

State Recognition and Respect for the Rights of Customary Law Communities in the Maluku Islands Region in the Exploitation of Forest Resources

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Abstract

The Constitution clearly provides recognition and respect for the existence of society customary law in Indonesia is regulated in Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution. However, how is the implementation in the islands such as Maluku Province which has unique characteristics such as cultural, social, religious culture and especially in the utilization of forest resources based on local wisdom that has been maintained for generations. This writing uses a juridical-normative approach. From the results of the writing it can be stated that the centralized system of government development which has so far been practiced through various permits for the management and exploitation of natural resources including forests has resulted in the degradation and function of forests which has resulted in the loss of access to indigenous and tribal peoples in the archipelago, which has led to economic, social and environmental excesses.

Keywords: Customary Law Communities, Forest Resource Utilization, Islands Region

1. Introduction

Regulations regarding the management and exploitation of natural resources in Indonesia are contained in Article 33 paragraph (3) of the 1945 Constitution which states that: water and natural resources contained herein shall be controlled by the state and used for the greatest prosperity of the people". The control of natural resources by the state must be used for the welfare of all Indonesian people, including indigenous peoples who have participated in preserving the existence of these natural resources.

The Indonesian nation is gifted by God Almighty, natural wealth in the form of tropical forest resources which are one of the basic assets of national development to be utilized optimally, fairly, equitably and sustainably for the welfare of the Indonesian people in particular and human life and life in general. Forests as renewable natural resources are susceptible to various influences from human interference and have horizontal and vertical linkages, with the surrounding natural environment, so their management and exploitation must be integrated with the management of other natural resources so that sustainable national development can be realized as practice. Pancasila and the 1945 Constitution.

The recognition of the existence of the Customary Law Community in Indonesia has been contained in the 1945 Constitution and various statutory regulations. Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution states: "The state recognizes and respects indigenous peoples and 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, which are regulated. in law". Article 28I paragraph (3) states that: "The cultural identity and rights of traditional communities are respected in accordance with the times and civilizations".

The recognition of the existence of customary law communities based on Article 18B of the 1945 Constitution serves as a guideline for recognition as well as a form of legal protection for the existence of customary law communities in Indonesia. This recognition means that indigenous peoples are recognized and protected as legal subjects and their traditional rights. In fact, this form of recognition is found in various government activities, especially activities related to the existence of customary law communities, including the rights of customary law communities in the use of natural resources in terms of forest management to obtain optimal benefits from forests and forest areas for community welfare.

Forest exploitation in Indonesia is experiencing a very fast development due to the high interest of economic actors and the large market opportunities. However, considering that the interests of the community, including customary law communities, and cooperatives, are not yet real, the development of forest exploitation has led to the formation of large businesses. Meanwhile, attention to people's economic development did not run smoothly.

For this reason, the economic empowerment of the people, especially the community around the forest, the role of cooperatives, small and medium enterprises have not received real attention.

In the context of management and utilization of natural resources by customary law communities, it is inseparable from the role of the State which regulates such management as regulated in Article 33 paragraph (3) of the 1945 Constitution which confirms the position of the State as a legal entity that regulates the designation and management of forests by citizens including the community. customary law. Through the authority of the State's Right to Control, the goal to be achieved is for the greatest prosperity of the people, in a smaller case, namely the customary law community. The existence of Article 33 paragraph (3) and Article 18B of the 1945 Constitution confirms that customary law communities have the power of *ulayat* territories including customary forests as part of the existence of customary law communities.

Article 25A of the 1945 Constitution affirms that the Unitary State of the Republic of Indonesia is an archipelagic State characterized by an archipelago with a territory whose boundaries and rights are stipulated by law. As a country characterized by islands, Maluku Province consists of small islands having unique characteristics in terms of biophysics, geography, inhabitants, culture and environmental carrying capacity, among others; the various biogeophysical and socio-economic conditions of the community; have large coastal areas and oceans; have linkages and mutual influence between nearby ecosystems; islet with topography wavy until mountainous forms narrow watersheds which greatly affect hydro-logical process; availability clean water and limited groundwater; more land are affected by volcanic eruptions, earthquakes earth, tsunamis, landslides, and tropical cyclones/storms; the area is affected directly by maritime climate; have that environment specifically with populations of its endemic species high; the archipelago mostly still isolated; most of society is helpless, and are more strongly tied to their culture (adatcustoms); encouraging local economic conditions there is migration of people to other areas causing scarcity of human resources quality, in a rural area.

Potential Forests in an archipelago such as Maluku have various types of endemic flora and fauna which have high value and are preserved until now and provide many benefits to the community. Apart from having abundant natural resources, from the social and cultural aspects of Maluku, Maluku is also known for its unique and distinctive culture seen from various kinds of traditional ceremonies or rituals, "*pela and gandong*" traditions and so on, the customary law communities in Maluku in maintaining their function, the carrying capacity and sustainability of forest resources still use local wisdom. Likewise with the forest which is believed by the Maluku customary law community as a home for their life to live and earn a living. A place to carry out various activities to support economic, social, cultural and religious life such as hunting, gathering, performing traditional rituals and so on.

