of 1999 concerning Forestry was filed by the Alliance of Indigenous Peoples of the Archipelago (AMAN), the Unity of the Kenegerian Kuntu Customary Community and the Cisitua Congregation of Indigenous Peoples' Community with the Constitutional Court with registration number 35 / PUU-X / 2012. Petitioners submitted material tests to the Articles contained in Law Number 41 of 1999 concerning Forestry relating to the status of customary forests and conditional recognition of indigenous and tribal peoples, which on May 16, 2013 was partially granted by the Constitutional Court.

According to the Constitutional Court, the 1945 Constitution of the Republic of Indonesia has guaranteed the existence of customary law community units along with their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia regulated by law as contained in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. Even though it is called an adat [illegible] law community, such a society is not static. The description of indigenous peoples in the past is likely to have changed. Even customary law communities with their customary rights in various places, especially in urban areas have started to thin out



and some no longer exist. Such a society has changed from a society of mechanical solidarity to one of organic solidarity. A society of mechanical solidarity almost does not recognise the division of labour, emphasise togetherness and uniformity, individuals must not stand out, generally do not know how to read and write, self-sufficient needs (*autochton*), and making important decisions are left to the elders of the community (*primus inter pares*).

In some areas of Indonesia, legal communities are still characterized by mechanical solidarity. Such a society is unique and recognised (*respected*) and respected by the 1945 Constitution of the Republic of Indonesia. On the contrary, the organic solidarity community has known various work divisions, the position of individuals is more prominent, the law is more developed because it is rational and deliberately made for clear purposes (Constitutional Court Decision Number 35 / PUU-X / 2012).

Based on Constitutional Court Decision Number 35 / PUU-X / 2012 Article 1 number 6 of Law Number 41 of 1999 position concerning Forestry "A customary forest is a state forest within the territory of indigenous peoples" was declared contrary to the 1945 Constitution of the Republic of Indonesia 1945 and changed to "Customary forests are forests that are within the territory of indigenous peoples" ( Constitutional Court Decision Number 35 / PUU-X / 2012).

### **Research Method**

This study uses a normative legal research method by means of a literature review . Secondary data are used , namely Constitutional Court Decision Number 35 / PUU-X / 2012 against Ruling of Law Number 41 Year 1999 Concerning Forestry, journals, books and related laws and regulations.

Data analysis was carried out in a qualitative descriptive manner. The analysis phase started from data collection, this data was then presented by selecting, systematically and juridically classifying in order to find out the specific problem related to the research. Subsequently, the writer interpreted and compared theories and concepts from secondary data consisting of scientific books, journals, and related legislation and opinions from legal experts.

### **Discussion**

Forests as sources of Indonesia's natural resources are based on Article 33 paragraph (3) of the Republic of Indonesia's Constitution which states: "The earth, water and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people" ( 1945 Constitution of the Republic of Indonesia). The essential point is that the state or government has the authority to manage, utilize maintain and regulate legal actions over forest control by certain legal subjects.





In the forestry sector, the mandate of Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia in particular (*lex specialis*) is regulated by Law Number 41 of 1999 concerning Forestry. In the context of the control and management of forest resources, Article 4 paragraph (1) of Law Number 41 Year 1999 concerning Forestry states that: "All forests within the territory of the Republic of Indonesia including natural resources contained therein shall be controlled by the state for the maximum prosperity of the People" (Law Number 41 of 1999).

Forests are fundamentally sources of natural resource owned by Indonesia at the highest level and controlled by the state as an organization of power for all people, used to achieve the greatest prosperity for the people in the sense of nationality, prosperity and independence. Accordingly, forests are "controlled" by the state, but are not "owned" by them, rather as stipulated in the provisions of Article 4 paragraph (2) of Law Number 41 of 1999 concerning Forestry : "The control of forests by the state authorizes the government to: (a) regulate and manage all matters relating to forests, forest areas and forest products; (b) designate certain areas as forest areas and forest areas as non-forest areas; (c) regulate and establish legal relations between people and the forests, as well as regulate legal actions regarding forestry " (Law Number 41 of 1999).

