

Implementation of the Recognition and Protection of the Rights of Indigenous Peoples in the Management of Indigenous Forests in Maluku

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ABSTRACT

Indigenous peoples are groups of people who have lived for generations in certain areas and have a strong relationship with their customary rights. However, for customary law community units, Law Number 41 of 1999 concerning Forestry, presents uncertainty over the rights to their customary forest areas. Regarding the conditions of the application of the Forestry Law, indigenous peoples filed a judicial review of the existence of the said Law, so that the Constitutional Court of the Republic of Indonesia issued a Constitutional Court Decision Number 35/PUU-X/2012 against the review of Law Number 41 of 1999 concerning Forestry, which constructs the concept of customary forest ownership by removing it from the category of state forest. As a consequence, the government must remove customary law areas from state forest areas. Thus the problem that will be examined in this paper is how recognition and protection of customary forests are used as the object of forest management efforts. This type of research is normative legal research, with statutory regulations, concept approaches, comparative approaches and case approaches. The legal material collection technique used in this research is library research. Based on the background and research methods mentioned above, the results obtained are philosophical, recognition and respect for customary forests is to provide legal protection to customary forests which are a place and source of life for indigenous peoples, and to determine the location of customary forests by the government. after the MK decision No. 35/PUU-X/2012.

Keywords : Customary Law Community, Customary Forest,

1. INTRODUCTION

Customary law communities have the right to own and manage land and natural resources on the grounds of traditional ownership. According to the United Nations Development Programme, currently, around 370 million people are members of indigenous and tribal peoples who live in more than 70 countries around the world, constituting 5% of the entire world's population. Meanwhile, 80% of all biodiversity on this planet thrives in 22% of the earth's territory which is home to indigenous and tribal peoples.¹

From generation to generation, indigenous peoples own, control and manage and extract natural resources in their customary territories, both in the sea and land areas. In other words, indigenous peoples have autonomy in regulating and managing all natural resources within their customary territory according to the legal rules that apply in the customary community unit in question. This also often raises the issue of conflict of interest between the community and the government. The government manages natural resources in the customary lands of indigenous peoples by granting management rights or permits to companies which in practice evict indigenous peoples from their territories, and even damage the environment which should be the life support for future generations.

Rafael Edy Bosko said that a common problem faced by indigenous peoples in relation to their rights to natural resources is the government's failure or reluctance to recognize the rights of indigenous peoples to land, territories and natural resources.¹ Government policies can have an impact on indigenous peoples' rights to the forests and natural resources within their territories. The government's action in granting permits to entrepreneurs pays little attention to the interests of customary law communities, to the rights of indigenous peoples that have been controlled or owned for generations as a place to depend on for life. The government in various development policies must pay attention to the existence and rights of indigenous peoples as a community that existed before the formation of the state. According to Aristotle in Soehino's writings, the state came about because of the

¹Rafael Edy Bosko, *Rights of Indigenous Peoples in the Context of Natural Resource Management*, Elsam, Jakarta, 2006, p. 82.

merging of families into a larger group, the group regrouped to become a customary law community. Then these indigenous peoples joined again, and so on until the State emerged.²

The existence of customary law communities or commonly referred to as customary law community units is the forerunner to the formation of the state. Therefore, the rights of indigenous and tribal peoples must not be ignored but must be respected and appreciated in the implementation of the act of granting business licenses by the government so as not to harm the customary law communities as a form of implementing the constitutional provisions of Article 18 paragraph (2) of the 1945 Constitution of the Republic of Indonesia. is obliged to strive for welfare for all Indonesian people, through government actions, one of which is through the act of granting business licenses in the forestry sector, but government actions may not violate the rights of citizens which are legally guaranteed as a manifestation of the implementation of the Indonesian state as a rule of law.

The determination of the State of Indonesia as a constitutional state has consequences for every action by the community, government and other state institutions that must be based on applicable legal regulations. HWR Wade said that in a rule of law, everything must be done according to law (*everything must be done according to law*), the law stipulates that the government must obey the law, not that the law must obey the government.³ Meanwhile, Burkens, that A rule of law is a state that places law as the basis of state power and the exercise of this power in all its forms is carried out under the rule of law.⁴ In every legal state, including Indonesia's legal state, the rule of law is the basis or guideline for every action or deed in the life of the nation and state. The rule of law referred to is not only written legal rules, but also unwritten legal rules, one of which is customary law that lives and develops in the life of indigenous peoples, including customary law which regulates the rights of indigenous peoples in controlling and managing natural resources that are in forests which are an integral part of customary lands of indigenous peoples.