Customary law communities in archipelagic areas have a multidimensional relationship with archipelagic nature, namely land, sea, natural phenomena and archipelagic air, which is a complete unity in the fact of its existence. For indigenous peoples in the archipelago, forests are not just an economic source. Forests are an inseparable part of the entire life of indigenous peoples. Various traditional rituals are carried out as a form of their spiritual relationship with nature. The neglect of the relations of the Customary Law Community in the islands with the land, forests and their territories, the origins of control over land, forests and territories of the Customary Law Community and the history of agrarian politics that has occurred so far has resulted in the destruction of the life order of the Customary Law Community in the archipelago as a whole.

One of the fundamental things in the rules that are enforced by the customary law communities in the archipelago in the preservation of their environment, namely the existence of customary rules and the still strong customary sanctions that are strong for violators. The firmness of this sanction is a control system that is more obeyed by the customary law community in the archipelago rather than the normative form of state law which is often inconsistent with the "*living law*" in the customary law communities in the islands. On the other hand, in practice, state laws and regulations over the areas managed by customary and tribal peoples are actually a driving force for the process of decaying customary values on the one hand, and often provide greater opportunities for the destruction of customary governance over their own natural resources. Granting state permits and concessions that prioritize private, corporate, and large capital owners in the form of Business Use Rights (HGU), Forest Concession Rights (HPH), Mining Business Permits (IUP), Industrial Plantation Forests (HTI), Use Rights (HP), Conservation and the like have proven to be the main entry points

for ecological destruction and loss of rights and the marginalization of indigenous peoples in the archipelago over their land, water and territories.

The government's policy to control the management of customary forests directly or handed over to investors in the form of Forest Concession Rights, which has now been changed to Forest Concession Business Permits (IUPH), often overlaps with the rights of indigenous peoples in archipelagic areas resulting in losses for indigenous peoples in the archipelago. The control and management exercised by the government or investors tends to be done exploratively with the aim of obtaining the maximum profit. From an economic perspective, Forest Concession Rights can provide income for the government's financial budget and for private parties who receive HPH/IUPH provide great benefits, but for indigenous people in archipelagic areas the existence of HPH/ IUPH actually reduces and even closes the rights of communities in these *ulayat* areas. Indigenous peoples in Indonesia have long demanded improved rights to natural resources on their customary lands.

Judging from the social aspect, the implementation of HPH/IUPH often creates unrest in communities whose customary areas are used for HPH/IUPH, because indigenous peoples in archipelagic areas or local communities will be eliminated from their territories, efforts to exclude and impoverish the state in a structured manner can be seen with various utilization permits. Natural resources include forests on small islands in Maluku, such as forest exploitation in the Aru Islands, Tanimbar Island, West Southeast Maluku, mining in Southwest Maluku. Viewed from the environmental aspect, the implementation of HPH/IUPH generally causes quite severe environmental damage, this is due to the vulnerability of the carrying capacity of small islands due to massive exploitation of natural resources including forests and generally HPH/IUPH holders do not do greening or reforestation of forests that have been harvested. Damage to protected forests caused by the implementation of HPH/IUPH and illegal logging resulted in landslides and bad flooding during the rainy season; and the peak will occur global warming (*global warming*) can even cause the loss of these small islands.

The purpose of this research is to analyze and explain how the state's recognition and respect for the rights of indigenous peoples to the use of forest resources in the constitution and secondly to analyze how the implementation of state control over forest resources is related to the rights of indigenous peoples in Maluku Province.

In accordance with the problem and the title of this research, the type of research used is normative legal research, namely research that primarily examines positive legal provisions, legal principles, legal principles and legal doctrine in order to answer legal problems at hand.¹ This study uses two approaches, namely a legal approach which examines various legal foundations, both products of legislation and regulations related to exploitation of forest resources in islands and the second approach is a conceptual approach related to the problem under study.

2. RESULT AND ANALYSIS

2.1 Concept of Forest Exploitation

Natural resources are elements consisting of vegetable natural resources (plants) and animal natural resources (animals) with surrounding non-living elements that form an entire ecosystem². Natural resources have a role in meeting human needs.

Juridically, the definition of natural resources is contained in Article 1 paragraph 9 of Law Number 32 of 2009 concerning Protection and Management of the Environment, which states that natural resources are elements of the environment consisting of biological and non-living resources which as a whole make up ecosystem unity. Rustiadi proposed a more generic definition by providing pre-conditions regarding natural resources. In this definition, it is stated that natural resources are naturally available resources, provided that (1) humans already have or master the technology to utilize them and (2) there is a demand to exploit them³.

According to Article 1 of Law Number 41 Year 1999, "Forest is an integrated ecosystem in the form of a stretch of land containing biological natural resources dominated by trees in their natural environment, which cannot be separated from one another". The existence of forests is a very important matter, this makes forests highly protected by the state, as can be seen from the formulation of Article 4 paragraph (1) of the Law on Forestry which regulates that all forests within the territory of the Republic of Indonesia include the natural wealth contained in it is controlled by the State for

¹ Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Prenada Media, 2005), 35

² KEHATI, *Materi Kursus Inventarisasi flora dan fauna Taman Nasional Meru Betiri*, Malang, (2009): 8

³ E. Rustiadi, S. Saefulhakim dan Panuju, *Perencanaan dan Pengembangan Wilayah*, (Bogor: Institut Pertanian Bogor, 2008), 14

the greatest prosperity of the people. By granting forest control by the state according to Article 4 paragraph (2) of the 1999 Law on Forestry, the government then gives authority to:

- 1) Manage and manage everything related to forests, forest areas and forest products;
- 2) To determine the status of certain areas as forest areas or forest areas as non-forest areas;⁴
- 3) Regulate and determine legal relations between people and forests, as well as regulate legal actions regarding forestry.

