# SYNERGY FOR THE EXISTENCE OF CUSTOMARY FORESTS AFTER THE DECISION OF THE CONSTITUTIONAL COURT NUMBER 35/PUU-X/2012 REVIEW OF LAW NO. 41 OF 1999 CONCERNING FORESTRY

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## ABSTRACT

*In Law Number 41 of 1999 concerning Forestry, it is stated that customary forest is a state forest located within the territory of customary law communities (MHA). This creates injustice and great loss for MHA. And it is clearly against the constitution of the Republic of Indonesia, the 1945 Constitution. After the Constitutional Court Decision Number 35 / PUU-X / 2012 it was stated that customary forest is forest located in the territory of MHA, and no longer State forest. This is a decision that MHA all over the country have been waiting for. But in reality in the field there are still many customary forests that are still claimed unilaterally by the Government. And it is made worse by the process of conditional recognition of the existence of MHA through a Regional Regulation which is considered very difficult and convoluted. In this regard, the problem discussed in the research is what are the inhibiting factors for returning customary forests to MHA after the Constitutional Court Decision Number 35/PUU-X/2012?*

*This research is a normative legal research. With a statute approach and a historical approach. This study uses secondary data, namely data obtained through primary legal materials as well as secondary legal materials and tertiary legal materials, namely materials that provide instructions for primary legal materials and secondary legal materials. The focus in this qualitative analysis is a study related to the integration of the substance (material) of laws and regulations regarding the synergy of the existence of customary forests after the Constitutional Court Decision.*

*The results of the study show that the inhibiting factors for the return of customary forests are a) Conditional recognition of Article 67 paragraph (2) of the Forestry Law which is considered administratively burdensome to MHA. Although there has been a legal product of regional regulations concerning the recognition of MHA, the return of customary forest cannot be enjoyed automatically. There are still steps as stipulated in Article 4 paragraph (1) and paragraph (3) of the LHK Ministerial Regulation. It is made worse by the absence of budgetary political alignments in the determination of customary forests, a) Differences in perspectives across ministries (sectors). The current sectorial laws are still considered unfair to MHA, b) Another contributing factor is the lack of good will from several local governments.*

**Keywords:** Synergy, Customary Forest, Constitutional Court Decision 35/PUU-X/ 2012.

# INTRODUCTION

## Background

With regard to forest status as stipulated in the Forestry Law and the problems with the Basic Agrarian Law (UUPA), that is what causes the position of customary forests in this decentralization era to be at a "crossroads" (Warman, 2010). Based on the provisions of Article 1 letter (f); Article 5 paragraph (1) and its explanation; and Article 37 of the Forestry Law shows as if the state is the owner of all forests and the existence of customary forests is only a kind of "kindness" of the state towards indigenous peoples. This is not in accordance with the principles contained in the provisions of Article 1 paragraph (1) of the UUPA which states that the entire territory of Indonesia is the unity of the homeland of all the Indonesian people, who are united as the Indonesian nation.

The Forestry Law (UUK) Number 41 of 1999, which has been in effect for many years, has been used by the government as a legal umbrella to fortify arbitrary actions to take over the rights of Indigenous Peoples (MHA) over their customary forest areas to be used as state forests, which in turn In fact, in the name of the state, it is given and/or handed over to the owners of capital through various licensing schemes to be exploited without paying attention to the rights and local wisdom of the surrounding MHA who depend heavily on the existence of the forest.

One phenomenon that is at the root of the problem is the conflict between MHA and the authorities and entrepreneurs who use their customary forests that occur in most parts of Indonesia. And it is very unfortunate that the government tends not to protect the rights of its citizens. We are very aware that if MHA is faced with the power of the state as a ruler and the power of big entrepreneurs, MHA tends to be in a weak bargaining position, both economically, socio-culturally and politically. The status of customary forests which are categorized as state forests according to the Forestry Law has caused injustice and great losses for MHA, not only materially but also the moral burden they have been carrying so far. What causes MHA to be in poverty, expelled from their customary territory, the state allows them to be swayed and often discriminated against by government officials. This is a blurry portrait of MHA's life so far. MHA struggles to demand recognition of customary forests. This is one of the starting points that made the Indigenous Law Community Alliance of the Archipelago (AMAN) together with the Kenegerian Kuntu Indigenous Law Community Unit (Riau) and the Kasepuhan Cisitu Customary Law Community Unit (Banten) file a lawsuit to conduct a judicial review of the Law Forestry to the Constitutional Court (MK).