For customary law community units, Law Number 41 of 1999 concerning Forestry, presents uncertainty over the rights to their customary forest areas. In fact, the rights of customary law community units over customary territories are hereditary rights. This right is not a right given by the state to indigenous peoples but an innate right, namely a right born from their process of building civilization in their customary territory. Unfortunately, state claims to forest areas are always considered more valid than indigenous peoples' claims. In fact, the rights of indigenous peoples over customary territories, most of which are claimed as forest areas by the state, always far precede the rights of the state.

Regarding the conditions of the application of the forestry Law, the indigenous peoples filed a judicial review of the existence of the said law, so that the Constitutional Court of the Republic of Indonesia (hereinafter abbreviated as MK) issued the Constitutional Court Decision Number 35/PUU-X/2012 against the review of Law Number 41 1999 concerning Forestry. Which constructs the concept of customary forestry ownership by removing it from the category of state forest.

This means that the existence of customary forest is not part of state forest. Customary forest is customary forestry owned, controlled and managed by indigenous peoples. As a consequence, the government must remove customary law areas from state areas. Such conditions provide legal-formal and sociological, but also psychological for indigenous peoples throughout the archipelago. With the existence of the Constitutional Court's decision, it certainly has consequences for forestry business permits that been issued by the government on customary land in the customary territory of customary law communities. The business location given by the government must be restored or returned to their original state, and customary law communities have right to control and manage forestry natural resources that are in their customary lands.

Ignoring the rights and existence of indigenous peoples will cause problems in the life of the community and the government. Therefore, the government's action in granting business licenses does not take away or eliminate or harm the rights of indigenous peoples in customary areas. The neglect of the rights of indigenous peoples does not only occur in Indonesia, the relationship between the Government of Canada and Canada's indigenous peoples cannot be said to be harmonious. It is known that the Canadian government does not pay attention to sites that are considered sacred by indigenous peoples when carrying out construction or granting permits to companies carrying out construction⁵. In several cases that occurred in the Philippines, areas developed for agricultural areas were not intended for indigenous and tribal peoples such as in the Zamboanga del Sur region. The land obtained by the customary law community is infertile or damaged due to pests or chemicals, as happened in the Sultan Kudarat and Davao City areas. In addition, their agricultural area is small and grassland, which is mostly unproductive land. Their economic activities are very vulnerable to natural conditions such as dry and rainy seasons which affect the income of indigenous and tribal peoples⁶. Similar to what happened in Sabuai Country, Pamatang Siwalalat District, East Seram Regency (SBT), Maluku Province, The indigenous people of Sabuai who tried to defend their forest instead faced the law, around 26 residents were arrested by the police, two people are now suspects.⁷ Likewise for the indigenous people of Honitetu Village, Inamosol District, West Seram Regency, Maluku Province. Honitetu Village has a history of forest land tenure based on solidarity to defend its customary territory. Intervention by outsiders on customary territories and adaptation to changing needs of life have created various problems for land in West Seram Regency, Maluku Province. Therefore, the legal issue that will be examined is related to the restoration of indigenous peoples' rights to customary forests.

² Soehino, 1988, State Science, Liberty, Yogyakarta, p. 24-25

³ Agussalim Andi Gadjong, 2007, *Regional Government Political and Legal Studies*, Ghalia Indonesia, Bogor, p. 28.

⁴ Tahir Azhari, 1995, *Indonesian Law State, Normative Juridical Analysis of its Elements*, University of Indonesia, Jakarta, p. 49.

⁵ Exner-Pirot, H. (2018). *Friend or faux Trudeau, Indigenous Issues and Canada's Brand*, Canadian Foreign Policy Journal. accessed: <https://www.tandfonline.com/doi/abs>

⁶ Hanaya Hirai, 2015, *Indigenous Communities in the Philippines: A Situation Analysis*, Manila: Yuchengco Center De La Salle University, p.6

⁷ <https://www.mongabay.co.id/2020/02/28/berusaha-pertahankan-hutan-adat-warga-sabuai-terjerat-Hukum/>

2. RESEARCH METHODS

A. Research Type

In accordance with the substance of the problems of this research, this research is legal research. According to Peter Mahmud Marzuki that legal research is a process to find legal rules, legal principles, and legal doctrines to answer the legal issues at hand.⁸ Meanwhile, according to Erwin Pollack cited by Soejono and H. Abdurrahman that, legal research is a study to find inconcretions which includes various activities to find out what constitutes a proper law to be applied inconcritically to resolve a particular case.⁹

This type of research is normative legal research to study legal principles, legal theories, legal concepts, legal doctrines and legal norms to gain an in-depth understanding of the restoration of the rights of indigenous peoples to customary forests which are used as objects effort by the government.

