

The Guarantees for the Fulfillment of the Constitutional Rights of Customary Law Community in Indonesia

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Abstract

The Customary Law Community (CLC) is a part of the diversity and plurality in Indonesia based on equal rights and obligations to other Indonesian citizens, which are governed by Article 18B of the 1945 Constitution of the Unitary State of the Republic of Indonesia. According to the Declaration on the Rights of Indigenous Peoples, which has been adopted by the Human Rights Council, the state's disregard and marginalization of their rights is a form of unconstitutionality or a violation of human rights. Furthermore, the CLC has the right to determine, prioritize, and strategize their development in the utilization of lands, territories, and other natural resources, such as forestry resources, which are guaranteed to be explicitly fulfilled in the Decision of the Constitutional Court of the Republic of Indonesia No. 35 / PUU-X / 2012.

Keywords: Constitutional Rights, Customary Law Community, Decision of Constitutional Court of the Republic of Indonesia No. 35/PUU-X 2012

Introduction

The existence of the Customary Law Community (CLC) is compromised by the indifference of the state towards their traditional rights and the frequency with which those rights are violated in nearly every aspect of their lives, including the deprivation of Customary lands and other agrarian resources by the state. These violations have been a major issue even though the guarantee position of CLC is clearly stated in Article 18B Paragraph (2) of the 1945 Constitution that "States recognize and respect the unity of CLCs and their traditional rights, as long as it is alive and correlate with the development of society and the principle of the Unitary State of the Republic of Indonesia which is governed by law". The discrimination and marginalization of the CLC in the management of natural resources persist although the constitution recognizes and protects the CLC and its traditional rights. Furthermore, the CLC continues to face real-life challenges in exercising its rights, particularly in the areas of land and natural resource management. The condition of CLCs is terrible compared to other societies because they are not only burdened by lengthy discrimination, but they are also barred from access to their lands and all of their natural resources. Additionally, they have become estranged from their own cultural, economic, and religious systems. Politically, they do not have a strong bargaining position, while economically, they are not guaranteed the sustainability of their lives. This leads to a lack of enthusiasm in the community members due to the controversial offers, which jeopardises their integrity and independence as human beings.

Indigenous communities, people, and nations are those who consider themselves distinct from other sectors of the societies because of their historical ties to pre-invasion and pre-colonial societies that developed in their territories. Additionally, they are currently non-dominant sectors of society, determined to preserve, develop, and transmit to future generations their ancestral territories, and ethnic identity as the foundation of their continued existence, in relation to their own cultural patterns, social institutions, and legal system.

At this level of practice, the regulations that are consistent with the Ministry of Environment and Forestry and the National Land Agency are continuously established at the state institutions level. The owners of these lands are usually referred to as "landlords" by CLCs, who are often impatient while waiting for their policies, which are related to traditional rights of CLCs, to be executed by the Constitutional Court's Decision 35.

It is not incorrect to use the phrase "No REDD No Right", as the CLC frequently does, because this indicates that CLCs will not participate in any government policies, in this case, the Reducing Emissions from Deforestation and Forest Degradation Plus scheme, if the state does not respect their traditional rights. However, the REDD + scheme, which is derived from UN-REDD, requires that every country participating in the scheme have active participation in the CLCs in reducing emissions from deforestation and forest degradation.

According to the Declaration on the Rights of CLCs, which has been adopted by the Human Rights Council, CLCs have the right to determine, prioritize, and strategize their development, usability, territory, and other natural resources. This is especially important to the Constitutional Court's decision 35 to immediately realize the restoration of traditional rights of CLCs through the deregulation of the forestry sector to ensure the fulfillment of their traditional rights as defined in Article 18B of the Constitution.

Methodology

This study employed the legal paradigm of constructivism to see the reality of it as an assortment of mental constructions based on social, local, and specific experiences and was also dependent on the person conducted. Ideally, the epistemological relationship between observer and object is one of subjective unity and is the result of their interaction. Consequently, hermeneutics and dialectics were the primary methods employed, along with sociological field studies gotten from data in the form of instrument study of the literature and in-depth interviews with selected resources.

