



Responsibilities of Local Governments for Determination of Customary Forests

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<http://dx.doi.org/10.18415/ijmmu.v9i1.3221>

Abstract

UU No. 41 of 1999 concerning Forestry, stipulates that customary forests are part of state forests. This makes it legal for the government to take over the rights of customary law community units over customary forests that have been controlled for generations. However, the Constitutional Court decided through the Constitutional Court's Decision No. 35 of 2012 that customary forest is not part of state forest, but part of MHA unit area and customary law community unit has the right independently to take legal actions on customary forest. The decision of the Constitutional Court in question needs to be followed up with the determination of the customary forest of each customary law community unit in the region. However, it is the responsibility of the district/city government to stipulate regional regulations regarding the stipulation of recognition of customary law community units as well as to identify customary law communities in their area and to make maps of the customary territory of each customary law community unit as a prerequisite for submitting an application for the determination of customary forest. However, the Central Maluku district government in Maluku Province has not carried out this responsibility, so the government has granted forest management permits to CV Sumber Berkat Makmur and PT Bintang Lima Makmur in the customary forest area of the Sabuai and Naulu customary law community unit on Seram Island in the Province of Maluku. Maluku. This has created a conflict between the two customary law community units who are trying to maintain their customary forest due to forest clearing by the two companies.

Keywords: *Responsibility; Local Government; Customary Forest*

Preliminary

Forests are part of the Natural Resources (hereinafter abbreviated as SDA) contained in the earth of Indonesia as a gift from God Almighty which must be regulated and managed for the greatest prosperity of the Indonesian nation, because it has many benefits, both ecological, socio-cultural, and environmental benefits, economic and other benefits.

Natural resources in Indonesia's forests do not only concern trees and animals but also other natural resources in the forest and in the bowels of the earth in the forest. This natural wealth is very likely to be useful for the life of the community, nation and state.

Forest is an ecosystem unit in the form of a stretch of land containing biological natural resources which is dominated by the natural ecosystem of the environment, which cannot be separated from one another.¹ Law of the Republic of Indonesia Number 41 of 1999 concerning Forestry (State Gazette of the Republic of Indonesia of 1999 Number 167, Supplement to the State Gazette of the Republic of Indonesia Number 3888, as amended by Law Number 19 of 2004 concerning Stipulation of Government Regulation in Lieu of Law Number 1 of 2004 concerning Amendments to Law Number 41 of 1999 concerning Forestry into Law (State Gazette of the Republic of Indonesia Year 2004 Number 86, Supplement to the State Gazette of the Republic of Indonesia Number 4412) categorizes the status of forest as state forest and private forest as stipulated in Article 5 paragraph (1) and paragraph (2), that:

- (1) Forests based on their status consist of:
 - a. state forest; and
 - b. private forest.
- (2) State forest as referred to in paragraph (1) letter a, may be in the form of customary forest.

The above provisions stipulate the status of the state forest of the republic of Indonesia as state forest and private forest. State forest is forest located on land that is not encumbered with land rights. Meanwhile, private forest is forest located on land that is encumbered with land rights. UU No. 41 of 1999 categorizes customary forests as state forests. Customary forest is legalized as part of state forest, customary forest is state forest located within the territory of customary law communities.

The legal political design of Law No. 41 of 1999 made customary forests part of state forests. This is a legal instrument to legalize the government's action to take over the rights of customary law community units (hereinafter referred to as MHA) over customary forests that have been controlled for generations by MHA units by granting forest management rights to various companies to manage natural resources in forest areas. custom. The government takes over forest management rights in customary forests from MHA units for certain subjective reasons, and even prohibits MHA unit members from encroaching on forest areas, collecting forest products, and so on inside customary forests.

This condition is the cause of various conflicts between MHA units and companies and the government regarding customary forests. Conflicts between indigenous peoples and corporations that own oil palm plantations, industrial forest plantations, and mining have often adorned the mass media.² This condition results in the loss of the rights of the MHA unitary to the customary forest which is part of their customary territory. It is not uncommon for MHA to be considered as criminals when accessing customary forest areas which they have controlled for generations.

State action to regulate customary forest as part of state forest in Law No. 41 of 1999 resulted in the Alliance of Indigenous Peoples of the Archipelago (AMAN) together with the Indigenous Law Community Unit of Kenegerian Kuntu, Kampar Regency, Riau Province, and the Indigenous Law Community Unit of Kasepuhan Cisit, Lebak Regency, Banten Province, who are concerned about the existence of customary forests to test the provisions of Article 1 point 6, Article 4 paragraph (3), Article 5 paragraph (1), paragraph (2), paragraph (3) and paragraph (4) and Article 67 of the Law of the Republic of Indonesia Number 41 of 1999 concerning Forestry, to the Constitutional Court.

Regarding the application for review, the Constitutional Court decided through the Constitutional Court Decision Number 35/PUU-X of 2012 that:

¹ Article 1 number 2 of the Law of the Republic of Indonesia Number 41 of 1999 concerning Forestry, as amended by Law Number 19 of 2004 concerning Stipulation of Government Regulations in Lieu of Law Number 1 of 2004 concerning Amendments to Law Number 41 of 1999 concerning Forestry into Constitution.

