

Indigenous Forest Protection and Management by Traditional Communities in Papua, Indonesia

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Abstract

Adat is a custom or tradition that connotes discipline and has sanctions (Adat Law/Customary Law). Legal politics is meant a revival of custom, which is not tradition but traditionalism within the local context of Papuan Traditional Communities specific in Special Autonomy. It still exists Traditional Communities and its customary territory which includes indigenous forest, requires the Recognition, Protection and Management of Indigenous Forests by placing the Traditional Communities as its subject. The definition of indigenous forest is a state forest within the territory of traditional communities. Indigenous forest in the sense of state forest, does not negate the rights of traditional communities insofar as they still exist and are acknowledged to exist, so that traditional communities can conduct forest management and harvesting of forest products in accordance with local wisdom. However, in the management and utilization of indigenous forests, there are frequent conflicts, causing claims on the territory, either in groups, or individually. Conflict occurring in the forestry sector, in fact has become an obstacle indicator in the process of indigenous forest management, the conflict also resulted in legal uncertainty in business activities in the field of forestry and encourage indifference to the future of forest resources. Special autonomy of Papua in preamble states "The management and utilization of natural resources of Papua Province has not been used optimally to improve the living standard of indigenous people". So that required protection and management of indigenous forest based on local wisdom, which ultimately can improve the welfare of traditional community of Papua.

Keywords: Indigenous Forest, Legal Politic, Traditional Community

I. Introduction

Indigenous Forest under the provisions of Article 1 point 6 of Law of the Republic of Indonesia Number 41 Year 1999 concerning Forestry (Forestry Law) states that "Customary forest is a state forest within the territory of traditional communities". Furthermore, in the provisions of Article 67 of the Forestry Law states that traditional communities, in fact, still exist and are acknowledged shall be entitled to collect forest products to meet the daily needs of the indigenous peoples concerned, to carry out forest management activities under customary law applicable and not contrary to the law, and to obtain empowerment in the context of improving the welfare of the community.

From the provisions of the two articles mentioned above, it can be described that there are three elements in forest management by traditional community, namely: 1) elements of existence of traditional community; 2) forest management element based on customary law which is not contradictory to the law; 3) elements of sustainable forest management and can improve the welfare of traditional community.

The first element of recognition of traditional community as long as the reality still exists. Constitutionally contained in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia which states that the state recognizes and respects the unity of traditional community and their traditional rights as long as it is alive and according to the development of society and the principle of the Unitary State of the Republic of Indonesia, as governed by law. It is also mentioned in Article 3 of Law of the Republic of Indonesia Number 5 Year 1960 on Basic Regulation of Agrarian Principles (UUPA) related to the recognition of the Communal Right of traditional community.

Traditional community in the conception of the Forestry Law, pursuant to Article 67 paragraph (1) is determined if it meets the following elements:

1. Society in the form of paguyuban (*rechtsgemeenschap*);
2. There are institutional customary authorities;
3. There is a clear customary law area;
4. There are institutions and legal instruments, especially customary courts, which are still adhered to by the community;
5. Still holding forest product harvesting in the surrounding forest area for the fulfilment of daily needs.

If it meets the above requirements, then according to article 67 may be confirmed the existence and abolition of traditional community, which is determined based on the regional regulation. Regional regulations are prepared considering the results of research by customary law experts, the aspirations of local communities, and indigenous people's leaders in the area concerned, as well as other related institutions or parties.

Recognition of traditional community is also regulated in Article 2 of the, that the right to control the State

of its implementation may be authorized to the traditional community, is merely necessary and not contrary to the national interest, in accordance with the provisions of the regional government. Furthermore, in the MPR Decree No. IX/2001 on Agrarian Reform and Natural Resources Management in Article 4 regulated on the principles of agrarian reform and natural resource management must be implemented one of them with the principle of recognizing, respect, and protect the rights of traditional communities' cultural diversity over agrarian resources or natural resources.