Customary forests are removed from state forests and then included in the category of private forests. In the decision of the Constitutional Court No.35/PUU-X/2012 it is expressly stated that "customary forest is no longer a state forest", the category of private forest in it must be included in customary forest. The juridical consequence of this decision is that there are three nomenclatures of forest status in Indonesia, namely state forest, private forest and customary forest.

In practice, it can be seen in the field that legal reform has not fully provided a solution in overcoming the problem of customary forest. There are still many visible obstacles in the implementation of the Constitutional Court Decision No. 35/PUU-X/2012, and a major problem for MHA, one of which is the requirement for MHA recognition through local legal products to be able to access and restore their customary forest.

When the Covid-19 pandemic hit the world, including Indonesia, the seizure of customary territories by the state and corporations was still happening, which was accompanied

by acts of criminalization and violence against indigenous peoples and indigenous community fighters and even showed a widespread trend. We certainly still remember the indigenous peoples of Kampong Durian Selemak in North Sumatra, the Rendu indigenous people in Nagekeo, East Nusa Tenggara, the Pubabu indigenous people in South Central Timor Regency, East Nusa Tenggara, the Agabag Dayak people in North Kalimantan and the Kamung Long Bagun in East Kalimantan. When we are fighting against the pandemic at the same time we must also strive to defend our customary territories. The pandemic has actually become an opportunity for capital expansion and exacerbates the expropriation of customary territories in the name of law (Sombolinggi, 2021).

The conditional recognition of the existence of indigenous peoples through Regional Regulations (PERDA) as mandated by the UUK is still valid. In fact, it should be considered that the local political reality of recognition through a regional regulation is very heavy and requires considerable political costs, takes a long time and is expensive. Legal recognition should suffice through a Decree (SK) of the head of the Province/Regency/City only. In connection with the Constitutional Court's decision No.35/PUU-X/2012, the Minister of Forestry has issued Circular Letter No. SE.1/Menhut-II/2013, which states that Regional Regulations remain one of the conditions for the state to recognize the existence of customary law communities.

It should be after the decision of the Constitutional Court 35/PUU-X/2012 that customary forests located within customary law areas can be used according to the aspirations and needs of MHA without ignoring other applicable laws and regulations. Therefore, future customary forest management strategies must also be able to explain and carry out activities in the form of: (i) determination of customary communities, (ii) determination of customary forest boundaries, and (iii) establishment of customary community institutions (Subarudi, 2013). This is in line with the opinion of Sumardjono (2020) who has determined the criteria for determining the existence of ulayat rights. As with any claim to a piece of land, when talking about the customary rights of MHA, the main focus is: (a) who is the subject/holder of the rights; (b) where is the object (its location, area, boundaries); and (c) what is the legal relationship between the subject and the object.

## RESEARCH METHOD

This research is a normative legal research. The approach used is the statute approach and the historical approach (Marzuki, 2011). This study uses secondary data (Soekanto, 2014), namely data obtained through primary legal materials as well as secondary legal materials and tertiary legal materials, namely materials that provide instructions for primary legal materials and secondary legal materials. The focus in this qualitative analysis is a study related to the integration of the substance (material) of laws and regulations regarding the synergy of the existence of customary forests after the Constitutional Court Decision. The focus of this integrated study will be related to the law that is currently in effect, the law that has been in effect as well as to the law that is expected to apply in the future which is described in the form of theoretical thinking.

