Policy Directions Of The Government And Local Governments In The Recognition Mechanism Of Indigenous Law Communities

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ABSTRACT

Recognition of customary forest can be suspended if it is not in accordance with community development and is contrary to the principles of the Unitary State of the Republic of Indonesia, then customary forest must be seen as state forest. Policies contained in laws and regulations are often not implemented in accordance with people's expectations, can even cause problems in society, for example, the policy is contained in the provisions of Article 1 point 6 and Article 5 of Law Number 41 of 1999 concerning Forestry, and the Constitutional Court Decision Number 35/PUU-IX/2012 is declared contrary to the 1945 Constitution and therefore the provision has no binding legal force, Thus, the position of customary forest after the Constitutional Court Decision Number 35/PUU-IX/2012 as forest located within the territory of customary law communities with due regard to the rights of customary law communities as long as the fact still exists and is recognized for its existence, and does not conflict with national interests in accordance with with the development of society and the principles of the Unitary State of the Republic of Indonesia as regulated by law. The policy directions of the Government and Regional Governments should be in the regulation of customary forests after the Constitutional Court Decision Number 35/PUU-IX/2012 are as follows: Determine the area which is customary forest separate from state forest management, and is designated as a buffer zone for state forest areas; melakukan pengaturan masyarakat hukum adat melalui pemberdayaan masyarakat sesuai kearifan lokal; to regulate customary law communities through community empowerment according to local wisdom; provide guidance and guidance to customary law communities regarding procedures for utilizing customary forests according to local wisdom.
Keyword : Policy, Government, Local Government, Indigenous

A. Introduction

The Constitutional Court of the Republic of Indonesia with its decision Number 35/PUU-X/2012 on May 16, 2013 has decided the application for review of Law Number 41 of 1999 concerning Forestry against the 1945 Constitution of the Republic of Indonesia submitted by the Alliance of Indigenous Peoples of the Archipelago, Kuntu Kenegarian customary law community unit, Kesepuhan Cisitu customary law community unit.

The articles that are intended to be tested are: Article 1 point 6, Article 4 paragraph (3), Article 5 paragraph (1), paragraph (2), paragraph (3), paragraph (4) and Article 67 of Law No. 41 of 1999 concerning Forestry. In the decision of the Constitutional Court, the Constitutional Court stated that it partially granted the request. The main material in the decision of the Constitutional Court stated that it partially granted the petition to the applicant. The main material in the decision of the Constitutional Court is:

1. Article 5 paragraph (1) which stipulates that the status of forest with status consists of:
   a.State Forest;
   b. Forest of Rights.
   Customary Forests that were previously part of State Forests, based on the Constitutional Court's decision, Customary Forests must be interpreted as part of Private Forests.
2. Article 1 point 6, must be interpreted as Customary Forest is a forest located within the territory of customary law communities.

3. Article 4 paragraph (3) is interpreted as "the control of forests by the State shall continue to pay attention to the rights of the Customary Law community, 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 as regulated in the Law.
4. Article 18 paragraph (2) of the 1945 Constitution secures that the existence of the customary law community must be regulated in the law, as long as the law in question has not yet been formed, then the inauguration and abolition of customary law communities stipulated by a regional regulation can be justified, as long as the regulation guarantees legal certainty and justice.
5. In Article 5 paragraph (3) of Law Number 41 of 1999, based on the decision of the Constitutional Court it must be interpreted as "the government determines the status of the forest as referred to in paragraph (1); and the customary forest is maintained as long as in fact the customary law community concerned still exists and its existence is recognized.

If in its development the customary law community no longer exists, then the customary forest management rights are returned to the government and the customary forest status returns to state law. The rest of the requests were not granted, namely:

1. The provisions of Article 5 paragraph (4): "If in the development of the community the relevant Customary Law no longer exists, then the rights of the customary forest manager return to the government":
2. The provisions of article 67 paragraph (1), paragraph (2) and paragraph (3) remain valid, namely:
    a. Customary Law Communities as long as according to reality still exist, their existence is recognized.
    b. Recognition of the existence and elimination of customary law communities is stipulated by a regional regulation.
    c. Provisions regarding the existence of the Customary Law community, the rights and confirmation of the existence and elimination of the Customary Law community are regulated by a Government Regulation.