² Sukirno, Reconstruction of Regulations for Acceleration of Designation of Customary Forests, (2019) 17 (1) Progressive Legal Journal, p. 87

1. The provisions of Article 1 point 6 which reads "Customary forest is a state forest located within the territory of customary law communities", is changed to "Customary forest is forest located within the territory of customary law communities".
2. The provision of Article 4 paragraph (3) which reads "State control of forests shall continue to pay attention to the rights of indigenous peoples, as long as they exist and their existence is recognized, and does not conflict with national interests", is changed to "State control of forests still pays attention to community rights. customary law, as long as it is 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".
3. The provision of Article 5 paragraph (1) which reads "Forests based on their status consist of: a. state forest, and b. private forest", is changed to "State forest as referred to in paragraph (1) letter a, not including customary forest".
4. Remove the provisions of Article 5 paragraph (2) which reads "State forest as referred to in paragraph (1) letter a, can be in the form of customary forest".
5. The provision of Article 5 paragraph (3) which reads "The government shall determine the status of the forest as referred to in paragraphs (1) and (2); and customary forest is determined as long as in reality the customary law community concerned still exists and its existence is recognized", changed to "The government determines the status of the forest as referred to in paragraph (1); and customary forests are determined as long as according to the fact the customary law community concerned still exists and its existence is recognized".

The legal implications of the Constitutional Court's decision no. 35 of 2012 then all articles and paragraphs that stipulate that customary forest as part of state forest are canceled and have no binding legal force. This means that customary forests are no longer state forests, but customary forests as forests of customary law communities.

Constitutional Court Decision No. 35 of 2012 provides legality for MHA units to own customary forests as part of the MHA unitary area, and provides legality for MHA units as legal subjects who have the right to take legal actions on customary forests. As a consequence of the said Constitutional Court's decision, it is necessary to establish customary forests from MHA units in each region in order to provide clarity and legal certainty to their customary forests.

However, many regencies/cities in Indonesia, including in Maluku Province, have not established customary forests in their respective administrative areas. Such conditions can have an impact on the uncertainty and uncertainty of customary forest law from each MHA unit which can cause legal problems between MHA units, both the government and companies, such as what happened to the Sabuai MHA unit on Seram Island, which tried to maintain their customary forest due to deforestation. forest by CV Sumber Berkah Makmur. And the Naulu MHA Unit on the island of Seram, which carried out the logging by PT Bintang Lima Makmur. Based on the description, the problems that will be examined in this research are (1) What is the nature of customary forest for the Customary Law Community Unit. (2) How is the implementation of Customary Forest Determination? (3) What is the responsibility of the local government in determining customary forest?

Discussion

I. The Nature of Customary Forests for Customary Law Community Units

a. Existence of Customary Forests for Customary Law Community Units

Sociologically, forests provide very important benefits for human life, both economic, social, cultural, and ecological benefits, even though forests have different functions for every human being. In the doctrine of sustained yield, people without forests are people who die.

The existence of the forest not only deviates from natural resources but also saves humans in it. Likewise, customary forests not only store natural resources but also store MHA units. In customary forests, there are MHA units that build a civilization of life from generation to generation.

Customary forests are part of the customary territory of the MHA unit which has economic, social, cultural, political, and religious values, so that the customary forest cannot be separated from the existence of the MHA unit, because it is part of the customary area which is the place and source of life for the MHA unit. in building civilization. The MHA unit has built a relationship with the customary forest since being in the area in question and is entitled to the customary forest.

The rights referred to are called ulayat rights, the mention of ulayat rights by each MHA unit in all regions in Indonesia is different, some call it ulayat forest, clan forest, petuanan forest, or other names according to the designation in each region. In general, MHA units in the Maluku Province, especially in Central Maluku Regency, call it the term petuanan rights.

Ulayat rights or petuanan rights give rise to legal relations from MHA units to all natural resources in their customary territories, including customary forests. Mochamad Tauchid defines ulayat rights as regional or ethnic rights over the land environment, which contains the authority to regulate the control and use of land within its territory.³ According to the Department of Home Affairs-Faculty of Law UGM, ulayat rights are rights that are inherent as special competencies for customary law communities, in the form of authority/power to manage and regulate the land in its contents, with internal and external marketability.⁴

In Article 1 of the Regulation of the Minister of Agrarian Affairs, the Head of the National Land Agency Number 5 of 1999 concerning Guidelines for the Settlement of Problems with the Ulayat Rights of Indigenous Peoples, it is stated that customary rights are the authority which according to custom is owned by certain customary law communities over certain areas which are the living environment of their citizens to take resources. nature, including the land in the said area, for the survival and life of the people, arising outwardly and inwardly from generation to generation and uninterrupted between certain customary law communities and the area concerned.

Customary rights or petuanan rights give rise to the rights, authorities and obligations of the MHA unit over all natural resources located in the customary territory. Therefore, the MHA unit can determine the legal relationship, both public law relations and civil law relations between people or the unit and the customary forest in question.

The regulation of public legal relations is manifested in the authority to regulate the duties and obligations of members of the MHA unit to control, manage, maintain, as well as the allocation and use of resources in the forest area. While the regulation of civil law relations is manifested in the form of buying and selling or renting or others for resources located in customary forest areas. The authority or authority to determine or regulate the legal relationship between the person and the customary forest in question, not the state authority. This means that there is autonomy from the MHA unit to regulate and determine their own legal actions and relationships in customary forests.

The characteristic of ulayat rights is joint or communal ownership, so that ownership of customary forest is communal. In the sense that the resources in the customary forest are the common property of the members of the MHA unit. The nature of the relationship between MHA unit rights and customary forest will continue or cannot be interrupted as long as the existence of the MHA unit still exists or lasts as long as the existence of the MHA unit still exists. For this reason, under any

³ Dyah Ayu Widowati, Ahmad Nashih Luthfi, Igusti Nyoman Guntur, Recognition and Protection of Indigenous Peoples' Land Rights in Forest Areas, Center for Research and Community Service, National Land College, 2014, Yogyakarta, p. 12

⁴ Ibit, p.20

circumstances and in any case, there is no power that can decide and nullify the relationship of these rights as long as the existence of MHA units still exists or lives in certain customary areas.

