



Constitutional Court Decision's Implication on the Traditional Forest Management Rights Recognition

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Abstract— This article examines the legal implications and the effectiveness of Constitutional Court Decision (CCD) on Customary Forest Management to enhance the indigenous peoples' rights in managing customary territories. The normative juridical method combine with conceptual and statutory approach was chosen to see the effectiveness of these regulations in strengthening indigenous people's rights. The theory of legal effectiveness proposed by Lawrence M. Friedman is used to see how the structure, substance, and legal culture of regulations governing customary territory management rights change. The research results show that CCD on Customary Forest Management has provided changes to the substance of the Forestry Law due to the interpretation of state forests, which no longer cover customary forests. These changes have the impact of strengthening the legal structure that grants Indigenous peoples the right to manage customary forests. Nevertheless, the legal culture formed in society still does not support these changes and continues to mainstream economic activities, which are detrimental to customary law communities. Based on this analysis, this article supports the ratification of the Indigenous Peoples Bill, which, in its substance and structure, is expected to support changes in legal culture to recognize the Indigenous peoples' rights.

Keywords— Customary Areas, Indigenous Peoples, Judicial Review

I. INTRODUCTION

This article explores the legal implications of the Constitutional Court Decision Number 35/PUU-X/2012 (CCD on Customary Forest Management) concerning the rights of Indigenous Peoples (IP). This research is essential to carry out because IP is a vulnerable group that has a considerable role in maintaining the noble culture of the Indonesian nation. Guided by the theory of legal effectiveness put forward by Lawrence M. Friedman, every regulation has a legal structure, substance, and culture that supports its implementation. These indicators will be used to examine the guarantee of customary forest management rights contained in Forestry Law and the changes after the enactment of CCD on Customary Forest Management. The research was conducted using normative juridical methods. The conceptual and statutory approaches are the basis for looking at the main objectives and effectiveness of implementing the Forestry Law and CCD on Customary Forest Management.

Recognition of IP's rights to manage their customary forest is an essential issue in Indonesian government policy. In 2012, the Indonesian Constitutional Court issued CCD on Customary Forest Management to test the constitutionality of the Forestry Law. The existence of these CCD significantly influences the legal basis regarding recognizing the right to manage customary forests. Based on this decision, the Indonesian government must provide recognition and protection of IP's rights to their customary land because customary forests are in customary

areas and not in state forest areas.[1] Suppose we refer to the view of legal positivism. In that case, a judicial review should be able to form a corridor for a legal norm so that, in its application, the norm no longer infringes IP's constitutional rights.[2]

The CCD on Customary Forest Management can be interpreted that state forest and customary forest are different, and the management of customary forest must pay attention to the community's rights and following the principles contained in the Law.[3] The decision was made based on a petition submitted by the Alliance of Customary Law Communities (AMAN), the Kenegerian Kuntu Traditional Law Community Unit, Kampar Regency, and the Kasepuhan Cisitu Traditional Law Community Unit, Lebak Regency. According to the Forestry Law, *customary forests* defined as a part of state forests. This provision then arise legal uncertainty in managing customary forest area. As proof, corporations continue to erode the rights of IP, who are applicants in managing their customary forests.[4] The judicial review process can resolve conflicts over customary forest management that have occurred for decades so that IP can return to carrying out their activities following the beliefs and traditions of ancestral values that have existed since before Indonesian independence.[5]

Even though the CCD has strengthened IP's rights, implementing this policy remains challenging. One form of violation of customary forest management rights after the issuance of the CCD on Customary Forest Management occurred in West Kalimantan. This problem was then handled by the National Human Rights Commission (Komnas HAM) in 2014. This conflict involved the regional government and PT. Ledo Lestari. This private company has been carrying out economic activities such as land clearing, logging, and planting oil palm since 2004 in customary forest areas without having a permit. As a result, natural damage, such as changes in flow and water quality in the Kumba River and Semunying River, have resulted in fish deaths, resulting in a decrease in the number of food sources for IP.[6] Apart from that, violence, intimidation, and loss of livelihood have also befallen members of the Dayak Iban sub-ethnic customary law community. The Bengkayang regional government, which received reports of this action, did not try to prevent and resolve the conflict. For this reason, Dayak Iban as indigenous community then filed a lawsuit with the district court regarding alleged unlawful acts committed by the Regent of Bengkayang and PT Ledo Lestari.