With the decision of the Constitutional Court, the construction of Customary Forests has changed before and after the decision of the Constitutional Court, especially the understanding that customary forests are not state forests but are interpreted as private forests.

B. Formulation of the problem

How are the steps and directions of the Government and Regional Government, especially the Ministry of Environment and Forestry in responding to and implementing the Constitutional Court Decision No.35/PUU-X/2012 on 16 May 2013.

C. Research Method

The research method of this paper uses analytical descriptive, which describes various legal issues, and facts to provide as accurate data as possible about humans, circumstances or other phenomena[1] regarding the position of customary community forests after the decision of the Constitutional Court Number 35/PUU-X/2012. Furthermore, an analysis is carried out to obtain clarity in connection with the problem under study.

D. Finding & Discussion

1. The Unitary State of the Republic of Indonesia and the Customary Law Community.

The Unitary State of the Republic of Indonesia became independent on August 17, 1945. That for the birth of the Republic of Indonesia, 3 important components are needed to form the State, namely the Government, the community including the Customary Law community and the territory of the State.

Thus, the community component, including the customary law community, is an important component whose existence must be protected within the framework of the Unitary State of the Republic of Indonesia and Bhineka Tunggal Ika. However, the understanding of the rights of the Customary Law community after independence must be adjusted to the real conditions in the community. The existence of community members in an area due to heredity/customary law community, Besides that, it is also possible because of government policies, such as transmigration, or due to a natural disaster so that you have to occupy an area because the place of origin cannot be occupied, for example due to tsunamis, landslides, floods, fires, volcanic eruptions and so on. In addition, it is necessary to protect economic actors who have invested legally/obtained a permit from the competent authority on the land so that they obtain title rights or use loan permits or other valid permits.

For this reason, the confirmation of the existence of the Customary Law community, including their living space/labensraum, must be really appropriate and thoroughly studied by a truly credible team so as not to cause problems in the community, Besides that, it also requires a wise and wise attitude from all parties, so that the Unitary State of the Republic of Indonesia continues to be realized.

The principle of the Unitary State of the Republic of Indonesia, namely the maintenance of the success of the unity of the State and the Indonesian Nation must always be maintained and avoid actions that are contrary to national interests, For this reason, the existence of the Customary Law community must actually support the principle of the Unitary State of the Republic of Indonesia.

The implementation of customary law community rights related to managing natural resources should not interfere with national ties and the Unitary State of the Republic of Indonesia.

[1] Soerjono Soekanto, *Pengantar Penelitian Hukum*, UI, Jakarta, 1986, hlm. 9-10.

Thus, the implementation of the rights of the customary law community must be adjusted to the real conditions in today's society.

2. Customary Forests and Indigenous Peoples

Law Number 41 of 1999 concerning forestry regulates the unity of the existence of customary law communities as regulated in Article 67 Paragraph (1). Based on the article, it is stated that customary law communities as long as in reality they still exist and their existence is recognized as having the right:

a. Collecting forest products to meet the daily needs of the indigenous peoples concerned;
b. Carry out forest management activities based on applicable customary law and do not conflict with the law;
c. Get differences in order to improve their welfare

The acknowledgment of the existence and elimination of the legal community according to paragraph (2) Article 67 shall be stipulated by a Regional Regulation. Furthermore, in the elucidation of Article 67 paragraph (1) of the forestry law, it is stated the requirements for the recognition of customary law communities. The existence of customary law communities is recognized if according to reality it fulfills the elements, among others:

a. Society is still in the form of embracing (*rechtsgeneenschap*);
b. There are institutions in the form of traditional rulers;
c. There is a clear customary law area;
d. There are intermediaries and legal instruments, especially customary courts, which are still being adhered; and
e. Still collecting forest products in the surrounding forest area to fulfill daily needs.