Forest control exercised by the state must be exercised with due observance of the rights of indigenous peoples, which in fact still exist and are recognized for their existence and do not conflict with national interests. Forest management is not only about determining forests as protection of climatic lands, water sources and meeting the needs for wood and other products, but forest management must be aimed at utilizing all land for the benefit of the state, even other countries as well. Thus, it will be understood about the hydrological, biological support, soil fertility, economic, social, cultural, recreational and aesthetic functions of the forest as a whole.⁵

Natural resources are not only controlled by the state, but must also be exploited. Natural resources are not only inanimate objects or just unprocessed treasures. It must be used so that its potential can benefit the people. Exploitation of natural resources was initially interpreted as exploitation that has an economic impact, namely the approach to exploitation of natural resources is only an economic approach, however, the development of mature policies to place exploitation of natural resources is not only an economic approach but a non-economic approach is also a principle inherent in exploitation of natural resources⁶.

The conception of exploitation is not only oriented to an economic approach as explicitly stated in international law. *United Nation* through the *World Commission on Environment and Development (WCED)* which formulates that: "*Sustainable development is a process of change in which the exploitation of resources, the direction of investment, the orientation of technological development; and institutional changes are all in harmony and enhance both current and future potential to meet human needs and aspirations*".⁷

The exploitation of forest resources is not only for the sake of economic commodities to achieve state revenue alone, but social and environmental aspects are also inseparable aspects of exploiting forest resources. Regarding environmental aspects, this is not only a principle of exploitation of forest resources, but this aspect even enters the process of exploitation itself. In the context of implementing forest resources exploitation, environmental administrative and technical instruments become an integral part of the exploitation process. Every activity of exploiting forest resource must fulfill an analysis of environmental impacts (AMDAL), environmental management efforts and environmental monitoring efforts UKL-UPL or environmental permits.

In terms of social aspects, sustainable development in the exploitation of forest resources, state policies are still not comprehensive. Even in the articles in the natural resources sector law, it only regulates community empowerment which seems to be limited to procedural and formal arrangements, for example as regulated in Article 108 of Law Number 4 of 2009 concerning Mining and special mining business permits are obliged to compile a program. community development and empowerment. The preparation of these programs and plans is consulted with the government, local government and the community. This has resulted in many social problems arising from exploitation of natural resources, including forests. The problems that most often occur include social conflicts between communities around the area of exploitation of forest resources and those carrying out mining business activities. These social problems are caused by many factors, for example the presence of companies that carry out forest resource business activities that do not provide benefits to the surrounding community. Even the presence of this company causes losses, for example the loss of community livelihoods because the community's fields have been converted into mining areas, plantations and factories. Not to mention the problem of environmental damage caused by exploitation patterns of forest resources that do not pay attention to environmental protection.

⁴Forest area is a certain area designated and/or stipulated by the government to maintain its existence as permanent forest. See Law on Forestry, Law No. 41 of 1999, Art. 1 point 3.

⁵Arifin Arif, *Hutan dan Kehutanan*, (Yogyakarta: Kanisius, 2001), 15

⁶Ahmad Redi, *Hukum Sumber Daya Alam Dalam Sektor Kehutanan*, (Jakarta: Sinar Grafika, 2014), 15

⁷United Nation, *UN Documents Gathering a body of global agreements, Our common Future, Chapter 2: Towards Sustainable Development From A/42/427. Our Common Future: Report of the World Commission on Environment and Development.*

The characteristics of natural resources, especially mining, oil and natural gas which are *non-renewable*, and forestry whose function is difficult and very long to recover, make this natural resource an activity whose land use is not permanent. Juridically, the formulation of social utility for exploitation of forest resources can be carried out through the scheme *Corporate Social Responsibility*.

In Article 74 of Law Number 40 of 2007 concerning Limited Liability Companies, it is stipulated that companies that carry out their business activities in the field of or related to natural resources including forests are obliged to carry out their business activities in the field of or related to natural resources are obliged to carry out social and environmental responsibilities. The exploitation of forest resources must pay attention to the principles of sustainable development which have been legally-normative in various laws and regulations.

With the participation of both foreign and national private capital, intensive and modern forest exploitation is possible by utilizing the experience and expertise of more developed countries in this field. Forest exploitation with modern techniques will give maximum results, if carried out in a large enough area / working area, so that it constitutes large forest product production and industrial projects that contribute to national economic development. Policy and coordination in the context of forest exploitation that is spread throughout the territory of Indonesia, both based on foreign investment and domestic capital, is implemented by the central government, however this does not neglect the interests of the region, where forest exploitation is carried out.

In the event that the forest concession area is burdened with Forest Concession Rights according to the fact that there are customary rights and / or other community rights based on customary law that are still alive, the implementation is regulated in such a way that it does not obstruct the implementation of the Forest Concession concerned in accordance with the Forest Exploitation Work Plan.

In Law Number 41 of 1999 concerning Forestry, the term used for forest exploitation is the use of forest areas as regulated in Article 23 to Article 37 of Law Number 41 of 1999 concerning Forestry. The definition of forest area itself is according to Article 1 paragraph 3 of Law Number 41 Year 1999 concerning Forestry. is a certain area designated and or stipulated by the Government to maintain its existence as permanent forest.