Although the ownership rights of the MHA unit to customary forest are communal, there are individual rights of the members of the MHA unit referred to in the customary forest area of course. This means that there are parts or areas of customary forest that have their rights allocated to certain individuals. However, individual ownership rights are not absolute. At any time, the MHA unit can take over for certain reasons, one of which is if the individual who has the right does not have offspring to continue the inheritance rights in the customary forest area, which causes the legal relationship of the ownership right to be terminated.

The principle is that within the MHA unit there are communal rights and individual rights. These rights are fixed and attached to the existence of the MHA unit in the district of Central Maluku. The unitary rights of MHA in customary forests are inherited from generation to generation from their ancestors since building a life in their customary territory, not given by the government or the state. The rights referred to are inherent in the existence of MHA units, even customary forests are an attribute of the existence of one MHA unit.

The implementation of MHA rights in customary forest areas is realized through the regulation and use of forests for settlements, planting crops, and others, including the maintenance of the forest in question, as well as determining the legal relationship between people and the forest, and determining the legal actions of people over the forest. Thus, the existence of customary forests is very important for the existence of MHA units, including MHA units in the Central Maluku district, Maluku Province, because they are a place and source of life for MHA units to build a living civilization.

b. State Recognition of the Existence of Customary Forests

It has been described previously that the existence of customary forests is a place and source of life for MHA units. Therefore, many countries recognize and respect the rights of MHA units to customary forests as part of the MHA unitary territory.

During the 1980s the governments of Nepal, China and several other developing countries carried out reforms in the forestry sector to open up opportunities for the recognition of customary rights of customary law community units over forest areas. One of the important reasons for recognizing the rights of indigenous peoples to forest areas is related to social justice, protection of indigenous cultures and religions.⁵

Article 14 paragraph (1) of the Convention on International Labor Organization (abbreviated as ILO) Number 169 of 1989 stipulates that the rights of ownership and control of indigenous peoples and indigenous peoples over land that MHA traditionally inhabit and use must be recognized. As a complement to this recognition, actions must be taken in appropriate situations to protect the rights of indigenous peoples and indigenous peoples in using land, not least for lands that are not inhabited by MHA, but where MHA has traditionally had access to carry out their activities. subsystem and traditional MHA activities. In this regard, special attention should be paid to nomadic communities and shifting cultivators.

Article 25 of the United Nations Declaration on the Rights of Indigenous Peoples stipulates that Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.⁶

⁵ Agus Widodo, 2006, *Politics of Decentralization: Forests, power and people*, Bogor, p. 85.

⁶ Article 25 United Nations Declaration on the Rights of Indigenous Peoples

It appears that the United Nations recognizes the rights of MHA to land, territories, water and offshore areas, and other resources which they have traditionally owned or which they have traditionally occupied and it is their responsibility to uphold it for future generations.

Countries in the world highly value and respect the existence of customary forests as part of the MHA unitary territory and the rights of MHA units to customary areas including customary forests. According to Eddie Riyadi, the issue of the existence of indigenous peoples and their rights to the international community cannot be separated from the long struggle at the local and national levels in their respective countries. Each country's response to indigenous and tribal peoples is different and is influenced by new worldviews and philosophical perspectives.⁷

In Indonesia, state recognition of customary forests can be seen through the legal arrangements in Law No. 41 of 1999. However, Law No. 41 of 1999 places customary forests as part of state forests. Categorization of customary forest as part of state forest in the construction of Law No. 41 of 1999 became the basis for legitimacy for the government's actions to take legal action to grant customary forest management rights to entrepreneurs and to restrict or prohibit MHA units from exercising their rights to customary forests which they have owned and controlled for generations. As a result, various conflicts have arisen involving indigenous peoples with companies and the government.

Determination of customary forest as part of state forest in the construction of Law No. 41 of 1999 is very contrary to the substance of the provisions of Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which recognizes and respects the existence of MHA units with their rights including rights to customary forests.

Recognition and respect for the existence of MHA units and their traditional rights is a form of application of the recognition principle for the existence of MHA units with their rights as indigenous peoples. Recognition and respect for the existence of MHA unity is not only related to their physical existence, but also their rights, one of which is the right to customary forests. Therefore, the legal construction of customary forest status as part of state forest in Law No. 41 of 1999 was annulled by the Constitutional Court through the Constitutional Court's Decision No. 35/PUU-X/2012 that customary forest is forest located within the MHA unit area which is separate or independent outside the state forest. The Constitutional Court also emphasized that customary forest is a forest that has been owned by customary law communities for generations, so that MHA has the right to customary forest, and MHA is the owner of rights to customary forest.