## RESULT AND DISCUSSION

### Conditional Recognition Article 67 paragraph (2) Forestry Law

The existence of MHA in Indonesia had emerged long before the independence period in 1945 (Soemardjo, 2009) or even existed during the heyday of the kingdom of the archipelago. The existence of indigenous peoples along with their customary land inheritance has also been accommodated in Article 5 of Law no. 5 of 1960 concerning Agrarian Principles. However, in the early days of reform, the spirit of MHA was broken by Law No. 41/1999 on Forestry. A regulation that states that customary forest is a state forest located within the territory of customary law communities. Which in the previous law there was no article that said so.

Either directly or indirectly, since the verdict of the 35th Constitutional Court, MHA in various customary forests have put up signs that read "this is MHA forest, not state forest, this indicates a new spirit from a very long struggle in fighting for MHA rights. Forests that have been part of their survival and life from generation to generation are certainly very natural if they reach the last drop of blood and will continue to fight for it. This should be appreciated as a concrete manifestation that MHA cannot be separated from their customary lands and concrete evidence that they have an emotional connection that cannot be separated from the forest that is their identity.

According to Rikardo Simarmata (2014) related to the idea and concept of the rule of law, the Constitutional Court's decision no. 35/2012 is actually a continuation of the Constitutional Court's "tendency" to limit the state's power over its citizens. The question that needs to be answered is whether the issuance of the Constitutional Court's decision no. 35/2012 are there high hopes for MHA to be able to determine its own destiny?

The real impact of the issuance of the decision of the Constitutional Court No. 35/2012 is that customary forest is no longer a state forest area, but is also not included in the group of private forests (forest areas that have been encumbered with rights, such as community forests). Simarmata views this decision of the Constitutional Court from a doctrinal perspective, it still leaves a number of ambiguities regarding the procedure for determining customary forests, land rights and customary forests and government authority over customary forests (Simarmata, 2014).

Naturally, MHA still has a long way to go in establishing its customary forest. Operational legal steps are still needed, integrated into a unified whole in implementing the Constitutional Court ruling 35 in the field. With all the limitations that are in a weak bargaining position, MHA must continue to be able to struggle to deal with a very complicated administrative process.

Article 67 paragraph (2) of the Forestry Law is considered to be contrary to Article 1 paragraph (3), Article 18B paragraph (2), Article 28D paragraph (1), and Article 28I paragraph (3) of the 1945 Constitution because the regulation of procedures for confirming the existence of MHA is stipulated by Regional regulations are unconstitutional provisions.

Inauguration and the existence of MHA are stipulated by regional regulations (Article 67 paragraph 2), but the determination of customary forest is the authority of the Minister of Forestry (Article 67 paragraph 3). The statement of Article 67 paragraph 2 is not in sync with the statement of Article 67 paragraph 3. The question that arises is whether this Government Regulation regulates customary law communities or regulates customary forests? It is clear that there are contradictions between the provisions of the Forestry Law itself regarding MHA and customary forests (Warman, 2012).

Confirmation of the existence and elimination of customary law communities is stipulated by regional regulations (Article 67 paragraph 2), UUPA and PMA/KBPN Number 5 of 1999 recognizes the customary rights of MHA, while the 1999 Forestry Law recognizes them but with different concepts and procedures. PMA/KBPN Number 5 of 1999 recognizes the existence of ulayat rights and regulates the procedure for recognizing ulayat rights claims outside forest areas, but this regulation is limited in its application to land that has been controlled by applicable regulations.

In Article 3 PMA/KBPN Number 5 of 1999 concerning Guidelines for the Settlement of Problems with Customary Rights of Indigenous Peoples, it is stated that the implementation of the customary rights of MHA as referred to in Article 2 is no longer carried out on parcels of land which at the time the Regional Regulations were enacted as referred to in Article 6 (Moniaga , 2010). From the provisions of these articles, it can be seen that there are overlapping articles between MHA and the Ministry of Forestry.

In the Constitutional Court's decision Number 35/PUU-X/2012, for the first time, the Constitutional Court accepted an applicant who proposed to be a customary law community. Petitioner II from the Kenegerian Kuntu Community and Petitioner III from the Kasepuhan Cisitu Community argue that they meet the qualifications as a customary law community who can submit themselves as petitioners in the judicial review of the law at the Constitutional Court. In Article 51 paragraph (1) of the Constitutional Court Law, it has been determined that customary law communities constitute a special category of applicants in the judicial review.