Meanwhile, the explanation 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, the reality is that in implementing the determination of customary law communities, there are many obstacles. Determination by Regional Regulation through a mechanism that is complicated and takes a long time because it has to go through research by an integrated team and the cost is also not cheap. For this reason, legal breakthroughs are needed in order to speed up the process of issuing local regulations at a low cost, fast and enforceable. The policy breakthrough made by the Minister of Forestry with the issuance of Circular Letter Number S75/Menhut-II/2004 dated March 12, 2004 deserves thumbs up. However, it is still necessary to improve the Circular, namely the recognition of customary law communities by a district regulation (if the area covers one district). If the Circular has been perfected, it will speed up the process of determining the customary law community and customary forest.

3. Rights and Obligations of Indigenous Peoples over Forests

In accordance with the new spirit in the current reform era, The government has established policies in forestry development that are more pro-active and provide opportunities for local legal communities living in and around forests, whether they are customary law communities or other

local communities. This policy is intended to integrate the interests of local communities in and around the forest with the interests of the Indonesian people as a whole, as a consequence of the existence of a unitary state of the Republic of Indonesia. The prosperity that this nation aspires to is the prosperity of all the people and society of Indonesia which is achieved, among others, by using and utilizing one of the basic capital of development, namely "forest". The policy in question is a policy of community empowerment through village forests, community forests, community plantation forests and partnerships as mentioned above.

Thus, the policy is the actualization of the mission carried out in the Forestry development policy, namely: *First,* to provide business opportunities, work and increase people's income; *Second,* increasing revenue for the government for sustainable and equitable development, and, dan; *Third,* optimizing forest functions according to their designation, namely production and protection functions so that they can provide sustainable economic, ecological and social benefits.

With such a framework, policies regarding the rights of customary law communities to forests need to pay attention to the following matters:

a. Customary forest which is an area of ulayat rights (corporate forest) has a communal function;
b. Management of Customary Forests must refer to the provisions of the applicable laws and regulations;
c. Customary forests are unbreakable and privately owned;
d. Customary forest management is left to each customary law community;
e. Indigenous forest management is not allowed to enter into engagements that are not in line with the applicable laws:
    - Regulate and administer the designation, use, supply and maintenance of earth, water and space;
    - Determine and regulate the rights that can be had over the earth, water and space;

State forests managed by customary law communities are included in the definition of State Forests as a consequence of the existence of the right to control by the State as an organization of power for all the people at the highest level and the principle of the unitary state of the Republic of Indonesia as stipulated in Article 33 paragraph (3) of the 1945 Constitution. However, the inclusion of customary forest in the definition of state forest does not negate the rights of indigenous peoples as long as they exist and are recognized for their existence to carry out forest management activities. Thus, it is not wise to question and contradict the Basic Agrarian Law with Law Number 41 of 1999 because the two laws are synergistic in regulating the recognition of customary law communities to manage customary forests.

The rights of customary law communities as regulated in Article 67 paragraph (1) are as follows. Collecting forest products to meet the daily needs of the concerned Indigenous Forest community, such as:

a. Carry out forest management activities based on applicable customary law and do not conflict with the law;
b. Get empowerment in the context of their welfare.

Based on the description in Article 67 paragraph (1), the matters that must be followed up in the implementing regulations are;

a. Setting the collection pattern for the types of forest resources that are protected according to Law Number 5 of 1990;
b. Adjustment of forest management activities to the characteristics of the area as well as the socio-cultural community;
c. The use of participatory empowerment patterns as an ideal choice for indigenous peoples.

In addition, it is necessary to regulate the obligations of customary law communities in managing customary forests. These obligations are:

a. Obligations for the preservation of customary forests
b. Obligation to preserve protected plant and animal species in customary forest areas
c. The obligation to protect customary forests from human disturbance and other threats.