The Constitutional Court's decision No. 35/PUU-X/2012 is judged by customary law community activists as a success in the struggle of indigenous peoples.⁸ Constitutional Court Decision No. 35/PUU-X/2012 is a progressive achievement that resolves the misconception of forest area designation in Indonesia. Constitutional Court Decision No. 35/PUU-X/2012 corrected the mistake of the Forestry Law, by stipulating that customary forest is no longer part of state forest, but is part of private forest.⁹

The Constitutional Court's decision provides clarity and legal certainty regarding customary forests as part of the MHA territory, no longer customary forests as part of state forests. According to Noer Fauzi Rachman, the Constitutional Court's decision is also an acknowledgment of inclusive citizenship, considering that the existence of indigenous peoples has been neglected for so long.¹⁰

⁷ Sulastriyono, *Philosophy of State Recognition and Respect for Indigenous Law Communities in Indonesia*, Yustisia September 90 - December 2014 Edition, p.98

⁸ Madonna, E.A., 2019. Implementation of the Rights of Indigenous Peoples in Forest Management in Indonesia. *Journal of Environmental Law Development*, 3(2), p. 171.

⁹ Muki T. Wicaksono and Malik, the context of Legal Politics behind the Acceleration of Customary Forest Designation: notes towards the 2019 transition (2018), 4 (2) *Journal of Environmental Law* 28

¹⁰ Noer Fauzi Rachman and Mia Siscawati, "Customary Law Community Are Rights Holders, Legal Subjects, and Owners of Their Customary Territory: Contextually Understanding the Decision of the Constitutional Court of the Republic of Indonesia on Case Number 35/PUU-X/2012", supplement to the journal *Wacana*, Insist Press: 2014, p. 54

However, until now there are still frequent conflicts between MHA units and the authorities who get forest management rights from the Government whose management areas are in customary forests.

Even the Ministry of Environment and Forestry still categorizes forest status as only state forest and private forest. Not placing customary forest as a separate forest status, but placing customary forest as part of private forest, as stated in Article 4 paragraph (1) and paragraph (2) of the Regulation of the Minister of Environment and Forestry Number P.17/MENLHK/SETJEN/KUM. 1/8/2020 concerning Customary Forests and Private Forests (hereinafter abbreviated as Ministerial Regulation No. 17 of 2020) which stipulates that:

- (1) Forests based on their status consist of:
 - a. State forest; and
 - b. Private forest.
- (2) Private forest as referred to in paragraph (1) letter includes customary forest.

Such legal arrangement ignores the Constitutional Court's Decision No. 35/PUU-X/2012 which has decided the status of customary forest is independent from state forest and private forest. Regulation of Article 4 of Ministerial Regulation No. 17 of 2020 deliberately creates new legal norms that are contrary to the Constitutional Court's decision so that it can create legal uncertainty regarding the classification of forest status.

Likewise, the Ministry of Environment and Forestry still stipulates that customary forests are part of state forests, as stipulated in Article 8 of Ministerial Regulation no. 17 of 2020 which stipulates that:

- (1) Determination of the status of Customary Forests is carried out with the following criteria:
 - a. is in the State Forest area or outside the State Forest area;
 - b. there are Customary Areas in the form of Forests managed by MHA with clear boundaries for generations; and
 - c. there are still forest product collection activities by MHA in the surrounding forest area to fulfill their daily needs.
- (2) In the event that the Customary Area is located in a State Forest area and is not a Forest, it can be included in the Customary Forest determination map with a special legend in accordance with the conditions of land use/utilization.

This arrangement shows that the government still maintains legal politics in the construction of Law No. 41 of 1999 as an effort to legalize and maintain state control over customary forests owned by MHA units. This is different from the regulation in Article 15 PP No. 23 of 2021 concerning the Implementation of Forestry, which stipulates that:

- (1) Forests based on their status consist of:
 - a. State Forest;
 - b. Indigenous Forest; and
 - c. Forest of Rights.
- (2) Forest area consists of:
 - a. State Forest; and
 - b. Indigenous Forest.

This arrangement shows that there is an inconsistency in the construction of the legal status of the forest. There are different legal arrangements regarding the status of customary forests. This can lead to a conflict of legal norms regarding the status of customary forests between the legal norms contained in government regulations and the Regulation of the Minister of Environment and Forestry with the Constitutional Court Decision.

In fact, every region in Indonesia has MHA units with their own characteristics that have existed for hundreds of years. The existence of these MHA units has their own wealth, has citizens who can be

distinguished from other legal communities and can act either internally or externally as a legal entity (legal subject) that is independent and governs themselves.¹¹

MHA units in Indonesia can be grouped based on territorial similarity (region), genealogy (descendants), and territorial-geneological (region and descent), so that there is a diversity of forms of indigenous peoples from one place to another. The naming of MHA units in each region in Indonesia is different. Villages in Java and Bali, Nagari in Minangkabau, Huna in North Sumatra, Clans in Palembang, Gampong in Aceh, Villages in East Kalimantan, Negeri in Maluku, and so on. Each MHA unit referred to is an original entity that cannot be standardized immediately.

The existence of the said MHA unit existed long before the formation of the Republic of Indonesia, even before colonialism. It can be said that the existence of the MHA unit was the forerunner to the formation of the Indonesian state. This was realized by the founders of the Indonesian state so that respect for him was stated in the formulation of the 1945 Constitution through constitutional recognition and respect in the provisions of Article 18 of the 1945 Constitution (before the amendment) and its explanation which states that in the territory of the State of Indonesia there are approximately 250 *Zelfbesturende landschappen*. and *Volksgemeenschappen*, such as villages in Java and Bali, states in Minangkabau, hamlets and clans in Palembang and so on. These areas have an original structure, and therefore can be considered as a special area.

Therefore, when an amendment was made to the 1945 Constitution, Article 18B paragraph (2) was stipulated which stipulates that the State recognizes and respects customary law community units and their traditional rights 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. regulated by law.