In these two MHA units, there is no special regional regulation that defines them as customary law communities, as required under Article 67 paragraph (2) of the Forestry Law. In Kampar Regency where the Kenegerian Kuntu Customary Law Community is located, there is Kampar Regency Regional Regulation No. 12 of 1999 concerning Ulayat Land Rights. The regulation regulates customary land rights in general, does not specifically specify that the Kenegerian Kuntu Community is a customary law community. Likewise for the Kasepuhan Cisitu customary law community whose basis for recognizing its existence is also not a regional regulation, but the Lebak Regent's Decree Number 430/Kep.318/Disporabudpar/2010 concerning Recognition of the Existence of the Cisitu Indigenous Peoples Unity of Cisitu Indigenous Elders in Banten Kidul Regency in Lebak Regency. The Constitutional Court's assessment that the two communities meet the qualifications of customary law communities as applicants is the first time in the history of judicial review before the Constitutional Court (Arizona, 2014).

It is clear that the acceptance of the above case filed by AMAN and MHA Kenegerian Kuntu and Kesepuhan Cisiitu by the Constitutional Court is a form of legal recognition by the court of the existence of indigenous peoples. By itself, if we look repeatedly at the provisions in Article 67 paragraph (2) of the Forestry Law which states that a regional regulation as a legal basis or basis for determining the legal status of indigenous peoples must be read as one type of legal basis, it means that in terms of There is still a possibility for other legal reasons beyond that. But what has happened so far seems to be that we are complicated by coercion of the will to have to take a long and winding road. So the question arises, if it can be made easier why should it be complicated? So that the Perda is not the only legal basis, because in practice, recognition of the existence of indigenous peoples is also carried out by the decision of the regent and even by a court decision as was done by the Constitutional Court in this case.

We can imagine if a district/city has more than one (let's call it five) MHA entities that must be established. How much will it cost and how much time should be spent on it. To quote AMAN (2018) notes, since 2015-2018, there have been 42 initiatives from districts and cities to

form local regulations on indigenous peoples. However, until mid-June 2018, out of 42 regions, only 15 regencies and cities have stipulated draft regional regulations to become regional regulations. This condition illustrates that the formation of law through a political process is not an easy thing.

Elucidation of Article 67 Paragraph (2) states that: Regional regulations are drawn up taking into account the results of research by customary law experts, aspirations of the local community, and traditional community leaders in the area concerned, as well as other relevant agencies or parties. However, in the implementation of the determination of customary law communities, there are many obstacles. Determination by Regional Regulation (Perda) through a mechanism that is complicated and takes a long time because it has to go through research by an integrated team and the costs are also not cheap. For this reason, legal breakthroughs are needed in order to speed up the process of issuing regional regulations at a low cost, fast and enforceable.

It can be said that the recognition at the regional level is actually only an administrative action as a follow-up to the recognition of the rights of indigenous peoples in the constitution Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution. Especially considering that the laws mandated by the 1945 Constitution have not yet been formed. to date.

In order to answer the problems that occur in the field and in realizing the inauguration of the existence of MHA over their customary territories as a whole (comprehensive), and to provide new insights, it is necessary to re-apply to the Constitutional Court so that Article 67 paragraphs 1 and 2 of the Forestry Law are judicially reviewed. In view of Article 60 paragraph (2) of the Constitutional Court's procedural law stated that the application for judicial review could be re-done if the content in the 1945 Constitution which became the basis for testing was different from the previous application.

## The Implementation of the Constitutional Court's Decision is Still Involutionary or Running in Place

If the confirmation of the existence of MHA through local regulations has not been implemented, as described above, it will automatically have an impact on the return of MHA's customary forest, which will be hampered in its implementation. By itself, the implementation of the Constitutional Court's decision is still involution or running in place and can be said to be in decline. On the other hand, even though local regulations concerning the recognition of MHA have been issued, forest returns do not automatically be enjoyed. It still requires a big task to carry out the steps for submitting an application for the determination of customary forest to the central government (Ministry of Forestry). Furthermore, the minister will verify and validate the submission of the application.