The second element, is the existence of customary forest management by traditional communities. In order for a unity of traditional community to enjoy the right to the forest, there is a requirement which must be fulfilled by the unity of the traditional community, namely that the existence of the traditional community must first be recognized based on the regional regulation. In other words, a right to forest can only be granted to a traditional community unity that has previously been recognized in existence first. Decision of Constitutional Court of the Republic of Indonesia No. 35/PUU-IX/2011 affirm that customary forest is not customary forest but is a forest of rights that the traditional community has had for generations to the extent that it can be proven.

Presence of Decision of Constitutional Court of the Republic of Indonesia No. 35/PUU-IX/2011 which is the implementation of Article 18B of the 1945 Constitution to date is still unclear form of implementation in terms of providing legal protection of traditional communities over customary forests which have been in the state forest area.

The third element, the element of customary forest management can improve the welfare of traditional community. Law of the Republic of Indonesia Number 21 Year 2001 on Special Autonomy for Papua Province is granting wider authority for the province and the people of Papua to organize and manage themselves within the framework of the Unitary State of the Republic of Indonesia, namely the authority to organize the government and manage natural resources in the Papua Province for the prosperity of the people of Papua as part of the people of Indonesia in accordance with legislation. The granting of special autonomy status due to abundant natural resources, where geographical factor is one important factor. For example, the mountainous of nature, highlands and lowlands, valleys, even icebergs.

Explicitly on the factors that encourage the specificity of Papua Province can be seen in the consideration of Law on Special Autonomy for Papua Province in point f, g and h as follows:

- a. That the implementation of the government and the implementation of development in the Papua Province has not fully fulfilled the sense of justice, has not fully enabled the welfare of the people, has not fully shown respect for Human Rights,
- b. The management and utilization of natural resources of Papua Province has not been utilized optimally to improve the living standard of indigenous people, which has resulted in gaps between Papua Province and other Provinces, and the abandonment of the basic rights of indigenous Papuans,
- c. Whereas in order to reduce the gap between Papua Province and other Provinces, and to provide opportunities for indigenous Papuans, special policies in the framework of the Unitary State of the Republic of Indonesia.

In order to realize the above, other aspects needed in customary forest management in order to bring prosperity to indigenous people of Papua are Institutional Forest Management. Required institutional arrangements related to customary forest management. The Forestry Law states that the Cooperative is the only institution chosen by the community in order to develop its economy through forest management. This needs to be synchronized with the existence of local institutions or customary institutions that live and thrive in traditional communities.

The three elements mentioned above contained in the Forestry Law related to customary forest management by traditional communities, basically require recognition mechanisms, protection in customary forest management, in order to improve the welfare of traditional communities. Based on these thoughts then the problem to be discussed in this paper is how to recognize, protect and manage customary forest by traditional community? and how does the Papuan government in special autonomy realize customary forest management to improve the welfare of Papuan traditional communities?

II. Research Method

The nature of research in this paper is descriptive done with the normative legal approach,¹ namely research law conducted by researching and reviewing various laws and regulations.

Normative legal approach in this research is divided into two, namely: statute approach and conceptual approach.²

Primary legal materials in the form of the 1945 Constitution of the Republic of Indonesia, MPR Decree No.

¹ Soerjono Soekanto and Sri Mamudji, 2011, *Penelitian Hukum Normatif*. Jakarta: Rajawali Pers. p. 14.

² Peter Mahmud Marzuki, 2010, *Penelitian Hukum*. Jakarta: Kencana Prenada Media Group. p. 96.

IX/2001 on Agrarian Reform and Natural Resources Management, Law of the Republic of Indonesia No. 5/1960 on Basic Regulation of Agrarian Principles (UUPA), Law of the Republic of Indonesia Number 41 Year 1999 on Forestry, Decision of the Constitutional Court of the Republic of Indonesia No. 35/PUU-X/2012, as well as other laws and regulations. Secondary legal materials used in the form of books, law journals, research results, newspapers, and the internet associated with the problem of customary forest.

Primary legal and secondary law materials are analysed to answer legal issues and can provide prescriptions about the legal solution of the problems in this paper.