The Purpose Of The Constitutional Court Decision Number 35/Puu-X/2012 In Strengthening The Position Of Customary Law Community In Indonesia

According to Boedi Harsono, the traditional rights of customary law community such as ulayat right refer to a set of authorities and obligations of a customary law community that is related to the location of the land within its territory as the primary supporter of the livelihood and life of the community concerned throughout the period. The ulayat right, which is a legal community right, is defined by Achmad Sodiki as a unity that has authority in and out of the community. There is also an individual right to the land, the right which is born due to the intensive continuous exploitation of a plot of empty land.

According to previous studies, the importance of the Constitutional Court's Decision Number 35/PUU-X/2012 is the first point. The Forestry Law, which includes customary forests as part of state forests, is a form of disregard for CLCs' rights and a violation of the Constitution. Secondly, the customary forests are excluded from the former as part of the state forest before their inclusion in the category of forest rights. Thirdly, the owner of the right to land also owns the right to the forest. Fourthly, there is variation in state authorities on state forests and customary forests. Fifthly, CLCs are the right-holders and legal subjects who possess rights and obligations. Sixthly, the customary law community is called a Village. The Constitutional Court's verdict indirectly declares that a legitimate legal community is termed "village" or known by another name. Seventhly, CLCs are dynamic and not static, while the last is that the existence of CLCs is sufficiently supported by district-level legislation.

The Constitutional Court's Decision 35 is a form of abolition of "stateisation" that is regarded as a source of denial of the existence of CLCs and their rights, as well as a form of criminalization against the people. This is a form of recognition and respect for CLCs, who are recognized as people with rights, legal subjects, and owners of customary territories. The previous categorization of indigenous forests as entering state forests, which have been practiced for a long time by government institutional practices, has led to the marginalization and discrimination against indigenous people.

The forest sector deregulation policy is one of the efforts to address the issues or social conflicts that frequently arise due to overlapping forest ownership or control. Additionally, this policy can be effectively applied in the establishment of forest land permits. This policy is expected to reduce the occurrence of land-based social conflicts, particularly those involving CLCs to ensure that the positions and traditional rights of CLCs are no longer marginalized and the state fully guarantees the fulfillment of CLCs' livelihoods in various aspects of life.

The Regulation Of The Indonesian Forestry Post-Constitutional Court Decision Number 35/Puu-X/2012

The Regulations of the Forestry Sector, which was mandated by the Indonesian government to implement the Decision of the Constitutional Court 35 include the following publications:

Law number 6 of 2014 on The Village

The Village Law became widely anticipated in the recognition of customary community rights before the implementation of the Decision of the Constitutional Court 35, but it could not be effectively implemented outside Java after two years. This statement is confirmed by Article 8 paragraph (3), which deals with the establishment of new villages and their population.

Law number 18 of 2013 on The Prevention and Eradication of Forest Destruction.

The law, which was issued shortly after the Constitutional Court's decision 35, was not specifically aimed at corporations but rather at small communities. None of the corporations have been found guilty since the inception of the law, but 53 people have been brought to justice in the community surrounding the forest area. Furthermore, 43 people were convicted, while the farmers accounted for 43% of the population.

Regulations of Minister of Home Affairs, Number 52 of 2014 on Guidelines for the Recognition and Protection of CLCs.

d. Joint Regulations, Minister of Home Affairs, Minister of Forestry, Minister of Public Works, and Head of National Land Agency Number 79/2014 No PB.3 / Menhut-II / 2014; No 17 / PRT / M / 2014; And No. 8 / SKB / X / 2014 dated October 17, 2014 on Procedures for Settlement of Land Tenure within the Forest Estate.

It would appear that the Joint Regulations show normative empathy, which is to reward and protect people's rights to land, particularly within the forest area, and are intended for quick, integrated handling. However, it turns out that some provisions in it have a potential vulnerability point of conflict. One of the provisions is that:

- 1) All forest land tenure in all forest functions, including protected forest and conservation, will be accommodated on relatively light terms, either through the affirmation of rights and recognition of land rights or through the provision of community empowerment programs around the forest area (Chapter III Chapter 8). The procedures for releasing forest lands and transferring functions, which should involve the parliament, are usually disregarded.
- 2) Joint Regulations consider the object of the law, termed "forest" the same as other lands, and not a "forest" that has a unique purpose, let alone one that has been established.
- 3) The IP4T Team is established in Chapter II to regulate the execution of land tenure settlements in the forest region by determining the inventory, control, ownership, and utilization of land. Additionally, the IP4T team's recommendations include three main points:
 - a) Control is acknowledged and granted by rights confirmation if the tenure and usage of the land have occurred for 20 consecutive years or more.
 - b) The right to land can be granted if the land tenure within the forest area is less than 20 years and if the land can become the focus of agrarian reform.
 - c) The scheme of community empowerment in state forest regions, such as community forest, village forest, and community plantation, recognizes public access if the land tenure is less than 20 years and the land is not an object of agrarian reform. However, some aspects are not well-organized in this joint regulation. Take, for example, the 20-year time limit.
- 4) This joint regulation does not confirm the form of acknowledgment of the existence of the customary law community, whether it is in form of local regulation, as required by Law No. 41 of 1999, or other legal products.
- 5) According to the joint regulations, the forest region is regarded as a free area of land ownership by citizens and CLCs.
- E The Ministerial Decree No: 552 of 2013 on the social mapping of CLCs (December 30, 2013). Logically, this circular is incorrect in its interpretation of CLCs, because the circular stated that CLCs enter the Sultanate through tribes, clan groups, palaces, and empires.
- f. The Forestry Minister's regulation no. P / 62/2013 on the confirmation of forest regions.

According to this regulation, the customary forest is excluded from the forest area, and the existence of a mandate to enact laws on CLCs has been explained in the Forestry Law, however, the Customary Forest Government Regulation does not exist.

The Implementation Of The Constitutional Court Decision Number 35/Puu-X/2012 In The Customary Law Community Of East Kalimantan

Many local regulations that have been made to recognize CLCs and their territories as a result of the Constitutional Court's Decision 35 because the recognition of its existence is possibly established by both federal and state regulations. The forms of legal products produced by the region include the Regional Regulation of Recognition, the Regulation of the Determination, the Regulation of the Governor /Regent, and the Decree of the Regent. There are currently 108 local legal products that recognize the existence of CLCs and regions that include forests. Additionally, the legal products consist of 19 provincial regulations, 45 district regulations, 6 governors' regulations, and 38 regent decisions.

The implementation of the Constitutional Court's Decision 35 in the context of legal recognition of CLCs in a region should be tailored to the policy and regulatory context in which CLCs exist. The legal recognition of CLCs' existence and rights has been distinguished from the type of law and substance they regulate to date. However, the legal recognition of CLCs' existence and rights at the regional level is achieved in terms of the legal forms indicated below:

- A Regional regulation / governor's regulation
- B Decree of the Regional Head
- C Court Decisions
- D Agreements between CLCs and Government agencies to recognize the existence and rights of CLCs on both land and forest.

Some examples of policies and regulations in East Kalimantan regarding the recognition of CLCs' existence and rights include:

- A The existence of CLCs - This is similar to the Provincial Regulation of East Kalimantan No. 1 of 2015 on Guidelines for the Recognition and Protection of CLC in East Kalimantan.
- B Customary institutions - This is similar to the West Kutai District Regulation no. 24 of 2001 on Empowerment, Preservation, Protection, and Development of Customs and Customary Institutions within the Territory of West Kutai and District Regulation of Paser Regency no. 3 of 2000 on Empowerment, Preservation, Protection, and Development of Customs and Customary Institutions.
- C The Local Regulation No. 12 of 2006 on the Settlement and Development of Customary Law Community in the Kutai Barat Regency.

Conclusion

According to Article 18 B of the 1945 Constitution, the Indonesian government has undoubtedly attempted to accommodate the interests and rights of CLCs in several regulations to guarantee their lives and welfare, but some policies are partially fulfilled due to poor execution. Furthermore, the customary law community, which existed long before the Unitary State of the Republic of Indonesia was formed, was eventually considered to be residing in Indonesian territory. Lastly, the existence of the Constitutional Court's Decision of the Republic of Indonesia No. 35 / PUU-X / 2012 supports the existence and recognition of CLC as well as their traditional forest management rights as a form of economic and territorial sovereignty.

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