And must meet the requirements of the application for determination of customary forest. Regarding the map of the area, location and boundaries of customary (forest) areas which until now are still difficult to form due to various factors, including; the overlapping of customary territories between ethnic groups, the difficulty of determining the boundaries of customary territories and the lack of goodwill from the local government to provide recognition for the existence of MHA in their area. This causes the protection of indigenous peoples' rights to their customary forests is less than optimal and even triggers conflicts, the sustainability of customary forests is threatened.

Looking at the sequence of steps that MHA must go through, it can be ascertained that government policies do not reflect a strong commitment to carry out the mandate of the

Constitutional Court's decision, especially the Ministry of Environment and Forestry (KLHK). Logically, of course, the acceleration of agrarian reform in the forestry sector will not work as expected. Not to mention it is made worse by the absence of budgetary political alignments in the determination of customary forests.

For example, for Eastern Indonesia, data from the Indonesian Forum for Budget Transparency (Fitra) was compiled that the realization of social forestry in Tanah Papua is influenced by three main factors. First, the dualism of regulations and policies at the national and regional levels in determining indigenous peoples. Second, the low level of regional commitment to the realization of social forestry in the planning documents. Third, the lack of budget support. Ava Warawarin, Production Forest Management Unit (KPHP) Fakfak said, for two years KPHP only budgeted for office operations. There are no funds available to the field, including for social forestry program assistance. The operational funds, he said, decreased from Rp. 400 million in the first year to only Rp. 200 million in the second year.

Determination (restoration) of rights to customary forests as a way of resolving tenure conflicts within forest areas. Data from the Indonesian Budget Center (IBC) reports that there was a gap between targets and budget politics in 2017. The budget for customary forest activities in 2017, was still very minimal, at 23% or Rp. 2,522 billion, consisting of the central and local government budgets, 77 % for conflict handling, internal services and office services. The minimal budget policy has implications for achieving the target for establishing customary forest. Until 2018, only 17,089.99 hectares were designated as customary forest from the target of the national medium development plan (RPJMN) of 5,008,000 hectares (Arman, 2018).

**Differences in Perspectives across Ministries (Sectoral)**

The current sectoral laws are still seen as unfair to MHA. The winds of reform that have been blowing since mid-1998 have opened up new opportunities. There are at least 5 decisions of the Constitutional Court that affirm the state's recognition of the rights of MHA, including on land or customary/ulayat land. The important thing about these decisions is that the Constitutional Court has formulated criteria and conditionality as well as a more definite recognition process than in the past, which has been a coachman's debate that has led to the denial of the rights of indigenous peoples (Zakaria, 2015).

Prior to the Constitutional Court's Decision No.35/PUU-X/2012 on the review of Law Number 41 of 1999 concerning Forestry, several problems arose with the stipulation that customary forests were state forests. More concretely, some of the problems that arise as a result of this regulation are the discovery of forms of human rights violations against the legal community.

Differences in cross-ministerial (sectoral) perspectives on the Constitutional Court's Decision No.35/PUU-X/2012 on the development of returning customary forests to indigenous peoples can slow down the process of establishing customary forests. In terms of legal substance, these provisions regulate different procedures in granting recognition and protection of the rights of indigenous peoples to customary forests. The implementation of the Constitutional Court's decision through a number of rules is considered biased and creates legal uncertainty and the legal protection of indigenous peoples over customary forests has not been achieved.

**Another contributing factor is the absence of goodwill from several local governments**

Yando Zakaria, Researchers at the Ethnographic Center for Indigenous Communities in Yogyakarta assessed that the policy should be meaningful as an effort to implement the constitutional mandate, but it actually hinders it. Of the 9.3 million hectares proposed by the Alliance of Indigenous Peoples of the Archipelago, 6.5 million hectares are in forest areas and require a regional regulation to obtain recognition of customary areas or forests. Based on data from the Ministry of Environment and Forestry (KLHK), based on the results of the study of the status of legal products, 105 districts or 2.8 million hectares do not yet have legal products and 52 districts or 3.6 million have legal products.