III. Results and Discussion

Recognition, Protection and Management of Indigenous Forest by the Traditional Community

Papua has an area of 316553.074 km², with a population of 3144581 people.¹ According to the projection data of the population of Papua 2010-2035 that there will be an increase in population over the next 25 years, from 2,5 million in 2010 to 4,1 million in 2035.² The rate of population growth in Papua is inversely proportional to the average rate of deforestation in Papua. In 2005-2009, Papua's forest area was 42 million hectares (ha), three years later in 2011 the area of Papua's forest is only 30.07 million ha remaining. Information obtained from local governments, each year the average deforestation rate in Papua is 143.680 ha. While the rate of deforestation for West Papua Province per year on average by 25 percent or 293 thousand ha.³ Deforestation occurs due to forest clearance for oil palm plantation activities, construction of infrastructure expansion of offices and community settlements.

The above figures show considerable loss of forest cover. Expansion of land-based industries such as deforestation, plantation, timber plantations and mining are the main cause besides the splitting of the administrative regions of government. Almost the entire exploitation of Papua's natural resources, especially forests, is becoming increasingly uncontrolled because of the difficult access and minimal facilities of the government, this is also exacerbated by unscrupulous behaviour of unscrupulous government.⁴

Forests are the capital of traditional communities, local government capital, the capital of a State, even in the broader sense of the function of forest as a capital for the preservation of planet Earth from the effects of greenhouse gases (Concept one earth).³ Forests for Papuan traditional communities are life-sustaining resources, as Alyssa A. Vegtert:⁵

“In forested areas, rural villagers rely upon the forest for a variety of subsistence resources. 30 For example, the customary landowners of forests in KiungaAiambak, Western Province, use their forests for the collection of housing material for temporary birthing houses, building material for canoes, access to sago palms which provide their local food staple, and hunting grounds for animal protein”.

Forests for indigenous Papuan traditional communities are life-sustaining resources, ie where to find timber and non-timber forest products, food sources such as sago, sweet potatoes, gembili, taro and jawawut. Therefore, in the Special Regional Regulation Number 21 Year 2008 on Sustainable Forest Management in Papua Province. In consideration include among others:

- a. That forest management has not been improving the welfare of the people of Papua, especially Papuan traditional communities, and has not strengthened the fiscal government in the province of Papua.
- b. That the forests of the Papua Province are the creations and gifts of God Almighty, shall be used wisely for the welfare of mankind, both present and future generations.
- c. That since the enactment of Law of the Republic of Indonesia Number 21 Year 2001 on Special Autonomy for Papua Province, the state of Indonesia recognizes, respects the rights of Papuan traditional communities over natural resources, including forest resources.
- d. That forest management in the Papua Province is conducted with the alignment, protection and empowerment of Papuan traditional communities in order to achieve prosperity and independence within the Unitary State of the Republic of Indonesia.
- e. That forest management in the Papua Province is conducted through equal and equitable partnership cooperation, keeping in mind the principles of environmental sustainability of justice, equity and human rights.

The above-mentioned special local regulations on sustainable forest management based on special autonomy emphasize the alignment, protection and empowerment of Papuan traditional communities in order to

¹ See <https://papua.bps.go.id/statictable/2015/04/24/36/luas-wilayah-jumlah-penduduk-dan-kepadatan-penduduk-di-provinsi-papua-menurut-kabupaten-kota-2012---2013.html>

² See <https://www.slideshare.net/daldukpapua/proyeksi-papua-20102035>

³ Charles Tawaru, Forest Campaigner (Papua). See <http://www.greenpeace.org/seasia/id/blog/hutan-surga-papua-yang-semakin-terancam/blog/36462>

⁴ *Loc.Cit.*

⁵ Alyssa A. Vegtert. 2005. *Forsaking the Forests for the Tress: Forestry Law in Papua New Guinea in Hibits Indigenous Customary Ownership*. Pacific Rim Law & Policy Journal Association

achieve prosperity and independence through forest management through equitable partnership and equitable partnership, keeping in mind the principles of environmental sustainability, justice, equity and human rights. This is in line with the objective of law which contains three identity values, as Gustav Radbruch puts it as follows:¹

1. The principle of legal certainty (*rechtmatigheid*).
2. The principle of legal justice (*gerechtigheit*).
3. Principles of legal benefit (*zwechmatigheid* or *doelmatigheid* or *utility*).