Utilization of forest areas is an effort to make forest areas able to provide benefits and benefits to the welfare of the community, nation and state.⁸ According to Article 1 Paragraph 4 of Government Regulation Number 6 of 2007 concerning Forest Management and Formulation of Forest Management Plans, as well as Forest Utilization, what is meant by Utilization forest is an activity to utilize forest areas, utilize environmental services, utilize timber and non-timber forest products and collect timber and non-timber forest products optimally and fairly for the welfare of the community while maintaining its sustainability. Sustainable forest uses as referred to must meet the criteria and indicators for sustainable forest management. These criteria and indicators cover economic, social and ecological aspects. The purpose of forest utilization is to obtain optimal benefits for the welfare of the entire community in a fair manner while maintaining its sustainability.

2.2. The Concept of Customary Law Communities

The concept of indigenous and tribal peoples was first introduced by C. van Vollenhoven. In his description of the foundations of the legal society organization, C. Van Vollenhoven⁹ emphasized the importance of national groups for legal authority and power. These groups are organized, have authority and power. Because of their dignity and power, this group has the power to force its members. Coercion or legal coercion, if it is violated, it will be subject to sanctions or legal consequences. In his scientific oration on October 2, 1901, C. Van Vollenhoven said that "in order to know the law, it is especially necessary to investigate for the time if and in any area, the nature and structure of the legal community bodies, where the person under control lives a day.

The word "adat" comes from Arabic which means custom. According to A. SuriyamanMustariPide, the occurrence of law begins with the human person which creates "personal habits" and is then imitated by others, then gradually the habit becomes "custom" which must apply to all members of society, so that it becomes "customary law" so customary law is an accepted custom and must be implemented in the community concerned.¹⁰

⁸Salim HS, *Dasar-Dasar Hukum Kehutanan*, (Jakarta: SinarGrafika, 2013), 80

⁹DominikusRato, *Hukum Adat (Suatu Pengantar Singkat Memahami Hukum Adat di Indonesia)* (Yogyakarta: LaksBangPRESSindo, 2011), 84.

¹⁰ A. SuriyamanMustariPide, *Hukum Adat, Dulu, Kini, dan Akan Datang*, (Jakarta: Prenadamedia Group, 2015), 16

Customary law is the original law of the Indonesian people, rooted in customs or a reflection of the basic cultural values of the Indonesian people, which means it is also binding and finding all thoughts recognized by the constitution, the 1945 Constitution which reflects the legality principle of the application of customary law to the Indonesian state as custom or habit.¹¹

Customary law communities are human social communities that feel united because they are bound by common ancestry and / or certain areas, inhabit certain areas, have their own wealth, are led by one or several people who are considered to have authority and power, and have a value system as a way of life and have no desire to separate.¹² Based on this definition, there are six elements of customary law communities:¹³

1. There is a human community that feels united, bound by a feeling of togetherness because of the common ancestry (geneological) and / or region;
2. Inhabit certain areas, with certain boundaries according to their conceptions;
3. Own wealth, both material and immaterial;
4. Led by one or several people as group representatives, who have legal authority and power / are supported by the group;
5. Have values as a guide in their social life.
6. There is no desire on the part of the group members to separate themselves

Regarding the term indigenous peoples, formulated by the Alliance of Indigenous Peoples of the Archipelago (AMAN) at the First Congress of 1999, which affirms that indigenous peoples are communities that live on the basis of their ancestral origins over customary territories that have sovereignty over land and natural resources, socio-cultural life regulated by customary law and customary institutions that manage the sustainability of their community life.

According to Ade Saptomo¹⁴, indigenous peoples are an community unit *autonomous*, that is they regulate their life system (law, politics, economy, etc.). He was born from, developed together, and is taken care of by the community itself.

According to F.D. Holleman in the book *De commune Trek in het Indische Rechtsleven*, there are 4 general characteristics of indigenous peoples, namely religious magis, communal/togetherness, cash and concrete/Visual.¹⁵

2.3. State Recognition of Customary Law Community Rights in the Constitution.

Recognition of the existence of indigenous peoples, can be seen in both international and local contexts. According to Hubertus Samangun,¹⁶ the highest international instrument for the protection of indigenous peoples is the Charter of the United Nations (UN). This charter was created by the international community as a tool to protect humans; because indigenous peoples are part of humanity, the UN Charter provides equal protection to indigenous peoples around the world, including in the archipelago.

The consequence of the State's recognition and respect for indigenous peoples and their traditional rights is the recognition of what is called *ulayat* rights or *petuanan* rights (*beschikkingsrecht*). Recognition and respect for the existence of customary law communities is contained in Article 18B Paragraph (2): "The State recognizes and respects indigenous peoples and their traditional rights as long as they are alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which regulated in law. "

Jimly Asshiddiqie,¹⁷ commenting on the provisions of Article 18B of the 1945 Constitution, stated that, (i) this recognition was given by the state to the existence of a customary law community and its traditional rights; (ii) the recognized existence is the existence of indigenous peoples. This means that recognition is given to one by one of these units, and therefore the customary law community must have a certain character;

¹¹Dedi Sumanto, Hukum Adat Di Indonesia Perspektif Sosiologi Dan Antropologi Hukum Islam, Jurnal Ilmiah Syariah, Vo.17 No.2, (2018), 190

¹²Dominikus Rato, Hukum Adat di Indonesia; Suatu Pengantar, (Surabaya: Laksbang Justitia, 2014), 82.