B. Problem Approach

The approach used in this study is the statutory approach that relates to this issue as well as the conceptual approach that refers to the principles, principles and logic of law relating to issues and doctrines developed by legal experts, and the case approach. In other words, the approach to the problem in this study is *the statutory approach*, the conceptual approach, *the philosophical approach*, the comparative approach. and the case approach (*case approach*).¹⁰ This is considering the statute approach, conceptual approach and philosophical approach as the legal basis for analyzing problems, while the comparative approach and case approach approach to obtain legal arguments in order to answer legal issues related to the restoration of indigenous peoples' rights to customary forests which are used as business objects by the government.

C. Sources of Legal Materials

The sources of legal materials used in this research are primary legal materials and secondary legal materials. Primary Legal Materials consist of:

1. The 1945 Constitution of the Republic of Indonesia
2. Code of Civil law.
3. Law of the Republic of Indonesia Number 5 of 1960 concerning Agrarian Principles.
4. Law of the Republic of Indonesia Number 41 of 1999 concerning Forestry
5. Law of the Republic of Indonesia Number 32 of 2009 concerning Environmental Protection and Management.
6. Law of the Republic of Indonesia Number Concerning Regional Government 23 of 2014.
7. Law of the Republic of Indonesia Number 6 of 2014 concerning Villages.
8. and other provisions of Legislation relating to the substance of this writing.

While Secondary Legal Material Sources are legal materials in the form of scientific works, legal experts, books, and magazines related to the issues studied and the results of legal research providing information on primary and secondary legal materials, in the form of cases case.

D. Techniques for Collection of Legal Materials and Analysis of Legal Materials

1. Legal Material Collection Techniques

Legal materials are collected through inventory procedures and identification of statutory regulations, as well as classification and systematization of legal materials according to research problems. The legal material collection technique used in this research is library *research*.

2. Legal Material Analysis Techniques

Primary legal materials and secondary legal materials that have been collected (inventory), then grouped. This is then reviewed with a statutory approach to obtain an overview of the level of synchronization of all legal materials. The legal material that has been classified and systematized is studied, reviewed and compared with the legal theories and principles put forward by experts, to be finally analyzed.

3. RESULTS AND DISCUSSION

1. Procedure for Recognition and Protection of Indigenous Forests.

of indigenous peoples through the Constitutional Court decision No. 35/PUU-IX/2011 which cancels the classification of customary forests as part of state forests as stipulated in Law no. 41 of 1999. Constitutional Court Decision Number 35/PUU-IX/2011 animates the existence of constitutional provisions of Article 18 B paragraph (2) of the 1945 Constitution, so that the existence of customary forests has legality as part of the territory of customary law communities, and customary law community units are the owners of rights to customary forest areas, even customary forests are an attribute of the existence of a customary

⁸Peter Mahmud Marzuki, 2005, *Legal Research*, Prenada Media, Jakarta, page 35.

⁹Soejono, H. Abdurrahman, *Research Methods of Thought and Application*, (Jakarta: Rineka Cipta, 2005), Second Printing, p.110

¹⁰*Ibid*., p. 93.

law community unit. The rights of indigenous peoples over customary forest areas are hereditary from their ancestors since they built their lives in the area, not given by the government or the state, so that the intended rights are inherent in the existence of a *customary* law community unit. However, even though there has been a decision of the Constitutional Court No. 35/PUU-IX/2011, it does not mean that customary forests located in areas receive legality legally from the government or the state. There are regulations stipulated by the government which require that in order to legalize the existence of customary forests, each unit of customary law community must submit an application accompanied by various requirements and its legalization must be stipulated by regional regulations, as stipulated in Article 9 of 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 Permen No. 17 of 2020) that:

- (1) Customary Forest status determination is carried out through a request to the Minister by customary stakeholders with a copy of:
 - a. regent/guardian city;
 - b. provincial government regional apparatus organizations in charge of environment and/or forestry;
 - c. district government apparatus organizations in charge of the environment; And
 - d. units related to the scope of the Ministry of Environment and Forestry.
- (2) The application as referred to in paragraph (1) is accompanied by condition:
 - a. regional regulations which contain the substance of the regulation or the substances for determining the recognition of indigenous peoples as referred to in Article 6 paragraph (3) along with the results of identification and maps of the areas of customary law communities by a team formed by the regent/mayor; And
 - b. statement which load:
 1. confirmation that the proposed area is customary territory/customary forest applicant; And
 2. approval for assignment of functions in accordance with regulatory provisions legislation.