The ineffectiveness of law in achieving its objectives, among others can be seen from the many cases that were born in the form of conflict. Cases of illegal logging by local communities and by external communities have led to conflicts of authority between local governments, both provincial and district governments, between Papuan traditional communities and migrant communities as well as groups of traditional community with other traditional community groups.

Conflict in the management of natural resources, usually occurs due to: (1) conflict over control of natural resources; (2) a conflict of interest; (3) conflict of designation; (4) conflicts of authority; (5) conflict of commercialization of cultural values; and (6) impact conflicts.²

Conflicts arising from the management of natural resources mentioned above, caused the province of Papua to experience rapid environmental changes. The change occurs because of deforestation caused by various factors, among others: Illegal Logging practices; expansion of plantation crops, and mining activities; which triggered the destruction of natural resources in Papua.³

Forest resource management conflict occurs because forest management, especially customary forest, should in its regulation give authority to traditional community to manage and manage customary forest resources according to local wisdom value. This is a consideration in the Decision of the Constitutional Court of the Republic of Indonesia Number 35/PUU-X/2012, the Constitutional Court annuls the articles contained in the Forestry Law, namely Article 1 number 6, Article 4 Paragraph (3), Article 5 Paragraph (1), and Article 5 paragraph (2). The amendments to such disabling articles are:⁴

- a. Article 1 point 6 turns into:
"Indigenous forest is a forest within the territory of traditional communities."
- b. Article 4 paragraph (3) turns into:
"Forest tenure by the state continues to pay attention to the rights of traditional communities, as long as it is alive and in accordance with the development of society and the principle of the Unitary State of the Republic of Indonesia regulated by law."
- c. Article 5 paragraph (1) turns into:
"State forest referred to in paragraph (1) letter a, excluding customary forests."
- d. Article 5 paragraph (2) becomes invalid.
- e. Article 5 paragraph (3) turns into:
"The Government determines the status of forests as referred to in paragraph (1); and customary forests are established insofar as in reality the traditional communities concerned still exist and are acknowledged to exist."

Based on the Decision of the Constitutional Court of the Republic of Indonesia Number 35/PUU-X/2012 became the legal instrument for the State to put the customary forest back as communal rights of traditional community as part of the communal right covering its customary territory. Some forms of regulation of recognition of traditional communities and rights, among others:⁵

- a. For areas where the condition of traditional communities is homogeneous, the regulatory model can be done by establishing a regional regulation on the Existence and Rights of traditional communities.
- b. For regions where the condition of heterogeneous traditional community is regulatory model can be done by establishing regional regulation of Determination.
- c. As for the area that will make the unity of traditional community as Indigenous Village, as referred to Law of the Republic of Indonesia No. 6 Year 2014 on the Village, its own regulatory model also, that is in the Regional Regulation Establishment of Indigenous Villages.

Recognition of traditional communities over customary forests that are the source of life for the Peruvian

¹ Dwika, "Keadilan dari Dimensi Sistem Hukum", See <http://hukum.kompasiana.com>. (02/04/2011), accessed on October 31, 2017

² Krinus Kum. 2015. *Konflik Pertambangan di Tanah Papua*. Jakarta; Mitra Wacana Media. p. 247

³ Herman Hidayat. 2015. *Pengelolaan Hutan Lestari*. Yayasan Pustaka Obor Indonesia, Jakarta. p. 127

⁴ Safrin Salim. (2016). *Perlindungan Hukum Masyarakat Hukum Adat Atas Hutan Adat*. Jurnal Hukum Novelty, Vol. 7 No. 2 August 2016, p. 209-224.

⁵ Kurnia Warman. *Peta Perundang-undangan Tentang Pengakuan Hak Masyarakat Hukum Adat*. See http://procurement-notices.undp.org/view_file.cfm?doc_id=39284

Amazon traditional communities of Peru, in the writings of Barbara Fraser:¹

Peru-Over the past half-century, more than 1,300 indigenous communities in the Peruvian Amazon have obtained title to more than 12 million hectares of land-about 17 percent of the country's forest area.