This condition then indicates that legal issues relating to the recognition of IP's rights as customary forest managers are still ongoing. Based on the theory of legal effectiveness postulated by Lawrence M. Friedman, the structure, substance, and culture of law can influence the success of the implementation process of a legal rule. The analysis in this study will focus on efforts to examine the implications of implementing the CCD on Customary Forest Management on these three aspects. From this study, the causes of inefficiency in implementing regulations regarding customary forest management and the solutions needed will be seen.

In order to answer this problem, the result and discussion will be divided into, *first*, a theoretical view regarding the factors that can influence the effectiveness of implementing legal rules will be presented in the sub entitled 'The Effectiveness of Forestry Laws in Protecting Customary Forest Management Rights according to Lawrence M. Friedman's Perspective.' *Second*, the analysis will continue with a description of the mandate of the CCD on Customary Forest Management regarding the Forestry Law viewed from a theoretical perspective. This section will also review the legal implications of this regulation and its effectiveness in protecting the constitutional rights of IP in managing customary forests. This analysis will be summarized in the sub-section 'Implications and Effectiveness of the CCD on Customary Forest Management to Enhance the Recognition of Indigenous Peoples' Rights'. *Finally*, the results of the analysis will be concluded.

II. LITERATURE REVIEW

Lawrence M. Friedman developed a theory about factors that can influence the effectiveness of implementing a legal system. Law and society can be connected because of legal and cultural factors. Legal norms can influence people's lives because of the influence of legal culture. On the other hand, the implementation process of a policy becomes dynamic with the existence of a legal culture. For this reason, research conducted to see the achievements or success of implementing legal rules must have a broad enough perspective to capture the social picture arising from these rules.

A legal system is generally static. This condition is caused by the substance and structure of the law, which tends to be fixed and does not change. In Friedman's view, legal substance includes the components contained in a regulation. This component can be in the form of content containing the normative values carried out and the required procedures. After the substance is promulgated, the legal structure is ready to regulate community actions to achieve justice.[7] In order to realize this goal, legal rules not only need to be created but also need to be implemented. This implementation process then requires a structure in law. This second aspect is closely related to organizations that have the authority to act following matters regulated by legal norms.

The structural aspect of regulation is not only limited to organs owned by the government. In this case, Friedman also opens up opportunities for the involvement of other authorized organs to participate and become responsible for implementing the substantive content of the regulation. This open opportunity is intended to increase the

effectiveness and efficiency of the regulatory implementation process. The thing that needs to be considered in this case is, of course, the limits of authority of the legal structure tasked with implementing the policy. Both government and private institutions with the authority to carry out their duties and functions will have limitations following matters mandated by these statutory regulations. In some cases, a set of legal systems also has room for the formation of structures that can be used to change the substance of the law.

Even though there is a structure that can change the legal substance, without demands to change this, the legal structure and substance will remain static. This condition means that the rules remain in effect according to the content when they were promulgated, and the structure only works to be a means of implementing the mandate of the legal product.[8] The third aspect related to legal culture is an essential factor that brings dynamics to implementing these regulations. Legal culture is part of the culture that lives in society. In this case, culture is interpreted as the values and attitudes that underlie society's relationship with the law. The values that live in society will determine the way of thinking, and behaving, and behaving so that there are differences in the legal position that exists in one community and another.[9]