¹³ Ibid

¹⁴Ade Saptomo, Hukum & Kearifan Lokal-Revitalisasi Hukum Adat Nusantara, (Jakarta: Grasindo, 2010), 13.

¹⁵Otje Salman Soemadinigrat, Rekonseptualisasi Hukum Adat Kontemporer (Bandung: Alumni, 2002), 29-30.

¹⁶Hubertus Samangun; Instrumen Internasional Untuk Perlindungan Masyarakat Adat; Dalam Sandra Kartika dan Candra Gautama; (2002): 133.

¹⁷Jimly Assidqie, Konsolidasi Naskah UUD 145 Setelah Perubahan Keempat, (Jakarta: Studi Hukum Tata Negara, Fakultas Hukum UI, 2002), 24.

(iii) the customary law community is alive (still alive); (iv) in environment (*lebensraum*) a certain; (v) the recognition and respect are given without neglecting the measure of worthiness for humanity according to the level of development of the nation's civilization; (vi) Such recognition and respect must not reduce the meaning of Indonesia as a country in the form of the Unitary State of the Republic of Indonesia.

However, in contrast to the policy of the Dutch East Indies government, which automatically gave recognition to *adat* (*rechtsgemeenschap*), the Indonesian Government did not automatically grant such recognition. In both Article 28I paragraph (3) of the 1945 Constitution of the Republic of Indonesia as well as various organic laws, there are various clauses and conditions that are limitative for the recognition of the existence of customary law or by Saafroedin Bahar¹⁸ it is referred to as conditionality on juridical status and rights. indigenous peoples.

The clauses contained in Article 28B paragraph (2) of the 1945 Constitution of the Republic of Indonesia are: As long as the indigenous people are still alive, in accordance with the development of society, the principles of the Unitary State of the Republic of Indonesia and regulated in law. Rikardo Simarmata¹⁹ mentioned four requirements for indigenous peoples in the 1945 Constitution after the amendment has a history that can be traced back to the colonial period. Requirements for indigenous peoples already exist in *Algemene Bepalingen voor de Oosters (1848)*, *Reglement Regering (1854)* and *Indische Staatsregeling (1920 and 1929)* which state that indigenous and foreign who do not want to submit to European Civil Law, are subject to religious laws, the institutions and customs of the community, "as long as they do not conflict with generally accepted principles of justice." Such requirements are discriminatory because they are closely related to the existence of culture. The orientation of the requirements that emerges is an effort to subdue customary / local laws and try to direct them to formal / positive / national laws. On the other hand, they also have the presumption that indigenous peoples are communities that will be "eliminated" to become a modern society, which practices the production, distribution and consumption patterns of a modern economy.

Meanwhile F. Budi Hardiman²⁰ said that conditional recognition has a subject-centric, paternalistic, asymmetric, and monological paradigm, such as: "The state recognizes", "the State respects", "as long as it exists, in accordance with the NKRI principle" which presupposes a large role for the state. to define, acknowledge, legalize, legitimize existence, as long as indigenous peoples are willing to be conquered under state regulation or in other words "tamed". Such a paradigm is incompatible with the principles of equality and autonomy that exist in democracy.

Satjipto Rahardjo²¹ mentioned the four requirements in Article 18B paragraph (2) of the 1945 Constitution as a form of hegemonial state power that determines the presence or absence of indigenous peoples. The state wants to interfere, regulate everything, define, divide, segment (*indeling-eel*), all of which are carried out by and according to the perceptions of the state power holders. Meanwhile, Soetandyo Wignjosoebroto mentioning the four requirements, both *ipso facto* and *ipso jure*, will easily be interpreted as 'the recognition being requested, with the burden of proving that the indigenous peoples will still exist by themselves, with a policy of recognizing or not recognizing unilaterally in the hands of the central government. Therefore, Article 18B paragraph (2) of the 1945 Constitution still contains constitutional problems. It is said to contain constitutional problems because the constitution which should be a forum for accommodating the basic rights of the community, including the rights to natural resources / environment, including forests and proper livelihoods by utilizing existing resources is limited by several requirements which historically have been a model inherited by the government. colonial. Apart from historical reasons, the conditional recognition model that has been around for a long time has had its own obstacles to be implemented in the field.

¹⁸Saafroedin Bahar, *Inventarisasi dan Perlindungan Hak Masyarakat Hukum Adat*, (Jakarta: Komisi Nasional Hak Asasi Manusia, 2005), 22.

¹⁹Rikardo Simarmata, *Pengakuan Hukum Terhadap Masyarakat Adat di Indonesia*, (Jakarta: UNDP, 2006), 309-310.

²⁰F. Budi Hardiman, *Posisi Struktural Suku Bangsa dan Hubungan Antar Suku Bangsa dalam Kehidupan Kebangsaan dan Kenegaraan di Indonesia (Di Tinjau dari Perspektif Filsafat)*, salam Ignas Tri (penyunting), *Hubungan Struktur Masyarakat Adat, Suku Bangsa, Bangsa, dan Negara, ditinjau dari Perspektif Hak Asasi Manusia*, (Jakarta: Komnas HAM, 2006), 62.