By 2016, 1,365 Amazonian communities had obtained title to more than 12 million hectares of land, while 644 claims, totalling nearly 5.8 million hectares, were pending.

As an alternative to individual community titles, indigenous organizations had also won the designation of 2.8 million hectares of reserves to protect semi-nomadic groups that shun contact with the outside world, and another 2.2 million hectares in "communal reserves", protected areas encompassing various communities.

Furthermore, in ensuring the protection and management of forest resources / customary forest, the local government approaches by inviting the participation of the community through the *ondoafi* (tribal chief). Some approaches are community participation in forest resources management, such as community participation related to CA Cyclops area in Jayapura District, among others:² *first*, the Head of Jayapura Forestry Office, Georg Karma requested the denomination of the *ondoafi* and the communal owners who partly belong to the land belonging to the protected forest area to give the land to the government; *second*, invite the community to reforest including the area which is about 500 meters from the buffer zone border; *third*, the Forest Service invites indigenous peoples to form a Forest Management Unit (KPH) about 54,000 ha covering protected forest, Limited Production Forest (HPT), and convertible production forest (HPK); *fourth*, to hold cooperation, including training between NGOs and Indigenous Peoples to design sustainable and sustainable forest management. This form of activity is a form of protection and forest management in Papua that always involves stakeholder participation and customary law communities in the effort to maintain and manage forest resources sustainably.

The Role of Government in the Protection and Management of Indigenous Forests

The conflict of indigenous forest management in Papua is caused by social, economic, and political relationships rooted in the struggle over the increasingly limited resources of ownership, causing some groups to try to defend it, and on the other hand more and more are trying to get it. Conflict in Papua according to Krinus Kum³ can happen because:

- a. Plurality is horizontal, meaning it is a culturally diverse society structure, such as ethnicity, religion, race. Cultural horizontal pluralism can lead to civil war and separatism movements. If this situation occurs, then the community will experience disintegration.
- b. Plurality is vertical, meaning the structure of society that is polarized by wealth, and power. Vertical pluralism can lead to social conflict because there is a small group of people who have wealth, well-established education, power and authority, on the other hand most have no or no wealth, low education and no power and authority.
- c. Differences of interests between individuals or groups of people who have different feelings, attitudes and cultural backgrounds.
- d. Changes in values in society, such as rapid or even sudden change of old values in traditional societies into new values in industrial society. Togetherness values are transformed into individualists and time-share values that tend not to be strictly transformed into strict time-sharing. These changes, if they happen quickly and suddenly, will create a shake-up of social processes in society, there will be an attempt to reject all forms of change because it is considered to disrupt the existing order of community life.

Conflict management and utilization of Papua's forest resources in the record⁴, that:

"several joint civil society organizations in Papua issued late 2017 records on land grabs, violence and deforestation in Papua during 2017, among others, the Government adopted new policies in the form of licenses for plantations and mining, over forest functions and the implementation of agrarian reforms without deliberation and agreement with indigenous peoples as owners of communal rights... Meanwhile, new policies and licensing in 2017 are contrary to the President's policy on a moratorium on new permits or Presidential Instruction of the Republic of Indonesia Number 6 Year 2017 concerning the postponement and completion of new natural forest and peat land permits."

Furthermore, in RTRW (Spatial Plan of Territory) of West Papua Prone to Massive Deforestation,⁵ that:

¹ Barbara Frase. (2017). *Long Road Ahead to Indigenous Land and Forest Right in Peru*. Forests News. Vol. 14. Nomor 2. p. 550. See <https://www.cifor.org/library/6426/reclaiming-collective-rights-land-and-forest-tenure-reforms-in-peru-1960-2016/>

² Herman Hidayat. *Op.Cit.* p. 149

³ Krinus Kum. *Op.Cit.* p.25-27

⁴ Asrida Elisabeth. *Catatan dari Papua: konflik Agraria Belum Usai, bagi-bagi hutan kepada pemodal jalan terus*. Jakarta November 28, 2017. See <http://www.mongabay.co.id/2017/11/28/rtrw-papua-barat-rawan-deforestasi-besar-besaran/>