Based on the said arrangement, even though there has been a Constitutional Court decision No. 35/PUU-IX/2011 does not automatically result in the existence of customary forests from customary law community units gaining legal legitimacy. Rather, customary law communities must submit an application accompanied by various requirements to the government. If the intended application meets the new requirements, then the government determines the existence of customary forests from customary law community units. This means that there are administrative phases or stages that must be carried out by the government before a customary forest location is determined from a legal community unit, even though there has been a Constitutional Court Decision No. 35/PUU-IX/2011 which has determined the existence of customary forests are forests of customary law community units.

Article 9 Permen No. 17 of 2020 illustrates that the government still maintains legal politics in the construction of Law No. 41 of 1999 as an effort to maintain state control of customary forests owned by customary law community units. Even the government through the Ministry of Environment and Forestry is still setting various criteria for establishing customary forests, as stipulated in Article 8 of Permen no. 17 of 2020 which stipulates that:

- (1) Determination of customary forest status is carried out with the following criteria:
 - a. located in the state forest area or outside the state forest area;
 - b. there are customary areas in the form of forests managed by customary law communities with clear boundaries that have been passed down from generation to generation; And
 - c. there are still forest product collection activities by customary law communities in the surrounding forest areas to fulfill their daily needs.
- (2) In the event that an adat territory is in a state forest area and is not a forest, it can be included in the customary forest designation map with a special legend according to the conditions of land use/utilisation.

Based on the arrangement as intended, determining customary forest is carried out with the criteria of being inside a State Forest area or outside a State Forest area, there is an Customary Area in the form of a Forest managed by customary law communities with clear boundaries hereditary, and there are still collection activities. forest products by customary law communities in the surrounding forest areas to fulfill their daily needs. In the event that an Customary Territory is located in a State Forest area and is not a Forest, it can be included in the customary forest designation map with a special legend according to the conditions of land use/utilisation.

Setting the criteria as mentioned above, it can be said that this is not in line with the state's recognition and respect for customary forests in the Constitutional Court Decision No. 35/PUU-IX/2011 which only stipulates that customary forests are determined as long as in reality the customary law communities concerned still exist and their existence is recognized. The Court is of the opinion that the phrase referred to is appropriate as a provision that is in line with the constitutional provisions in Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution.¹¹ However, in accordance with Permen No. 17 of 2020 that arrangements for the determination of customary forests are carried out through submission of applications for determination of customary forests by customary law community stakeholders to the Minister of Environment and Forestry, with a copy to the regent/guardian cities, provincial government apparatus organizations in charge of environment and/or forestry,

¹¹Op Cit, MK Decision, p.182

district government regional apparatus organizations in charge of the environment, and technical implementing units related to the scope of the Ministry of Environment and Forestry.

Applications submitted by customary law community stakeholders are accompanied by regional regulations which contain the substance of arrangements or stipulations for the recognition of customary law communities along with the results of identification and maps of customary law community areas by a team formed by the regent/mayor. In this case, there is the responsibility of the regional government to form and stipulate regional regulations regarding the regulation and determination of the recognition of customary law communities, and maps of customary law community areas. This responsibility is an obligation that the district/city regional government cannot ignore in order to provide legal protection.

Responsibility is an obligation as a consequence of giving government authority. However, the responsibility given to the district/city blood government is to formulate and stipulate regional regulations regarding the recognition of the existence of customary law community units, as well as to stipulate the results of identification of customary law community units and maps of the territory of customary law community units within the administrative area of government, as a requirement for submission. the application for determination of customary forest by customary stakeholders from one customary law community unit has not been carried out by regional regulations in regencies/cities in Maluku Province. This shows as if the local government ignores legal protection to recognize and respect customary forests that have gained legal legitimacy through MK Decision No. 35/PUU-IX/2011 .

Legally, customary forest designations cannot be carried out without recognition of the existence of customary law community units first, because recognition of the existence of customary law community units will act as the legal subject of the applicant for customary forest determination. Recognition of indigenous peoples through the establishment of regional regulations will have an impact on legalizing the rights of indigenous peoples in customary forest areas. The rights of customary law community units to customary forests are part of human rights or human rights which are always related to their lives and property. On this basis, humans use it. Natural rights over objects owned by humans based on: a). Its rational nature, because humans use their minds to utilize everything for the sake of their survival, b). Its social nature, because in this case, humans are "encouraged" to utilize everything for the benefit of their families.¹²

The rights of indigenous peoples to property within their customary territories are their nature because of the existence of indigenous peoples as a human unit, so that customary law communities are the holders of rights over all resources in their customary territories, including customary forests. Humans as natural law subjects are also rights subjects, both as rational individual beings (natural persons) and social beings (moral persons and juridical persons). ¹³The existence of legal rules to protect human rights (including customary law community units) as legal subjects. Law has the highest authority to determine human interests that need to be regulated and protected.