Based on the constitutional arrangement that recognizes and respects the existence of MHA units within the territory of the Republic of Indonesia with their rights so that through the Constitutional Court Decision No. 35/PUU-X/2012, the Constitutional Court re-constructed the status of customary forests as separate forests from state forests as a form of recognition and respect for the existence of MHA unity in Indonesia.

The Constitutional Court's decision gives legal legitimacy to customary forests as part of the legal entity of MHA units, even provides separate legal standing for MHA units over customary forests, and eliminates the exploitative nature of the state against customary forests by stopping entrepreneurs or closing investors' access to customary forests, customary forest.

Actually, before the Constitutional Court's decision No. 35/PUU-X/2012, Law No. 5 of 1960 concerning General Provisions on Agrarian Principles (hereinafter abbreviated as UU No. 5 of 1960) has recognized the existence of customary forests as part of customary land in the National Agrarian Law regime. UU No. 6 of 1960 confirms that national agrarian law is based on customary law. Forests including customary forests are above the land.

Therefore, Article 3 of Law No. 5 of 1960 stipulates that taking into account the provisions in Articles 1 and 2, the implementation of customary rights and similar rights of customary law communities, as long as in reality they still exist, must be in such a way that it is in accordance with the national and state interests, which based on national unity and must not conflict with other higher laws and regulations.

Article 1 of Law no. 5 of 1960 stipulates that:

¹¹ Husen Altung. 2010. *Legal Dynamics in Recognition and Protection of Indigenous Law Community Rights to Land*. Yogyakarta, p. 31.

- (1) The entire territory of Indonesia is the unitary homeland of all the Indonesian people, who are united as the Indonesian nation.
- (2) The entire earth, water and space, including the natural resources contained therein within the territory of the Republic of Indonesia as a gift from God Almighty, are the earth, water and space of the Indonesian nation and constitute national wealth.
- (3) The relationship between the Indonesian people and the earth, water and space as referred to in paragraph (2) of this article is an eternal relationship.
- (4) In terms of the earth, in addition to the earth's surface, it includes the body of the earth beneath it and those under water.
- (5) The definition of water includes both inland waters and seas within the Indonesian territory.
- (6) What is meant by outer space is the space above the earth and water as referred to in paragraphs (4) and (5) of this article.

Furthermore, Article 2 of Law no. 5 of 1960 stipulates that:

- (1) On the basis of the provisions in Article 33 paragraph (3) of the Constitution and the matters referred to in Article 1, the earth, water and space, including the natural resources contained therein, are at the highest level controlled by the State, as an organization. power of all the people.
- (2) The State's right to control as referred to in paragraph (1) of this article authorizes:
 - a. regulate and administer the designation, use, supply and maintenance of the earth, water and space;
 - b. determine and regulate legal relations between people and the earth, water and space;
 - c. determine and regulate legal relations between people and legal actions concerning earth, water and space.
- (3) The authority derived from the state's right to control as referred to in paragraph (2) of this article is used to achieve the greatest prosperity of the people in the sense of nationality, welfare and independence in society and an independent, sovereign, just and prosperous Indonesian legal state.
- (4) The state's control rights mentioned above can be exercised to autonomous regions and customary law communities, only as necessary and not in conflict with national interests, according to the provisions of Government Regulations.

Furthermore, Article 5 of Law No. 5 of 1960 stipulates that the agrarian law applicable to earth, water and space is customary law, as long as it does not conflict with national and state interests, which is based on national unity, with Indonesian socialism and with the regulations contained in this law. and with other laws and regulations, everything by heeding the elements that rely on religious law.

From the arrangement as mentioned, it shows that the state has recognized and respected the existence of the unitary rights of MHA to land including customary forest. Therefore, the MHA unit has the authority to regulate and manage the allocation, use, supply and maintenance as well as to determine the legal relationship between people and customary forests, as well as to determine legal actions carried out in customary forest areas. Thus, the state has recognized and respected the existence of customary forests as part of the territory of the MHA unit. However, in order to provide clarity and certainty to the customary forest area of the MHA unit, it must be followed up with the action of determining the customary forest area.

II. The Nature of Determination of Customary Forests.

a. Principles of Determination of Customary Forests

As previously explained, the Indonesian state has recognized the existence of customary forests as part of the territorial integrity of the MHA unit. On this basis, each MHA unit has rights to all

resources in the customary forest. The rights referred to are limited to the customary forest space or area of each of these MHA units. This means that each MHA unit only has rights to their customary forest, not to the customary forest of other MHA units. There are restrictions on the space for the exercise of rights.

In order that there are no claims against customary forest areas between MHA units, as well as government actions to give forest management rights to companies to manage forests in customary forest areas, it is necessary to establish customary forests from each MHA unit, including Central Maluku district, Maluku province.

Determination of customary forest in order to provide clarity and certainty to the customary forest area of each MHA unit. This means that even though the Constitutional Court's decision No. 35/PUU-X/2012 has given legality to customary forest as part of the territory of the MHA unit but it must be followed up with the action of determining the customary forest, so that there is legal clarity and certainty over the customary forest of each of these MHA units.

The stipulation is an activity to provide legal clarity and certainty regarding the status, boundaries and area and location of the customary forest area of each MHA unit, so that there is legal legalization regarding the legal status of the customary forest area in one MHA unit. This of course will protect the boundaries or area of customary forest from an MHA unit. The protection of customary forests is not only meant to prevent and limit forest destruction, but also to maintain and safeguard the rights of MHA units to customary forests, which are related to forest management.