Currently there are approximately 84 regional regulations regarding the recognition of indigenous peoples. These regional regulations mostly regulate the identity or origin of customary law community groups, territorial boundaries, customary laws and institutions, ulayat land or communal land along with their utilization and other matters deemed necessary. In fact, the process for indigenous peoples to obtain recognition until the issuance of regional regulations regarding such recognition is very long and complicated.

The factors that influence the low recognition of indigenous peoples (Arman, 2018) are the lack of political will of local governments to recognize customary law communities, lack of government information in exploring indigenous peoples, and lack of coordination between local governments and indigenous peoples in making a permit or policy on forests. custom. Forms of legal protection of customary law communities over customary forests after the Constitutional Court Decision Number 35/PUU-X/2012, among others:

a) Continuing the inventory of Regional Regulations related to customary law communities;
b) Accelerating the completion of the Draft Law concerning the recognition and protection of indigenous peoples;
c) Issuing the circular letter of the Minister of Forestry No. SE. 1/Menhut-II/2013 dated July 16, 2013 to Governors/Regents/Mayors throughout Indonesia and Heads of Provincial/Regency/City Offices in charge of forestry which contains an explanation of the Constitutional Court's decision;
d) Accelerate the issuance of government regulations on customary forest management as an implementation of Law Number 41 of 1999;
e) Coordination with the Ministry of Home Affairs to encourage local governments to immediately collect data, conduct research and confirm the existence of customary law communities along with their customary territories;
f) If it is proven that the territory of the customary law community based on the Regional Regulation is in a forest area, it is removed from the forest area.

Indigenous community members number 2,359 indigenous communities throughout Indonesia, totaling around 17 million individual members (AMAN, 2020). However, until now only a small number of legal products have received recognition (Malik, 2019). Until 2020, the achievement of customary forest is only 65 units, and even then in 2019, the Minister of Environment and Forestry issued a revision of regulations that are feared to complicate the route of recognition of customary forests, namely the stipulation of Minister of Environment and Forestry Number P.21/Menlhk/Setjen/Kum.1/4/2019 concerning Forests Customs and Private Forests. There are several factors that make the determination of customary forest difficult in practice. One of the issues that arise is the conditional recognition of indigenous peoples in various laws and regulations (Wibowo, 2020).

Experience for almost 20 years since the enactment of Law Number 41 of 1999 concerning Forestry shows that the issue of recognition of indigenous peoples and their

customary territories (customary forests) always intersects with the interests of a group of people (rulers and entrepreneurs) who consider the recognition of customary law communities and customary territories as a threat to their interests. Meanwhile, on the other hand, forums for the formation of laws and policies have always failed to translate the interests of indigenous peoples. This is because the legislature and executive do not understand the urgency of recognizing indigenous peoples and customary territories. Those who understand the issue of recognition of indigenous peoples and customary territories actually see it as a threat to the interests of certain groups.

Local governments have the authority to make regional legal products to recognize customary law communities, their rights and customary territories (customary forests). The diversity of conditions of indigenous peoples needs to be a concern in preparing regional legal products. Local governments together with customary law communities, academics and assistants need to discuss together the definition and criteria of customary law communities that are most appropriate to the conditions in their area. Therefore, specific and mutually agreed criteria are the key to forming a good local legal product (Myrna, 2014).

## CONCLUSION

There are many obstacles faced by MHA in returning customary forests to their owners (MHA). However, these obstacles can be minimized if the government is present and able to make a breakthrough that can protect the existence of MHA and their rights in the form of regional legal products (PERDA), by trying to ward off sectoral egos and create legal products that can support the function of customary forests so that they can be utilized by the community. MHA in a sustainable manner in order to improve welfare. Because the state is here to realize the principle of a just state.

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