Legal protection must look at the stages, namely legal protection born from a legal provision and all legal regulations given by the community which are basically community agreements to regulate behavioral relations between members of the community and between individuals and the government who are considered to represent the interests of the community. ¹⁴The existence of legal rules that are formatted in statutory regulations and judges' decisions as a basis or guideline for acting or acting in the life of the state is to provide protection to legal subjects including indigenous and tribal peoples. The law integrates and coordinates interests that are usually in conflict with one another, protection is created so as to avoid conflicts of interest between legal subjects.

Legal protection as an illustration of the legal function. The law provides protection, in addition to other legal functions, namely providing certainty and justice, and so on, so that legal relations between legal subjects run harmoniously, in a balanced and fair manner, in the sense that each legal subject gets what is his right and carries out the obligations imposed on him. . Law appears as a rule of the game in regulating legal relations as a consequence of the establishment of the state as a rule of law.

Presence of Candy No. 17 of 2020 which stipulates the determination of customary forests from a single customary community unit, by stipulating various requirements as mentioned above, does not provide protection for customary law communities, and even creates a regulatory conflict with the Constitutional Court Decision No. 35/PUU-IX/2011 which only stipulates that customary forests are determined as long as in reality the customary law communities concerned still exist and their existence is recognized. It can be said that it is as if the State does not provide legal protection to the rights of indigenous peoples to customary forests through the act of making statutory regulations, but instead creates space for conflict between indigenous peoples and the government or other parties.

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 causing delays in the recognition of customary forests in Indonesia, especially after the Constitutional Court Decision No. 35/PUU-X/2012. These three factors consist of: i) inconsistency in national law with regard to the legal framework for recognizing indigenous peoples and their territories; ii) the persistence of mindset among forestry bureaucrats that views 'forest areas' are only state forests;) strong political-economic motivation among local governments to prioritize land allocation for large scale investment over recognition of customary territories. ¹⁵Supposedly since the Constitutional Court decision No. 35/PUU-IX/2011 , legally customary forest as part of the territory of customary law communities has received legal legality, without further application for determination of customary forest by legal communities to the government to obtain legal legalization of customary forest locations .

¹²Thomas Aquinas, 2006, *Summa Theologiae*, I, IIae, Quaestio XC, in E. Sumaryono, *Ethics & Law, The Relevance of Thomas Aquinas' Natural Law Theory*, 5th Edition, Kanisius, Yogyakarta, p.260.

¹³ *Ibid* , p. 261

¹⁴Satjipto Raharjo, *Law Studies*, Bandung: PT. Citra Aditya Bakti, 2000, p.54.

¹⁵ *Op Cit* , Muki T Wicaksono and Malik, p.29

The facts about the occurrence of conflicts are caused by the government's lack of professionalism in managing legal norms, which has led to conflicts in the management of natural resources in several regions in Indonesia.¹⁶ This is the substance of the neglect of the rights of indigenous peoples over customary forests. Thus the legal arrangements in Permen no. 17 of 2020 as stated above is the basis or procedural guideline for establishing customary forests which have been recognized in the Constitutional Court decision No. 35/PUU-IX/2011 which cancels the classification of customary forests as part of state forests in Law no. 41 of 1999. However, the existence of Permen No. 17 of 2020 which stipulates the determination of customary forests from one customary law community unit, by stipulating various requirements as mentioned above, shows that it does not provide protection to customary law communities, and even creates a regulatory conflict with the Constitutional Court Decision No. 35/PUU-IX/2011.

2. Implementation of Recognition and Protection of Indigenous Forests

As previously described, the existence of the Constitutional Court decision No. 35/PUU-IX/2011 as a form of acknowledgment and respect for customary forests as part of the territories, rights and entities of customary law communities, so that when the Constitutional Court's decision No. 35/PUU-IX/2011 which stipulates that customary forests are not part of the state forest, each customary community unit has the right to all the resources in the customary forest. However, the validity of this right is limited to the customary forest space or area of each of these customary law community units, not to the customary forest of other customary law community units. This means that there are restrictions on the space for the implementation of customary law community rights to customary law locations.