²¹Satjipto Rahardjo, *Hukum Adat Dalam Negara Kesatuan Republik Indonesia (Perspektif Sosiologi Hukum)*, dalam Hilmi Rosyidan Bisariyadi (ed). *Inventarisasi Perlindungan Hak Masyarakat Hukum Adat*, (Jakarta: Komnas HAM, 2006), 62.

Apart from several criticisms by experts on the formulation of Article 18B paragraph (2) of the 1945 Constitution, recognition should be that the most important point of this provision must be interpreted and further elaborated for the promotion of the rights of indigenous peoples both as spelled out in statutory regulations and to be implemented in the field. So that the constitutionality of Article 18B paragraph (2) of the 1945 Constitution can be measured sociologically in its enactment in customary law communities.

The recognition of the existence of customary law communities based on Article 18B of the 1945 Constitution serves as a guideline for recognition as well as a form of legal protection for the existence of customary law communities in Indonesia. This recognition means that indigenous peoples are recognized and protected as legal subjects and their traditional rights. In fact, this form of recognition is found in various government activities, especially activities related to the existence of customary law communities, including the rights of customary law communities in the use of natural resources in terms of forest management to obtain optimal benefits from forests and forest areas for the welfare of the community.

The state in control of forest resources has the function of making policies, administering, regulating, managing and monitoring.²² In the context of management and utilization of forest resources by customary law communities, it is inseparable from the role of the State in regulating the management as regulated in Article 33 paragraph (3) of the 1945 Constitution which confirms the position of the State as a legal entity that regulates the designation and management of forests by citizens including the community. customary law. Through the authority of the State's Right to Control, the goal to be achieved is for the greatest prosperity of the people, in a smaller case, namely the customary law community. The existence of Article 33 paragraph (3) and Article 18B of the 1945 Constitution confirms that customary law communities have the power of *ulayat* territories including customary forests as part of the existence of customary law communities. Therefore, through Law No. 41 of 1999 concerning forestry and hereinafter referred to as the Forestry Law is regulated on customary forests.

In line with the times and civilization, apart from the 1945 Constitution, several sectoral laws also guarantee the rights of indigenous peoples. Recognition and protection of the rights of customary law communities is indeed important, because it must be recognized that traditional customary law communities were born and existed long before the Unitary State of the Republic of Indonesia was formed. However, in its development, these traditional rights must conform to the principles and spirit of the Unitary State of the Republic of Indonesia through normative requirements in the statutory regulations themselves. On many sides, these normative requirements become an obstacle to the existence of the rights of customary law communities, because *First*, in the practice of implementing development, the formulation of the phrase "as long as it is alive and in accordance with community development and the principles of the Unitary State of the Republic of Indonesia" means the presence of community rights. customary law as an acknowledged institution as long as it does not conflict with the spirit of development, so that there is an impression that the government is ignoring the rights of indigenous peoples. Meanwhile, in fact, in the community there is a spirit of reaffirming the rights of indigenous peoples. *Second*, in the 1945 Constitution, it is stated that the traditional rights of customary law communities are respected as long as they are still alive and in accordance with community development and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law. The problem that arises is the law on what or how to regulate the recognition of the rights of the customary law community. That is, it is still unclear what the form of law or the substance of the regulation is. So that there are those that are regulated in law, but there are also general regulations at the local level as outlined in the respective regional regulations. Various problems arise related to the weak recognition of indigenous peoples as legal subjects who have special and special rights. Then rampant violations of the rights of customary communities by the state, especially the rights to control, management and exploitation of forests. Thus, development laws and policies in Indonesia should pay special attention to the rights of indigenous peoples. The push for the government to immediately issue an implementable policy towards the recognition and protection of indigenous peoples continues to roll with the issuance of the Constitutional Court Decision Number 35/PUU-IX/2012 which recognizes the rights of indigenous peoples in forest areas which is the culmination of the most actual struggle.

In essence, Decision the Constitutional Court Number 35/PUU-IX/2012 concerns two constitutional issues, *first* regarding customary forests and *second* regarding conditional recognition of the existence of indigenous peoples. This decision granted the request relating to customary forests but rejected the request to abolish the requirements for recognition of the existence of customary communities contained in the Forestry Law.

²²Yance Arizona, 2011, Perkembangan Konstitusionalitas Penguasaan Negara Atas SDA Dalam Putusan MK, Jurnal Konstitusi, Vol. 8 No.3, (2011), 269

The Constitutional Court's decision provides guidance on how to implement an implementative conception of state control over natural resources. The implementative conception, namely:²³

1. The principle of Indonesian people's sovereignty over all sources of wealth.
2. The principle of the people collectively constructed by the 1945 Constitution mandates the state.
3. The principle of the collective mandate of the people to establish policies (*beleid*) and management actions (*bestuursdaad*), regulation (*regelendaad*), management (*beheersdaad*) and supervision (*toezichthoudensdaad*) greatest possible benefit for the people.

State legitimacy in the context of control of forest resources is enshrined in Law Number 41 of 1999 concerning forestry and its derivation which is centralism (forcing, exclusive, hierarchical, systematic and enforced uniformly) and applies from top to bottom (*top downward*) without pay attention to and clearly ignore the laws that apply in the community, namely customary law which is one of the causes of the prolonged conflict in the forestry sector between the government, forest concession rights holders and the customary law community so that it has been tested several times by the Constitutional Court²⁴. In its implementation, several Constitutional Court Decisions regarding Customary Law Communities such as the Constitutional Court Decision Number 35/PUU-X/2012 relating to forest status also experience separate problems, especially for local governments in terms of recognition of customary law communities and the designation of customary forests so that there are still many cases conflict after the decision of the Constitutional Court which led to the crime against indigenous peoples who have a weak position in front of the state when trying to defend their living space, namely forests that have been preserved and preserved from generation to generation based on *local wisdom*.