Although generally, in fact, a customary forest area of each MHA unit has boundaries and areas marked by natural evidence such as rivers or streams, mountains, and so on. In general, these customary areas have clear, factual boundaries. However, it is undeniable that the natural boundaries that mark the existence of customary forest areas from one MHA unit may undergo changes or can be lost or eliminated due to natural fluctuations such as forest fires, floods, landslides, and so on as well as human actions that can eliminate the clarity of boundaries. the intended boundary which may result in the unclear area and boundaries of a customary forest area of one MHA unit.

With developments in various fields and changes in the field, such as changes in forest function due to shifting cultivation, illegal cultivation, timber theft, encroachment of customary forest areas carried out by community groups living around and within forest areas and the use of forest area for development outside the forestry sector. Therefore, the determination of customary forest as a means of providing legal clarity and certainty to the customary forest of each MHA unit. If the determination of customary forest has been carried out, then there is legal legalization of the existence of customary forest from each MHA unit.

The act of establishing customary forest is not only to obtain the legalization of customary forest areas from MHA units, but more importantly to protect MHA units in exercising their rights within the boundaries of their forest areas, thus closing the possibility of any claims to customary forest areas between each other. each MHA unit, as well as closing the possibility of government action in granting forest management rights which are located in customary forest areas.

This act of establishing customary forest also helps the government in providing data information in the forestry sector to make it easier to carry out legal actions in forest areas. This means that there is an administrative order in forestry affairs in order to avoid granting forest management rights which can lead to forest area disputes. Thus the act of establishing customary forests provides legal legalization of customary forests from each MHA unit so that there is legal clarity and certainty in customary forests, avoids conflicts in the granting of forest management rights by the government and provides a forestry data information system in the context of making or establishing state policies. in the forestry sector.

b. Implementation Arrangements for Determination of Customary Forests

Determination of customary forest to obtain legal clarity and certainty regarding the condition of the space or customary forest area of each MHA unit. In order to determine the forest from each MHA unit, there is a procedure stipulated in Article 9 of the Ministerial Regulation 17 of 2020 which stipulates that:

- (1) Determination of the status of Customary Forests is carried out through an application to the Minister by the customary authorities with copies to:
 - a. regent/mayor;
 - b. provincial government apparatus organizations in charge of the environment and/or forestry;
 - c. district government regional apparatus organizations in charge of the environment; and
 - d. technical implementing unit related to the scope of the Ministry of Environment and Forestry.
- (2) The application as referred to in paragraph (1) is accompanied by the following requirements:
 - a. a regional regulation containing the substance of the regulation or the substance of the determination of the recognition of MHA as referred to in Article 6 paragraph (3) along with the results of the identification and map of the MHA area by a team formed by the regent/mayor; and
 - b. statement containing:
 1. confirmation that the proposed area is the applicant's Customary Area/Customary Forest; and
 2. approval of the determination of functions in accordance with the provisions of the legislation.

Based on the regulation, the determination of customary forest is carried out by submitting an application for the determination of customary forest by MHA stakeholders to the Minister of Environment and forestry, with a copy to the regent/mayor, provincial government organization in charge of environment and/or forestry, regional apparatus organization. district government in charge of the environment, and technical implementing units related to the scope of the Ministry of Environment and Forestry.

The application submitted by the MHA stakeholders is accompanied by a regional regulation containing the substance of the regulation or determination of MHA recognition along with the results of the identification and map of the MHA area by a team formed by the regent/mayor. For this reason, in order to provide clarity and legal certainty on customary forests, each MHA unit in Central Maluku district must submit an application to the Ministry of Environment and Forestry.

The MHA unit in Central Maluku district is called the State. The State is a unit of customary law community which has a territorial genealogy which has territorial boundaries, has the authority to regulate and manage the interests of the local community based on the rights of origin and local customs and is recognized and respected in the system of government of the unitary state of the Republic of Indonesia.¹²

Administratively, there are approximately 70 states or MHA units in 18 (eighteen) sub-districts in Central Maluku district. Sociologically, generally each country or MHA unit in Central Maluku district has customary forest. For this reason, each country or MHA unit in Central Maluku district must submit an application for the determination of customary forest to the Minister of Environment and Forestry for the determination of their customary law. However, until now, MHA states or units within the administrative area of the Central Maluku district government have not submitted an application for the stipulation of their customary law.

If the determination of customary forest is not carried out, it will cause problems or conflicts between MHA units and the government or companies that obtain forest management rights in customary

¹² Article 1 number 14 Regional Regulation of Central Maluku Regency Number 1 of 2006 concerning the State.

forests. This happened in the State or the Naulu MHA unit with PT Bintang Lima Makmur which carried out logging in the Naulu State customary forest. The same thing happened in the State or the MHA unit of Sabuai with CV Sumber Berkat Makmur who carried out the clearing of customary forests in the land of Sabuai.

The incident referred to is a minor issue that occurred between the MHA unit and forest management companies in customary forests that occurred in Maluku Province, so that customary forest determination had to be made. The nature of forest management must be carried out without causing damage to the forest environment. Likewise, in the context of clearing forest areas for development purposes, it must be carried out in such a way while maintaining forest sustainability, so that forests must be preserved, maintained and protected.