In order to limit the enforceability of the rights of each customary community unit in customary forest locations, customary forest determination must be made. Determination of customary forests as a form of implementation of recognition and respect for customary forests from each customary law community unit. As previously mentioned, the government has issued Ministerial Regulation No. 17 of 2020 as a guideline for determining customary forests. According to this provision, in order to determine customary forest, customary law community units are required to submit an application for determination of customary forest by customary law community stakeholders to the Minister of Environment and Forestry, with a copy to the regent/guardian, cities, provincial government apparatus organizations in charge of environment and/or forestry, district government regional apparatus organizations in charge of the environment, and technical implementing units related to the scope of the Ministry of Environment and Forestry.

The application for determination of customary forest submitted by the said customary community unit must be completed with regional regulations containing the substance of the regulation or the substance of determining the recognition of indigenous peoples, along with the results of identification and maps of the areas of customary law communities by a team formed by the regent/mayor, and a statement letter contains (1) confirmation that the proposed area is an Customary Territory/Customary Forest applicant, and (2) approval for the determination of functions in accordance with regulatory provisions legislation, as stipulated in Article 9 paragraph (2) Permen No. 17 of 2020 which stipulates that the Application as referred to in paragraph (1) is accompanied by condition:

- a. regional regulations which contain the substance of the arrangement or the substances for determining the recognition of indigenous peoples as referred to in Article 6 paragraph (3) along with the results of identification and maps of the areas of customary law communities by a team formed by the regent/mayor; And
- b. statement which load:
 1. confirmation that the proposed area is an Indigenous Area/Customary Forest applicant; And
 2. approval for assignment of functions in accordance with regulatory provisions legislation.

An application for the designation of customary forest must be accompanied by a Regional Regulation Concerning Recognition of the existence of customary law community units in their area, as well as determining the results of the identification of customary law community units and a map of the territory of the customary law community unit within the administrative area of government. However, as previously described, the local government has not made or determined the requirements in question, which are the responsibility of the regional government in question. In West Seram Regency and East Seram Regency, they have not made or enacted a Regional Regulation Concerning Recognition of the existence of customary law community units each region.

The regional governments of each region as mentioned have only recently stipulated regional regulations which only regulate the administration of customary law community units. Each customary law community unit in each region is generally referred to as the State. The Regional Government of West Seram Regency has enacted Regional Regulation of West Seram Regency Number 13 of 2019 Concerning Country, while East Seram Regency has not stipulated its Regional Regulation. Each regional regulation as mentioned regulates the governance of the customary law community unit referred to as the Country but does not stipulate recognition of the existence of the said customary law community unit. Whereas in Article 96 of Law no. 6 of 2014 has regulated that the Government, Provincial Regional Government, and Regency/City Regional Government carry out the arrangement of customary law community units and are determined to become

Traditional Villages. The said arrangement requires that the district/city regional government must first establish a customary law community unit before establishing a customary village. Therefore, before the Regional Governments of West Seram Regency and East Seram Regency stipulate Regional Regulations concerning the State or traditional villages, they must first stipulate Regional Regulations Concerning the Establishment of Customary Law Community Units. The Maluku Provincial Government has also stipulated Maluku Province Regional Regulation Number 14 of 2006 concerning Re-establishment of the

¹⁶Husen Alting, *Legal Dynamics in Recognition and Protection of Indigenous Peoples' Rights to Land (Past, Present and Future)*, LaksBang PRESSindo, Yogyakarta, 2010, p.vii.

Country as a Customary Law Community Unit within the Maluku Province Government Area, as well as Maluku Province Regional Regulation Number 19 of 2019 concerning Customary Village Arrangement, as a legal umbrella (*Umbrella Act*) for the regional government to establish a customary law community unit called the State.

The establishment of customary law community units by the district/city regional government in Maluku is important because until now, the traditions and customs as well as customs in daily life are still strongly maintained, and even used as a guideline for community life, including in customary forest areas. This can be seen in several phenomena, such as the existence of an alliance of customary law communities, the rights of indigenous peoples over their *petuanan* territory, the system of administering customary governance, and community dispute resolution, customary forest management, and so on. Therefore it is the obligation of the regional government to make or stipulate a Regional Regulation concerning the recognition of the existence of customary law community units in their area, as well as the responsibility of the district/city regional government to determine the results of the identification of customary law community units. As previously described, the regional governments of the West Seram Regency and East Seram Regency have not yet determined the recognition of the existence of customary forests in each region, so legally the three district governments as mentioned have not yet determined the results of identification of customary law community units, because the results of the identification of customary law community units as a requirement for establishing customary law community units. In the provisions of Article 2 of the Regulation of the Minister of Home Affairs Number 52 of 2015 concerning Guidelines for the Recognition and Protection of Indigenous Peoples (hereinafter abbreviated as Permendagri No. 52 of 2015), which stipulates that Governors and regents/mayors carry out the recognition and protection of indigenous peoples. Furthermore, in Article 4 of Permendagri No. 52 of 2014 stipulates that recognition and protection as referred to in Article 2 are carried out through the following stages:

- a. identification of Indigenous Peoples;
- b. verification and validation of Indigenous Peoples; And
- c. stipulation of Customary Law Society.