2.4. Implementation of State Recognition of Rights of Indigenous Peoples in Archipelago Territory.

As the largest archipelagic country in the world, Indonesia has the natural resources of small islands which are very large and diverse. Small islands that physically have abundant marine resources are strategic national assets to be developed based on the use of marine resources and environmental services. In the future, these resources will play an increasingly important role. The main problems faced in small islands are the understanding of the character of small islands which is still very limited and the development of knowledge related to small islands is not widely available. Regional development infrastructure tools and the concept of sectoral development, especially the concept of sustainable forest development, are still applied centrally, showing the concept of large islands and not taking into account the character and characteristics of small islands in Indonesia. As a result of this implementation, many problems have arisen in small islands. Many potential natural resources on land and sea are destroyed. As an entity that has special sizes, characteristics and vulnerabilities, the management of small islands in Maluku requires a different format from other regional areas, especially those on the mainland of large islands²⁵.

As is well known, there are still many people who live in the forest and around the forest who depend on a part of their lives from forest products. Data from the Ministry of Environment and Forestry in 2019, there are 25,863 villages in and around forest areas, of which 71 percent depend their livelihoods on forest resources and there are 10.2 million poor people in forest areas who do not have legal aspects of forest resources. The legality of customary forest is very important to provide legal certainty, considering that the community does not have evidence and a strong legal basis so that when there is a conflict with investors it is likely that they will always lose and lose their customary forest. Likewise, forests in Maluku have an important role in the lives of local residents. Even in Maluku, almost all forests and land are claimed as belonging to customary law communities. However, without legality there is prone to mutual claims, both among the customary law community and from investors who have a permit from the government. This legality can be in the form of regional regulations or decisions regional head.

Total customary territory 814 customary territories registered with the National Customary Territory Registration Agency (NCTRA).²⁶ However, only 65 regions have received regular recognition through legal products issued by local governments.

²³ Ahmad Redi, *Dinamika Konsep Penguasaan Negara Atas Sumber Daya Alam*, Jurnal Konstitusi, Vol.12, No.2, (2015), 410

²⁴ Eric Stenly Holle, Abrar Saleng, dkk, *Nature of Exploitation of Forest Resources Towards the Welfare of the Customary Law Community in Maluku Province (Perspectives on Pancasila Law and Legal Pluralism)*, Journal of Law, Policy and Globalization, Vol.94, International Institute for Science, Technology and Education, (2020)

²⁵ Jenny. K. Matuankotta, Eric Stenly Holle, *Exploitation Of Small Island Forest Resources In The Regional Autonomy Perspective In Maluku Province*, International Journal of Advanced Research (IJAR) (2020) 1226-1235

²⁶ *Peta Wilayah Adat* <https://brwa.or.id/sig/>. (2020)

Based on data released by NCTRA, until the April 2019 period, there were 814 indigenous territories registered with NCTRA. With a total area of 10.24 million hectares and located in 107 districts/cities in 26 provinces throughout Indonesia. With details, there are 33 maps with a registered status covering a total area of 1.3 million hectares, which are registered as many as 653 maps covering an area of 6.05 million hectares. Verified 110 maps covering an area of 2.43 million hectares and 18 maps of customary areas with status Certified covering 436,788 hectares.²⁷

Based on regional law products, customary territories that have received recognition through regional regulations or decrees (SK) of regional heads total 65 regions in 18 districts/ cities in 13 provinces with an area of 1,397,017.04 hectares. There are 174 customary areas that have received Recognition arrangements through regional head regulations/decrees. This number is located in 19 districts/cities in 10 provinces with an area of 2,366,905.28 hectares. Meanwhile, there are 575 customary territories that have not received recognition. The customary territories that have not been legally recognized by the government are located in 77 districts / cities in 21 provinces. The area is approximately 6,483,868.34 hectares.

Recognition of customary territories in regional policies consists of Regional Regulations (Perda) which are regulatory, stipulation and both. In a regulatory nature, a Customary Law Community Committee is usually formed through a Regent Regulation and Decree. Meanwhile, the determination of indigenous peoples and their customary territories is through a Regent Decree.

At the end of 2019, NCTRA recorded recognition of customary territories through Perda and Decree on Determination (39 areas, covering an area of 705,923 ha), Decree on Determination (11 customary areas, 252,082 ha), Perda Penetapan (16 customary areas, 551,307 ha), Perda and SK Committee MHA (105 customary areas, 1,893,768 ha), SK Panitia MHA (50 customary areas, 172,384 ha), Regulating Perda (228 customary areas, 1,878,065 ha), and no policies (390 customary areas, 5,139,788 ha)²⁸.