The level of legal awareness of the community and the options they will choose must be distinct from the rationality built due to the influence of the people's perspective in the area. Friedman gave the example that in facing a problem, a group may choose a different way of solving it from other groups. This social problem then becomes a demand that the rule of law can resolve it. Differences in rationality influenced by legal culture will make a difference in the ways chosen to articulate these demands. This process then makes the legal system dynamic. Laws, in this case, can influence people's lives and are also influenced by that community. It is not uncommon for demands and problems to arise due to the implementation process of a legal product. For this reason, the substance, structure, and legal culture are aspects that must be studied in order to see the effectiveness of the implementation of a legal system.[10]

Following the focus of this study, an analysis of the effectiveness of implementing the Forestry Law in safeguarding IP's rights to manage customary forests can be seen through the indicators proposed by Friedman. In first article, point 6 of the Forestry Law, *State forests also include customary forests*. It is important to note that not all customary areas are customary forests. However, the majority of indigenous communities still have customary forest areas because the majority of IPs still depend on forest products for their livelihoods and have various ancestral ritual traditions that are closely related to customary forest areas. This condition is accommodated explicitly in Forestry Law, especially in Article 67 paragraph (1), which gives a rights to IP in doing: (a) fulfill their daily needs by collecting forest products; (b) managing forest products under customary law under the forestry law; (c) welfare improvement by empowering the IPs. In order to obtain these rights, IP must be recognized by the government through Regional Regulations. This component later became the legal substance in the Forestry Law, which regulates customary forest management rights by IP. From this substance, there is a legal structure that gives regional governments the authority to legalize the existence of IPs who live in some customary regions.

The Forestry Law implementation then has implications for customary forest management rights that have existed for many years, even long before Indonesia's independence. Suppose we refer to the Forestry Law definition about customary forest, in that case, the state also has a rights to manage customary forest because there is no difference between customary forest and state forest. The state's authority to manage customary forests then threatens the IP's customary forest management rights, which are guaranteed through the Forestry Law especially in under Article 67. One of the polemics that emerged from this regulation can be seen in the case of East Kalimantan. In 2011 alone, at least 11 city and district governments in East Kalimantan issued location permits for plantation land clearing to 330 companies. Due to this permit, at least 3,708 hectares of land have changed function. However, in reality, more than 810,000 hectares of land are used as plantation land.[11] The practice of granting permits to these companies has taken away part of the traditional territory of the Benuaq Dayak Community.

In this case, the substance of the Forestry Law does not separate state forests from customary forests, thus creating overlapping forest management rights. The regional government here, become 'the structure' that has the authority to issue state forest management permits, has yet to show any sensitivity to the rights of IP to manage their forest, which should be accommodated through the Forestry Law. This condition then gives rise to conflict between the company and the local community. Until the end of December 2011, at least 45 conflicts had occurred.[11] The direct conflict that occurs between companies and IP is a form of legal culture that is formed in the region. However, the local government's role in granting permits to companies certainly reduces opportunities for indigenous communities to seek justice through hearings and discussions with the government. IP's non-involvement in the permit granting process makes them directly involved in conflict with the company.

From these case examples, it can be seen that the effectiveness of protecting IP's rights to manage customary forests has yet to be fully operational. Conflicts between communities and companies prove this due to overlapping management rights. Regarding legal substance, the provisions of the first article of the Forestry Law, legal uncertainty arise because of the definition on customary forests that exist in the state forest area. This article does not recognize the rights of IP as the sole managers of customary forests. In this case, the problem continues with the regional government's authority to issue state forest management permits, which then enter customary forest areas without permission from the IP. This condition then causes conflict between indigenous communities and companies to become a form of legal culture due to the Forestry Law.