The act of identifying indigenous peoples is carried out by the Regent/Mayor through the Sub-District Head or other designations involving customary law communities or community groups. Identification as intended is carried out by observing:

- a. history of Indigenous Peoples;
- b. Indigenous territories;
- c. customary law;
- d. customary assets and/or objects; And
- e. institutions/systems.

The identification results are verified and validated by the district/city Customary Law Community Committee. The Indigenous Law Community Committee as referred to consists of:

- a. Regency/city Regional Secretary as chairman;
- b. Head of SKPD in charge of community empowerment as secretary;
- c. Head of the Legal Section of the district/city secretariat as a member;
- d. Camat or other designation as a member; And
- e. The head of the SKPD is related according to the characteristics of the customary law community as a member.

The results of the verification and validation referred to are announced to the local Customary Law Community within 1 (one) month. The district/city Customary Law Community Committee submits recommendations to the Regent/Mayor based on the results of the verification and validation. The Regent/Mayor shall determine the recognition and protection of indigenous peoples based on the recommendation of the Customary Law Community Committee with a Regional Head Decree.

As already mentioned, the regional governments of the West Seram and East Seram districts have not yet identified the customary law communities in their respective regions. Apart from that, the Regency/City regional government is also required to map the location of customary law communities, in addition to the obligation for local governments to make or stipulate Regional Regulations Concerning Recognition of the existence of customary law community units in their area, determine the results of identification of customary law community units, as an administrative requirement to support the application. determination of customary forest that must be carried out by each customary law community unit. However, the regional governments of West Seram and East Seram districts have not carried out this responsibility. Thus it is the responsibility of the district/city regional government to form and stipulate regional regulations regarding the recognition of the existence of customary law community units, as well as to determine the results of the identification of customary law community units. and a map of the territory of a customary law community unit within a government administrative area has not been made as a requirement for submission of an application for determination of customary forest by customary stakeholders from a single customary law community unit.

This condition shows as if the regional government ignores its responsibility to provide protection and legal certainty regarding customary forests from customary law community units in their own area and does not respect the existence of customary law communities in their area which is guaranteed constitutionally in Article 18B of the 1945 Constitution which is confirmed through a Decision MK No. 35/PUU-X/2012. This condition is also very contrary to the principle of handing over government affairs to the regions through the implementation of decentralization and granting 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 the 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 social welfare through improving government services in the system of the Unitary State of the Republic of Indonesia.

Determination of customary forests in the framework of providing clarity and certainty to the customary forest areas of each customary law community unit, as well as providing legality to their customary forests as part of the territory of the customary law community unit so that there is legal clarity and certainty over the customary forests of each unit. the customary law community. The act of designating customary forest is not only to obtain legalization of customary forest areas from customary law community units, but more importantly is to protect customary law community units in exercising their rights within the boundaries of their forest areas, thus closing the possibility of claims for forest areas. adat between each customary law community unit, as well as closing the possibility of government action in granting forest management rights which are located in customary forest areas. Although generally in fact an customary forest area of each customary community unit has boundaries and areas marked only by natural evidence such as streams or rivers, mountains, and so on.

In general, these customary territories have factually clear boundaries, but it is undeniable that the natural boundaries that mark the existence of customary forest areas of a customary community unit may undergo changes or may be lost or eliminated due to natural upheavals such as forest fires, floods, landslides, and so on as well as human actions that can obscure the clarity of the boundaries referred to which can result in unclear areas and boundaries of an customary forest area of a customary law community unit.

This act of establishing customary forest also assists the government in providing data information in the forestry sector so that it is easy to carry out legal actions in the forest area. This means that there is an orderly administration of forestry affairs in order to avoid granting forest management rights which could lead to forest area disputes. Thus the act of determining customary forests provides legal legalization of customary forests from each customary law community unit so that there is legal clarity and certainty in customary forests, avoiding conflicts in granting forest management rights by the government and providing forestry data information systems in order to make or determine state policy in the field of forestry.