Myrna Safitri in her writing *Dividing the Land: Legal Gaps in the Recognition of Customary Land in Indonesian Forest Areas*, shows that there are three main factors that cause delays in the recognition of customary forests in Indonesia, especially after the Constitutional Court Decision No. 35/PUU-X/2012. The three factors consist of: i) inconsistency of national law related to the legal umbrella for recognition of indigenous peoples and their territories; ii) the persistence of mindset among forestry bureaucrats who view that 'forest area' is only state forest; and iii) strong political-economic motivation among local governments to prioritize land allocation for large-scale investment over recognition of customary territories.¹³

Although the determination of customary forest has not been carried out, the regional government of Central Maluku district has proposed establishing the function of conservation forest and protected forest in customary forest areas in 5 (five) customary forest locations in several sub-districts in Central Maluku Regency.¹⁴ This raises the question, is it possible to determine the function of conservation forest as well as protection forest and production forest in customary forest without going through the stipulation of customary forest?

According to the author, the determination of forest functions can be carried out in customary forests if the status of customary forests has been determined beforehand. If the status of customary forest has been determined, then the function determination can be carried out, whether it is a conservation function or a protection function or a production function for the intended customary forest. The actions of the Central Maluku district government seem to want to limit the activities of MHA units in their customary forests.

III. Responsibilities of Local Governments for Determination of Customary Forests

Whereas in order to determine customary forest, the customary holder must submit an application for the determination of customary forest to the Minister of the environment and forestry. The said application is accompanied by a regional regulation containing the regulation or stipulation of MHA recognition along with the results of the identification and map of the MHA area, as well as a statement letter containing confirmation that the proposed area is the applicant's Customary Forest as contained in Article 9 of Ministerial Regulation 17 of 2020 which stipulates that:

- (1) Determination of the status of Customary Forests is carried out through an application to the Minister by the customary authorities with copies to:
 - a. regent/mayor;
 - b. provincial government apparatus organizations in charge of the environment and/or forestry;
 - c. district government regional apparatus organizations in charge of the environment; and
 - d. technical implementing unit related to the scope of the Ministry of Environment and Forestry.

¹³ Op Cit, Muki T Wicaksono and Malik, p. 29

¹⁴ Interview with Muhaji Tuakia (Head of Legal Division of Central Maluku District Government), 30 June 2021, Masohi.

- (2) The application as referred to in paragraph (1) is accompanied by the following requirements:
- a. a regional regulation containing the substance of the regulation or the substance of the determination of the recognition of MHA as referred to in Article 6 paragraph (3) along with the results of the identification and map of the MHA area by a team formed by the regent/mayor; and
 - b. statement containing:
 - (1) confirmation that the proposed area is the applicant's Customary Area/Customary Forest; and
 - (2) approval of the determination of functions in accordance with the provisions of the legislation.

Based on the regulation in question, there is a delegation or granting of authority to district/city local governments including the Central Maluku district government to stipulate a Regional Regulation concerning the Recognition of the existence of MHA units in their regions, as well as stipulating the results of identification of MHA units and a map of MHA unit areas within the administrative area of government. as a requirement for submitting an application for determination of customary forest by customary stakeholders from one MHA unit.

The granting or delegation of government authority from a government organ or institution to another government organ or institution creates or creates responsibility for the government organ or institution that receives the said government authority to carry out the said government authority. This means that when there is a grant or delegation of government authority, there is a transfer of responsibility for implementation and legal accountability from the one who gives it to the one who receives the government authority, as said by Suwoto Mulyosudarmono that responsibility arises because of the granting or delegation of power.¹⁵

In Dutch, responsibility is known by two terms, namely aansprakelijk and verantwoordelijk. Aansprakelijk, defined as (1) aanspraakmakend kunnende worden om vergoeding (wegens tegebrachte schade); (2) Van goederen waarop iemands schulden kunnen worden verhaald.¹⁶ (1) can be sued for compensation (because of the losses incurred); (2) (damage) against goods caused by someone's fault, can be sued for compensation. Meanwhile, verantwoordelijk is defined as verantwoordelijkheid het gehouden; zijn om verantwoording te geven; zich voor iets verantwoordelijk, aansprakelijk, stellen.¹⁷ Another definition of aansprakelijk means verbonden, verantwoordelijk, in rechte gehouden voor enige schuld of voor de gevolgen van enig feit of enige handeling.¹⁸ (bound, responsible, legally responsible for the mistakes or consequences of an act). From this understanding emerges the term liability based on the law; “Wettelijke aansprakelijkheid is gehoudeheid tot schadevergoeding uit onrechtmatige daad” (accountability according to law, namely the obligation to compensate for losses arising from unlawful acts).

Every person or institution or government organ is responsible for the implementation of the government authority given to him. Every use of authority by officials is always accompanied by responsibility.¹⁹ Thus, when given the authority to the district/city government to stipulate local regulations regarding the recognition of MHA units and identify MHA units and map the MHA areas, it creates responsibility for the district/city governments, including the Central Maluku local government.

¹⁵ Suwoto Mulyosudarmono, 1990, Powers and Responsibilities of the President of the Republic of Indonesia, A Research on Theoretical and Juridical Aspects, Dissertation, Postgraduate Program, Universitas Airlangga, Surabaya, p. 32

¹⁶ R. K. Kuipers, 1951, Geilusteed Wordenboek Nederlansche Taal, Maatschappij Elsevier, Amsterdam, p. 20

¹⁷ Ibid, p. 20

¹⁸ S.J. Fochema Andrea, 1951, rechstgeleerd handwoodenboek, Tweede Druk, J.B. Wolter Uitgevers-maatschappij N.V, Groningen, p. 4.

¹⁹ Lutfil Ansori, Governmental Discretion and Accountability in Government Administration, Juridical Journal Vol.2 No. June 1, 2015: 134-150, ISSN 1693448, p. 135.