⁵ Indra Nugraha. *RTRW Papua Barat Rawan Deforestasi Besar-besaran*. Jakarta November 28, 2017. See <http://www.mongabay.co.id/2017/11/28/rtrw-papua-barat-rawan-deforestasi-besar-besaran/>

- West Papua RTRW 2013-2033 shows the threat of changes in the function and designation of forest area of two million hectares. It accommodates more economic and corporate interests,
- At present, 143.000 customary areas in West Papua have been identified. Overlapping in customary areas, causing the extent of forests to decline, as well as unrest and tension in Papuan communities.
- While the West Papua RTRW 2013-2033 saw an increase in the cultivation function to 66% (6,5 million hectares), the protection function fell to 34% (3,3 million hectares).
- The cultivation function consists of 16% limited production forest, 15% fixed production forest, 10% convertible production forest, another 5% cultivation area, 4% plantation, 3% settlement, 0.2% mining, and agriculture 12%. Then, protected functions: 16% protected forest and nature reserve or natural conservation area 18%.

From the above description, there is a possibility of conflict of management and utilization of forest resources between traditional community and entrepreneur holding management license. Conflicts can be triggered by a disputed RTRW policy without deliberation and agreement with indigenous peoples as owners of communal rights. The right of the people in the investment activity is to know the investment licensing plan, get the investment value from the investment, obtain the compensation, to file an objection to the issuing officer, to file the cancellation of the environmentally damaging permit and to harm the life of the community.

Past and current conflict resolution efforts are a sign of the government's seriousness to fulfil the rights of Papuan traditional communities. The government should also review the permits and various development cooperation agreements, as well as sanctions imposed on corporations that harm the right to life of Papuan traditional communities and violate the laws and regulations. This has been regulated in the provisions of Law of the Republic of Indonesia Number 21 Year 2001 on Special Autonomy for Papua (Article 40) and has not been implemented yet.¹

By the Indonesian Forest Entrepreneurs Association (APHI) asserted that any form of forest management applied in Papua in the era of special autonomy is expected not to shift from the following principles²:

1. Sustainable forest management means that the exploitation of natural resources must contain replanting efforts and enable forests to recover so that the present quality of forest resources can still be enjoyed by future generations;
2. Forest exploitation should be able to provide decent economic benefits for employers;
3. Forest exploitation must be capable of prospering the surrounding community;
4. Forest concessions must be law-abiding.

The legal basis of Forest Management in Papua through Special District Regulation No. 21 Year 2008 on Sustainable Forest Management in Papua Province, but until now cannot be implemented because there are no norms, standards, procedures, criteria (NSPK) by the Ministry of Environment and Forestry of the Republic of Indonesia. NSPK as stipulated in Article 9 and Article 11 of Government Regulation of the Republic of Indonesia Number 38 Year 2007 on the Division of Government Affairs between the Government, Provincial Governments, and Regency/City Government. Article 9 states that ministers/heads of non-departmental government agencies establish norms, standards, procedures, and criteria for the implementation of compulsory and optional affairs. Then in Article 11, the district/city and provincial governments in carrying out government affairs shall be guided by the NPSK.³ With the absence of NPSK set by the Ministry of Environment and Forestry of the Republic of Indonesia, the community will be constrained to the utilization of customary forests. Nevertheless, the Ministry of Environment and Forestry of the Republic of Indonesia should, as far as possible, promote and encourage local governments to actively fulfil the rights of customary law communities along the utilization of customary forest resources.

IV. Conclusion

Recognition and socialization of customary forest by local government should be done, so that the conservation and utilization of customary forest can guarantee the welfare of the community, preserve the environmental and forest functions, and can resolve the conflict. Improved participation of the community in the preparation of the RTRW and the RTRW implementation decisions. It is also necessary to arrange customary forests by mapping customary land and land use maps, as well as land and territorial management plans. The results of customary forest mapping, land use, management plans become advocacy materials for future landscape change.

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