The promulgation of Law Number 41 Year 1999 concerning Forestry has caused problems with customary forests' legal status. Customary forests' legal status forest in the forestry law is classified as state forest. As the status of customary forests is part of state forests and there are consequences for "the right to control the state", the rights of indigenous peoples and their traditional rights to forests in their own customary territories are marginalized, even neglected by the state. Moreover, it is intended for public interest or the community's social function.

The legal status of state forests and customary forests is of course two different things. State forests based on the "right to control the state" are public (*lex generalis*) and the position of the government is based on Article 2 paragraph (2) of Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles, while customary forests along with their customary rights or traditional rights have special status (*lex specialis*) and customary law is applied in accordance with Article 5 of Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles. Essentially, "the right to control the state" does not apply in the law of customary community rights and customary rights or traditional rights, although the functional relationship between the two can still possibly be regulated independently. Thus, government policies based on "state control rights" over state forests and customary forests must be different.



According to Article 1 paragraph (4) of Law Number 41 of 1999 concerning Forestry, state forest is defined as a forest that is on land and not encumbered with land rights. Therefore, customary forests certainly cannot be categorized as state forests, due to the fact that customary forest areas have inherent rights to land owned by indigenous and tribal peoples who were born from generation to generation since time immemorial. That is, customary forests were not born and sourced from the state, they existed long before this country was established. During this time, forest areas have often been claimed as state forest. In fact, state forests will never exist as long as private forests and customary forests have not been established by the government.

The status of customary forests which are categorized as state forests according to Law Number 41 of 1999 concerning Forestry has created an attitude of injustice for indigenous and tribal peoples. The struggle to claim recognition of customary forests resulted in the Alliance of the Indigenous Peoples of the Archipelago (AMAN) together with the Unity of the Kenegerian Kuntu Customary Community (Riau) and the Cisitua Kesepuhan Customary Law Community (Banten) conducting a *judicial review* of Law Number 41 Year 1999 concerning Forestry at the Constitutional Court. The Constitutional Court made a very important decision by stipulating that customary forests are no longer part of state forests under the Ministry of Environment and Forestry, but rather are part of an indigenous territory and fully owned by indigenous and tribal peoples.

Constitutional Court Decision Number 35 / PUU-X / 2012 contains several key points including:

- (1) The statement of the Constitutional Court Law Number 41 of 1999 concerning Forestry which so far has included customary forests as part of state forests is a form of neglect towards indigenous peoples' rights and are a form of constitutional violations.
- (2) Customary forests are excluded from being previously part of state forests and then included as part of the category of private forest.
- (3). Holders of land rights are holders of rights to forests.
- (4). State authority over state forests and customary forests is different.
- (5). Affirmation that indigenous peoples have rights ( Constitutional Court Decision Number 35 / PUU-X / 2012).

There are several implications following the issuing e of the Constitutional Court ruling, including:

- (1). The state is no longer allowed to take over the rights of the customary law communities that they manage except for reasons needed for the development of public interest as



regulated in Law Number 2 of 2012 or Presidential Regulation Number 71 of 2012 governing land acquisition for public use.

- (2). After Constitutional Court Decision Number 35 / PUU-X / 2012, the position of a customary forest is no longer that of a state forest, but as a forest similar to the rights of those held by the customary law community.
- (3). Customary forests are within customary right areas, so the government should respect the jurisdiction of indigenous peoples.

After Constitutional Court Decision Number 35 / PUU-X / 2012, the Ministry of Forestry issued Circular No. SE 1 / Menhut-II / 2013 concerning Constitutional Court Decision Number 35 / PUU-X / 2012 dated May 16, 2013 addressing Governors, Regents / Mayors and Heads of Forestry Services throughout Indonesia. In this presentation the Minister of Forestry emphasized that the determination of customary forest areas remained with the Minister of Forestry. The stipulation is carried out that the adat [illegible] community has been predetermined by the Regional Government through a Regional Regulation. As such, there are two stages for indigenous peoples to manage customary forests. The first phase is to encourage local government recognition of the existence of indigenous peoples and the second is to encourage determination by the Minister of Forestry.