The intended determination is an activity to provide legal clarity and certainty regarding the status, boundaries and extent and location of the customary forest area of each customary law community unit, so that there is legalization of the law regarding the existence of customary forest area legal status in one customary law community unit. This of course will protect the boundaries or area of customary forest of a customary law community unit. Protection of customary forests is intended not only to prevent and limit forest damage, but also to maintain and safeguard the rights of customary law community units over customary forests, which are related to forest management. Although generally in fact an customary forest area of each customary law community unit has boundaries and areas marked by natural evidence such as streams or rivers, mountains, and so on.

The act of establishing customary forest closes the possibility of claims for customary forest areas between individual customary law community units, as well as forbidding the possibility of government action in granting forest management rights which are located in customary forest areas without the approval of the customary law community concerned. Likewise, the determination of customary forest also assists the government in providing data information in the forestry sector so that it is easy to carry out legal actions in the forest area. This means that there is an orderly administration of forestry affairs in order to avoid granting forest management rights which could lead to forest area disputes. However, until now the act of establishing customary forests for communities in the Central Maluku district as well as West Seram District and East Seram District has not been carried out, because various requirements that should be the responsibility of the local government have not been carried out.

On this basis, customary law community units cannot apply for customary forest determination, because the application for customary forest designation must be accompanied by a regional regulation regarding the recognition of the existence of customary law community units and the identification results of customary law community units as well as a map of the area of the customary law community unit . This becomes a legal problem in determining customary forests as a manifestation and implementation of state recognition and respect for the existence of customary forests as part of the territorial unit of customary law communities.

The fact is that up to now not all regions (districts and cities) have formed regional regulations regarding customary forests. The absence of regional regulations on customary forests has had an impact on the disrespect for customary law community ownership of customary forests, and the absence of protection for customary law communities when conflicts occur regarding the utilization of natural resources in customary law community forests by entrepreneurs.¹⁷ The existence of indigenous peoples as rights holders is only half-heartedly acknowledged with certain burdensome requirements. Thus, it is important to encourage the recognition of indigenous peoples as legal subjects (*legal standing*), aiming to ensure that indigenous peoples as rights holders *are* protected by law.¹⁸ Even though the nature of recognition and respect for the existence of indigenous peoples as mandated by the 1945 Constitution, must be accompanied by legal arrangements that guarantee recognition and respect for the rights of indigenous peoples are also inseparable from the existence and development of the customary law community itself. This is a form of legal protection for the existence of indigenous peoples' rights to their customary forests. Legal protection as a form of protection of rights.

The law must provide legal protection for the rights of citizens. The law not only protects the interests of the community but also must provide protection to the government and all elements of the state including customary law communities, as Soedikno Mertokusumo said that law functions as a protector of human interests. In order for human interests to be protected, the law must be implemented. The implementation of the law can take place normally, peacefully, it can also occur when there is a

¹⁷Victor Juzuf Sedubun, *The Urgency of Forming Regional Regulations for Establishing Indigenous Forests in Maluku* (Review of Constitutional Court Decision Number 35/PUU-X/2012), Environmental Law Development P-ISSN 2541-2353, E-ISSN 2541-531X Volume 5, Number 1 , October 2020, p.116.

¹⁸ Pareke, JT and Arisandi, F., 2020. " *Recognition of Indigenous Peoples and Protection of Indigenous Territories in Rejang Lebong District* ." Environmental Law Development, 4(2), p/220

violation of the law. Law violations occur when certain legal subjects do not carry out the obligations they should carry out or because they violate the rights of other legal subjects. Legal subjects whose rights have been violated must receive legal protection.¹⁹ Thus, the recognition and respect for customary forests has not been realized in the form of customary forest determination by the government, because customary forest determination must go through the procedure for applying for customary forest determination by customary law community units to the government in this case the Minister, with various administrative requirements in the form of regional regulations regarding recognition existence of customary law community units and results of identification of customary law community units, as well as maps of the area of customary law community units .

The regional government has not fulfilled the requirements as referred to, so that customary law communities cannot apply for the determination of customary forests in their respective customary territories.

4. CONCLUSION

The form of recognition and protection of customary forests should be carried out in the form of determining the location of customary forests by the government after the Constitutional Court decision No 35/PUU-X/2012 and clearly stating that indigenous peoples have the right to the said customary forests, which is set forth in a Regional Regulation

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¹⁹Soerjaono Soekanto, 1983, *Law Enforcement, Creative Bidna*, Bandung, p.143.