On the basis of these rights and obligations, it is hoped that the management of customary forest carried out by the customary law community can run well and that the customary forest is used sustainably according to local wisdom.

4. Village Forest as One of the Ideal Policies

The regulation of village forest is contained in the explanation of Article 5 (1) of Law Number 41 of 1999 which reads as follows: "State forest managed by the village and used for village welfare is called village forest." Although the provisions regarding village forests are contained in the explanation of Article 5 paragraph (1), from a legal point of view the explanation has the same legal force as the body because the explanation of the law is an authentic interpretation of the articles. Thus the village forest regulation has definite legal force.

As a follow-up to the provisions of the village forest, it has been regulated in Government Regulation Number 6 of 2007 concerning Forest Management and Preparation of Forest Management Plans, as well as Forest Utilization in Articles 84 to 91. Based on the provisions in Government Regulation Number 6 of 2007 the following matters are regulated:

a. The purpose of establishing village forests in the context of empowering rural communities.
b. Village forest objects are production forest areas and protected forest areas;
c. The official who determines is the Minister of Forestry after receiving a proposal from the Regent or Mayor.

The rights granted are village forest management rights. These rights are non-transferable and are managed based on a forest management plan with the principles of sustainable forest management. The village forest management obligations include:

a. Prepare a Work Plan for village forest management rights during the village forest management period;
b. Implementing the boundaries of village forest management rights;
c. Protecting the forest;
d. Carry out forest product management;

e. Every utilization of forest products under village forest management rights is subject to PSDH and/or DR.

Taking into account the provisions regarding the village forest above, it is still a burden that must be borne and carried out by village forest management. This condition can hinder the implementation of community empowerment through village forests. For this reason, it is necessary to simplify the obligations of village forest managers. Policies regarding the establishment and management of village forests have at least seven advantages, namely:

a. The determination mechanism is relatively fast, namely based on the recommendation of the Regent and proposed directly to the Minister (without having to go through a Regional Regulation) as in the determination of customary law communities.
b. The monitoring mechanism is clear, namely village institutions.
c. The area is clear according to the Regent's proposal.
d. For all members of the village community.
e. Village forests accommodate community members who are not members of customary law communities.
f. Village forests are not focused on ulayat rights, so villages are formed from transmigrants and migrants who have become villagers.
g. The village forest responsibility system is clearer because it is directly managed by village institutions.

However, there is homework that must be considered, namely in the determination or management of village forests, among others:

a. What is the ideal area for a village forest to be established so that it can be used for the welfare of the village community? For example, the village forest area is one third of the village area. Is it sufficient? How about the level of soil fertility?
b. What about villages that are not directly adjacent to the forest, but are dependent on forest products? For this problem, a separate policy is needed, for example conducting a partnership pattern.
c. If a village where there is a customary law community that manages customary forest, can it get village forest management.

These three questions (these or many more) need to be addressed in the process of drafting a Ministerial Regulation as the implementation of Government Regulation No. 6 of 2007 concerning Forest Management and the Preparation of Forest Management Plans and Forest Utilization.

5. Role of Local Government

With the enactment of Law Number 32 of 2004 concerning Regional Government in conjunction with Government Regulation Number 38 of 2007 as amended in Law Number 23 of 2014, then the Regional Government has a major role in determining the existence of customary law communities in the context of customary forest management. The steps that must be taken by the Regional Government to support the existence of customary forests include:

a. Inventory of areas where there are still indigenous peoples.

b. Conduct studies and research.
c. Determining certain areas as territories of customary law communities in the form of Regional Regulations.
d. Propose to the Minister of Forestry to designate the territory of the customary law community as customary forest.