This responsibility is an obligation that cannot be ignored by the district/city government. Responsibility is an obligation as a consequence of granting government authority. However, the responsibility given to the district/city government is to form and stipulate regional regulations regarding the recognition of the existence of MHA units, as well as to stipulate the results of the identification of MHA units and a map of the MHA unitary areas within the administrative area of government, as a requirement for submitting applications for the determination of customary forests by stakeholders. The customary law of one MHA unit has not been carried out by the Regional Regulation of the Central Maluku Regency.²⁰

The Central Maluku district government has not carried out the said responsibilities, indicating that the local government ignores its responsibility to provide legal clarity and certainty regarding customary forests from MHA units in their own regions and does not respect the existence of MHA in their area which is constitutionally guaranteed in Article 18B of the NRI Constitution. In 1945 which was confirmed through the Constitutional Court Decision No. 35/PUU-X/2012.

Legally, it is not possible to determine the existence of the customary forest without first establishing the recognition of the existence of the said MHA unit, because the recognition of the existence of the said MHA unit will become a legal subject in the customary forest. State recognition of MHA in Maluku in local regulations will have an impact on the determination of customary forest areas in the MHA's petuanan area in Maluku.²¹

Myrna A. Safitri said that considering the practice of delineating boundaries that had been carried out in the past without paying much attention to the settlement of claims for rights and community access properly, a mechanism for handling community objections to the results of forest area determination also needed to be provided.²²

The local government of Central Maluku district has not carried out its responsibilities to make and stipulate regional regulations regarding the recognition of the existence of MHA units, as well as stipulating the results of identification of MHA units and maps of MHA unit areas within their administrative areas. autonomy to the regions to regulate and manage their own government affairs and the interests of the people in the regions based on the aspirations and conditions of the people and regions as an effort to improve government services to the people in the regions, because the purpose of implementing decentralization and granting regional autonomy is to accelerate the realization of community welfare through improved services. government in the system of the Unitary State of the Republic of Indonesia.

Philosophically, the handover of government affairs from the central government to the regions is an effort to bring government tasks closer to the people in the regions due to the condition of the State of Indonesia which has such a wide area with the complexity of community and regional life, both social and cultural life and so on. Such conditions, if all government affairs are centered on the central government, of course, will result in the duties of the central government becoming heavy and the central government ineffective and efficient in carrying out government services to fulfill the needs of all citizens scattered in various regions.

Likewise, the delegation of authority to the district/city government to make and stipulate regional regulations concerning the recognition of the existence of MHA units, and to determine the results of the identification of MHA units and a map of the MHA unit areas in the regions as an effort to bring the implementation of government service functions in the forestry sector closer to the citizens.

²⁰ Ibid.

²¹ Victor Juzuf Sedubun, The Urgency of Establishing Regional Regulations for Determination of Customary Forests in Maluku (Overview of the Constitutional Court Decision Number 35/PUU-X/2013), *Journal of Environmental Law Development* P-ISSN 2541-2353, E-ISSN 2541-531X Volume 5, Number 1, October 2020 DOI: <http://dx.doi.org/10.24970/bhl.v5i1.161>, p. 121.

²² Myrna A. Safitri, State Controlling Rights in Forest Areas: Several Indicators Assessing Its Implementation, *Indonesian Journal of Environmental Law*, VOL.1 Issue 2, December 2014, p. 16.

State, because from the approach to the organizational structure of government, district/city governments in Maluku are closer and more aware of and understand the needs of MHA units in Maluku than the central government, the Central Maluku district government should be more responsive to the needs of MHA units in Maluku. This makes the government bureaucracy more community-oriented in making decisions and carrying out government actions in the forestry sector, even deciding on government bureaucratic procedures that are structured, convoluted and less accommodating to the needs of local communities.

The central government gives a big role to the districts/cities in Maluku to participate in carrying out government tasks in the forestry sector according to their own initiatives and initiatives, or in other words, the central government gives autonomy to the districts/cities in Maluku in managing affairs in the forestry sector.

However, the responsibility given to the Central Maluku district government is to form and stipulate local regulations regarding the recognition of the existence of MHA units, as well as to stipulate the results of the identification of MHA units and a map of the MHA unit areas, as a requirement for the submission of an application for the determination of customary forest by customary stakeholders from one MHA unit. has not been carried out by the Regional Regulation of Central Maluku Regency.

Closing

In accordance with the description in the discussion, it can be concluded that the nature of customary forest for MHA units is a place and source of life for MHA units to build their civilization of life, so that the existence of customary forests cannot be separated from the existence of MHA units. In order to provide clarity and legal certainty for the customary forest of each MHA unit, it is necessary to determine the customary forest. The determination of customary forest is carried out through the submission of an application by customary stakeholders to the Minister of Environment and Forestry. The application is accompanied by a district/city regulation concerning the Stipulation of Recognition of MHA units, and the results of the identification of MHA units as well as a map of customary areas made by the district government. However, the local government of Central Maluku Regency in Maluku Province has not stipulated a regional regulation of Central Maluku district regarding the recognition of MHA units, and has not identified MHA units in their area and has not made a map of the customary territory of MHA units within the administrative area of their government. This shows as if the local government does not respect the existence of MHA in their area, and the local government ignores its responsibility to provide clarity and legal certainty of customary forest from MHA units in their own area which is constitutionally guaranteed in Article 18B of the 1945 Constitution of the Republic of Indonesia, which is confirmed through Article 18B of the 1945 Constitution of the Republic of Indonesia. Constitutional Court Decision No. 35/PUU-X/2012.

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