Based on the map of the distribution of customary territories in Indonesia, it shows that only six customary territories in the archipelago in Maluku province in particular have been registered, namely three countries (traditional villages) in Aru Islands Regency, namely Ngaiguli State 2,957.63 hectares, Negeri Ferinbotam 8,681.39 hectares, Negeri Rebi 31,882.87, hectare. Meanwhile, in Central Maluku Regency, there are 3 countries, namely Negeri Tananahu 11,937.38 hectares, Negeri Paperu 629.33 hectares and Negeri Haruku 1,444.91 hectares²⁹. Of the 10,593,317 hectares of customary areas registered in BRWA, there is a potential for customary forest covering 7,819,409 hectares. Until the end of 2019, the Ministry of Environment and Forestry (KLHK) has recognized 35,202.34 hectares of Customary Forests and 914,927.13 hectares of Indigenous Forest Indicative Maps³⁰.

In the author's opinion, recognition of indigenous territories in Indonesia is slow. Especially recognition of customary law communities and customary territories from the local government. First, the slow recognition of customary law communities and customary territories by the Regional Government. The two Ministries of Environment and Forestry have also been slow in verifying proposals for customary forests. The slow recognition of customary law communities and customary territories can be seen from the progress in the realization of recognition from the government.

According to the author's opinion, several alternative recognition of customary law communities, especially in archipelagic areas, can be examined as follows:

- The rights of indigenous peoples are of many kinds to natural resources (land, forests, sea), ancestral religions, cultural identities, medicines and so forth. Each of these rights may refer to different subject rights. The logic of recognizing the rights of customary law communities must be reversed so that they no longer prioritize the subject politically through regional regulations or regional head decrees but it is sufficient to register these rights to suit this very diverse subject. The state recognizes the types of rights of customary law communities.
- The capacity of customary law communities is very limited in accessing legislative political processes to produce regional regulations and to obtain recognition of regional head decrees.
- There are very many indigenous peoples. There are many units of customary law community alliances in Indonesia such as in Papua, Kalimantan, Maluku and so on, so it becomes a question when the local government is able to produce a regional head's decision regarding the existence of customary law communities.

²⁷ibid

²⁸ibid

²⁹ibid

³⁰ibid

- The state is too paranoid to see its citizens (customary law communities) in the form of political entities that can interfere with development interests. Indigenous peoples are often labeled as obstacles to development, therefore at the local government level it is difficult to gain legal legitimacy. So, in the process of recognition, there is really no need to determine who the real subject is and what the object that must be recognized is. Because who has the right to that particular object is clear in each unit of the customary law community. The systems that already exist in society are part of the mechanism for recognizing the rights of indigenous peoples. It is important that the state pays attention to the registration process, who is the subject and what object will be recognized.
- Indigenous peoples are given the freedom to deliberate or negotiate according to custom. The capacity of the State in this case only records the results of deliberation mechanisms that exist at the customary law community level.
- A new legal logic is needed which prioritizes the recognition of objects (land, forest, water, etc.) rather than the subject (customary law communities). While the subject arrangement will follow the object recognition mechanism.
- Our customary law communities are very complex, very diverse, it cannot be done with one regulation for all. Laws and regulations above the level such as laws provide sufficient direction while how it will be operational will be at the district level.
- It is necessary to re-educate district level government officials to re-recognize matters related to the existence of customary law communities in their territories so that the state's desire to recognize customary rights becomes operational.

In addition, knowledge about the ethnography of the rights of indigenous peoples in the archipelago in Indonesia must be improved. There are still many unknown areas. This is the role of government and academia. The customary law community in the archipelago itself is very adaptive to the times, the social changes that they face themselves already have mechanisms. How to adapt to the times. So even though the recognition of the customary law community in the archipelago would threaten the existence of other groups or transmigration in the transmigrant area is actually the result of the process of removing the authority of the customary community to take care of themselves. In order for this operational recognition to be realized, it has something to do with technical institutions, for example recognition of customary land is the duty of the national land agency, state recognition of ancestral religions can be made to the ministry of religion or the ministry of education and culture, or on the other hand it can also be a responsibility. The Ministry of Home Affairs, for example, in terms of ancestral rights as an identity that must be recognized in the population administration system. Thus, the recognition of the rights of indigenous peoples must be managed by the technical ministry, but in order for the recognition to be effective not against one another, a new ministry is needed to ensure that the recognition process in each technical ministry runs as it should be, at least even if the state ministry for affairs these indigenous peoples cannot yet be formed. The state must ensure that the affairs of indigenous peoples are guaranteed.

3. Conclusion

Customary law communities existed before the Indonesian state was founded. For this reason, the state as the largest organization recognizes and respects the rights and existence of indigenous peoples as regulated in the constitution and various sectoral laws. In fact, the regulation of the rights of customary law communities to forests is still based on the state and has not supported the rights of indigenous peoples to manage and utilize forest resources in their *ulayat* area. This is reinforced by the conditional recognition of the existence of customary law communities which are regulated through regional legal products as a result of the interpretation of Article 18B of the 1945 Constitution. Related to the management and exploitation of forest resources in Maluku through forest exploitation business permits granted by the state to the private sector (HPH / IUPH) in its implementation has implications for the rights of customary law communities over forests, distribution of forest benefits distribution, economic loss, cultural and identity lost, and environmental damage that has resulted in various conflicts over control and utilization of forest resources in several areas in Maluku Province. For this reason, the rights of customary law communities and their existence as legal subjects in the future must be regulated not by various sectoral laws but specifically regulated in one law only. In the future, it is also necessary to develop a community-based forest resource exploitation model that aims to improve their welfare economically, socially and culturally.

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