Regulations regarding customary law communities within the current legal framework are in the Laws and Government Regulations. This arrangement needs to be followed up in the form of a regional regulation for areas that have customary law communities and the existence of customary rights inherent in them. In the current decentralized era, local governments should be able to create a conducive democratic climate. Democracy requires legal certainty. Thus, local governments must be able to create legal products that can support the function of customary forests so that they can be used by the community in a sustainable manner in order to improve welfare (Riyanto b, 2004). Assessment and research on the existence of indigenous peoples needs to be based on sufficient knowledge about the social structure of a customary law community that is fluctuating that supports the operationalization of criteria/requirements regarding the existence of customary rights for those involved in determining the existence of customary law communities and the customary rights inherent in them, must can eliminate legalistic/formalistic attitudes (Sumardjono, 1999). The right approach must be used as a guide in the application of the applicable laws and regulations. In the current situation a participatory approach is the ideal choice. This approach prioritizes joint activities between the Government, the community and Non-Government Organizations starting from planning, implementation, monitoring and evaluation.

6. Action Steps After the Constitutional Court Decision

Understanding the decision of the Constitutional Court of the Republic of Indonesia above and based on the principles of the Unitary State of the Republic of Indonesia and the spirit of nationalism, it is necessary to have the attitude and action steps from the Government on the decision. The Ministry of Forestry as one of the sectors that must respond to the decision of the Constitutional Court and also the Ministry of Home Affairs, related to the recognition and confirmation of the existence of the Customary Law community and the National Defense Agency (BPN) regarding Ulayat Rights and the issuance of land rights. For the Ministry of Forestry, in our opinion, the following steps need to be taken:

a. Formation of a special team to prepare recommendations for the Ministry of Forestry's actions after the decision. The team's duties include:
   - Observing the material of the Constitutional Court's decision properly and correctly.
   - Preparation of material for the steps taken by the Ministry of Forestry after the Constitutional Court Decision.
   - Disseminate the material for the action steps to the ranks of the Ministry of Forestry both at the center and in the regions as well as related agencies and the community.
   - Reconstructing the draft of the RPP for the management of Customary Forests in accordance with the Constitutional Court's Decision by taking into account Law Number

41 of 1999 and Law Number 5 of 1990 concerning Biological Conservation with related agencies.

- Together with the team from the Ministry of Home Affairs and the National Defense Agency to formulate the RPP for the Customary Law community and also assist in the preparation of the Raperda if needed by the Regional Government regarding the inauguration of the Customary Law community.

b. The Ministry of Environment and Forestry to speed up the ratification of the RTRW that has been agreed upon by the regional parties and the integrated team, considering that the ratified RTRW will be the basis for drafting the Regional Regulation of the Customary Law community regarding customary areas.

c. The Ministry of Environment and Forestry should accelerate community empowerment through policies as regulated in Government Regulation no. 6 of 2007 and its amendments which include:

- village forest;
- Community forest;
- Community Forest Plantation;
- Partnership

If there are still many obstacles in the implementing regulations, it is necessary to deregulate the community empowerment policy. Specifically for the management of Nature Reserve Areas and Nature Conservation Areas, it is necessary to take concrete steps to strengthen the area by immediately completing the area management plan and area structuring. As well as the determination of buffer areas through the Buffer Regional Regulation. In addition to this, the Ministry of Forestry is also preparing an Academic Paper as a companion related to the proposed DPR RI initiative bill regarding customary law communities and their traditional rights. Academic Papers are intended to unite the steps and views of the Government both scientifically, technically and juridically.

E. Conclusion

The decision of the Constitutional Court must be addressed wisely and wisely and immediately take concrete steps for its implementation seriously. The seriousness of the Government can be shown by immediately formulating policies at the level of policy level dan institutional level up to the operational level, so that it can be used as a reference and immediately implemented in the regions. In preparing operational policies, it should be more accommodative and participatory so that it can be implemented and fulfill the community's sense of justice. If this can be realized, and the ideals of good governance can be realized, namely prosperous customary law communities and sustainable forests.

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