In 2015, the Ministry of Environment and Forestry issued a Regulation of the Minister of Environment and Forestry of the Republic of Indonesia Number: P.32 / Menlhk-Setjen / 2015 concerning Private Forests. The Ministerial Regulation regulates the procedure for implementing the determination of private forests, where customary forests are included in the category of private forests (Regulation of the Minister of Environment and Forestry of the Republic of Indonesia Number). In addition there are 2 (two) important points: first, the determination of customary forests (private forest) must first be recognized by the local government as essential to the existence of indigenous peoples through local legal products (regional regulations), secondly, after the recognition by regional government regarding the existence of indigenous peoples through regional legal products (regional regulations), the Minister of Environment and Forestry of the Republic of Indonesia must further verify and validate the determination of customary forests (private forest) in accordance with their functions through the Director General. With the understanding of differentiation of the status of state forests with customary forests which is a category of private forest, it is necessary for the whole community and stakeholders to respect and provide support for indigenous and tribal peoples to enjoy their rights in to survival .

Furthermore, evaluating Constitutional Court Decision No. 35 / PUU-X / 2012 putting indigenous forests within the category of forest rights is an indication of carelessness from the Constitutional Court ruling. Apart from the controversy related to the role of the Constitutional Court as a negative legislator that invalidates the norms of a law because it is





declared contrary to the provisions of the constitution, the Constitutional Court's Decision seems to be trapped in the provisions of the norms in Act Number 41 of 1999 concerning Forestry. When referring to the provisions of the 1945 Constitution of the Republic of Indonesia, the right to control the state is found in Article 33 paragraph (3), where traditional rights recognized in Article 28I paragraph (3) are regulated, also relating to the protection of citizens' property rights as in Article 28H paragraph (4). (The 1945 Constitution of the Republic of Indonesia).

In Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles, namely in Article 2 paragraph (2), customary rights as in Article 3, and other individual land rights are stipulated in the provisions of Article 16 Article 53. (Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles). By observing the logic of thinking established in the Constitution as well as in Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles we can state that customary forests should be positioned as different from private and state forests because of their communal ownership. However, by its decision the Constitutional Court actually classifies customary forests within the category of private forests. It is of particular concern for the Constitutional Court to pay more attention to provisions relating to land rights in the national land system, so that all existing laws and regulations are harmonious and do not overlap.

After issuing the Constitutional Court Decision, there has been a shift in the position of customary forests, from what was previously included in state forests to become part of private forest. The shift in status of customary forests certainly has a good impact on the customary law community. Indigenous and tribal peoples are no longer confronted with rules that discriminate or override their customary rights. The state as the authority holder of the right to control the state has limited authority over customary forests according to the extent of their authority, because following the Constitutional Court ruling, customary forests are no longer part of state forests, instead are part of rights forests (Safrin, 2016).

Customary forests (also called *marga*, *pertuanan* forest, or other designations) are within the scope of customary rights because they are in a territorial unit (territorial integrity) of the customary law community, based on *leluri* (*traditio*) who live in the atmosphere of the people and have a central governing body that is authoritative in its entire territory. As customary forests are part of private forests, the holders of rights to forests are the customary law community (rights holders) themselves. Customary law communities can now manage customary forests without fear of outside interference (Sukirno, 2016). In addition, after issuing Constitutional Court Decision No. 35 / PUU-X / 2012, the constitutional rights of indigenous peoples have been restored. Indigenous and tribal peoples are in full authority over their customary forests and the state no longer has the authority to have control over them.



### ***Conclusion***

Based on the results of the discussion, it can be concluded that after the issuing Constitutional Court Decision Number 35 / PUU-X / 2012, there has been a shift in the position of customary forests, from those previously entered into state forests to become part of private forests. This shift is a form of recognition of the rights of indigenous peoples by the constitution and certainly has a good impact on customary law communities. Indigenous and tribal peoples are no longer confronted with rules that discriminate or override their customary rights. The state's authority is limited to customary forests according to the extent of the authority included in them, because after the Constitutional Court ruling the customary forests are no longer a part of state forests, but instead is part of rights forests.

### ***Recommendations***

The Ministry of Environment and Forestry which is the authority in the field of forestry is to implement Constitutional Court Decree No. 35 / PUU-X / 2012 and encourage and facilitate local governments to follow up on the decision by creating a Regional Regulation (Perda) regarding the existence of customary law communities or customary rights.



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