III. METHOD

This article includes normative or doctrinal juridical law studies. [12] The preparation of this article used a statutory and conceptual approach. A legislative approach requires understanding, hierarchy and principles in statutory regulations.[12] In the context of this article, the legal regulations that will be analyzed are related to the recognition of IP rights and forest area management. Meanwhile, the theory of legal effectiveness put forward by Lawrence M. Friedman is our analytical tool to meet the conceptual approach. Primary and secondary legal materials are blended as the analytical materials.[13] Based on that kind of analytical materials, furthermore, legal materials in the form of act, all publications about law that are not formal documents will be used as a basic data.[14] The process of collecting data which are then selected based on their relevance to the research topic. At the stage of processing legal materials, the steps involve selecting relevant primary and secondary legal materials, classifying them and compiling the study results data in a structured and logical manner. In this context, it is important to create links and relationships between the various legal sources used to get an overall picture of the research results. Analysis of legal materials is carried out by evaluating the strengths, weaknesses and relevance of legal materials related to the identified legal issues.

IV. DISCUSSIONS AND RESULTS

Conflicts over customary forest management in Indonesia are still ongoing. Even though the Forestry Law has existed as a means for the government to regulate community rights in managing their customary forest areas, this has yet to work optimally. The problems that arise due to the implementation of the Forestry Law that violate IP's rights to manage their customary forest. For this reason, in 2012, the AMAN, the Kenegerian Kuntu Traditional Law Community Unit, Kampar Regency, and the Kasepuhan C situ Traditional Law Community Unit, Lebak Regency make a Judicial Review to the Constitutional Court. In this case, legal culture has influenced how indigenous peoples fight for their rights.

The involvement of the AMAN as one of the NGOs concerned with fighting for IP's rights certainly influences the rational choices of IP who experience losses due to the Forestry Law. In this case, the rationality that builds their legal awareness has brought judicial review as the alternative solution chosen to articulate their demands. The Constitutional Court is a legal structure that opens up opportunities for them to change the substance of the Forestry Law so that it can be a solution to the problems they face. Specifically, this request for judicial review was carried out to amend some provisions of Forestry Law. The efforts they made then produced positive results. The CCD partially granted their petition.

With the approval of the CCD, customary forests and state forests are different. Again, the traditional law that still exist as long as they do not conflict with the law can be used to manage the customary forest. Thus, the legal culture of IP affiliated with AMAN has made them choose judicial review to voice their aspirations and find solutions to the legal problems they face. It can be seen that the Constitutional Court acts is a legal structure that can be used by IP to change the substance of the law. This effort opens up the dynamics of regulations regarding protecting IP's rights to manage customary forests. It shows changes in legal substance that have occurred because the Forestry Law has not been able to protect IP's rights to manage customary forests effectively.

The existence of a CCD on Customary Forest Management underline that customary forests is different with state forests and should impact the protection of customary rights for IP. This decision annulled the possibility of the state being able to arbitrarily recognize and manage customary territories without the consent of the IP in the area. However, to access the rights owned by IP, the decision is still in the hands of the Regional Government. In this case, the provisions of Article 67 paragraph (2) state that Regional governments have the authority to legalize the existence of indigenous communities through the creation of regional regulations. In other words, IP still has to work hard to ensure that the government has registered them with Regional Regulations if they want to gain protection for the customary forest management rights attached to IP.

V. CONCLUSION

This presentation shows that the protection of IP's rights to manage customary forests still needs to run optimally. This regulation then impacts the emergence of conflicts between indigenous communities and companies that manage customary territories without permission. The horizontal conflict arises when the government choose to implement Forestry Law. Then, it brought IP's rationality to change the substance of the Forestry Law to protect their constitutional rights. The judicial review's result contained in CCD on Customary Forest Management has returned the authority to manage customary forests to the IP. That decision ensured that the state should recognize the IP's rights to manage their customary forest and is following the provisions of the Law. With this change in legal substance, the protection of IP's rights to manage customary forests can run more optimally. However, protection for IP can only apply to IP whose existence has been recognized by Regional Regulations. Based on these findings, this study suggests that regulations regarding the rights of IP in managing customary forests can be regulated in more detail in a particular Law on Indigenous Communities.

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