

RECOGNITION AND EMPOWERMENT OF CUSTOMARY LAW COMMUNITY IN BUSINESS PERMIT OF THE USE OF FOREST TIMBER (IUPHHK) IN PAPUA

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Abstract

Constitution of the Republic of Indonesia Year 1945 on Article 18B paragraph (2) has ensured that: "the State recognizes and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and are regulated by law". The existence of this recognition actually put the rights of customary law community to exploit forests including HPH/IUPHHK. In order to manage forests to obtain optimal benefits from forests and forest areas for the welfare of the community, then in principle all woods and forests can be managed by taking into account the nature, characteristics and virtues, and not allowed to change the main function. The function is the function of conservation, protection, and production. This is also the reason why empowerment of customary law community should be done. The empowerment is done by creating an atmosphere or climate that allows the community to thrive potential (enabling); and to strengthen the potential or power possessed by the people (empowering).

Keywords: Recognition and empowerment of customary law community, IUPHHK.

1. Introduction

Constitution of the Republic of Indonesia Year 1945 on Article 18B paragraph (2) has ensured that: "the State recognizes and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and are regulated by law". "The realization of such recognition should be found in various government activities, especially activities related to the existence of customary law community, including the rights of indigenous people in using natural resources. In order to manage forests to obtain optimal benefits from forests and forest areas for the welfare of the community, then in principle all woods and forests can be managed by taking into account the nature, characteristics and virtues, and not allowed to change the main function. The function is the function of conservation, protection and production. Therefore, in forest management needs to be maintained the balance of these three functions.

In accordance with the mandate of the Law Number 41 Year 1999 on Forestry, the state forest means a forest located on lands bearing no ownership rights. In terms of it, a forest that is on land that is not encumbered land rights, including customary forest such as forest areas that are in the area of indigenous peoples. With the inclusion of customary forest in terms of state forests, it means that it does not negate the rights of customary law communities along by the fact it is still existed and acknowledged. It also can conduct forest management and harvesting in accordance with the local wisdom of the customary law community.

Forest management in Indonesia has yet to show the clarity of property rights of forestland. This has complex implications in which in many places the claim's problem lays to the same forestland. Those conflicts consist of vertical and horizontal conflicts. The vertical conflicts are between communities and companies forest concessions (HPH) / business permit of the use of forest timber (IUPHHK). In terms of horizontal conflicts, the conflicts also occur among people in society due to the issue of rights over forest use.

The conflict in the forestry sector, in fact, has become an obstacle factor in the process of sustainable forest management because of the economic aspect particularly from the company side. The obstacle then conduces the lack of certainty in doing business in the field of forestry and to encourage indifference to the future of forest resources. From the social aspect, the conflict led to claiming over the area, both claiming by large groups, small or individually. While the ecological aspects related to the economic and social aspects as mentioned earlier, it would threaten the carrying capacity of forest areas, which in turn resulted in greater damage to forest resources.

Forest managed by the customary law community is included in the definition of state forests as a consequence of the right to control by the state as an organization of power for all the people at the highest levels and principles of the Unitary Republic of Indonesia. With the inclusion of customary forest in terms of state forests, it means that it does not negate the rights of customary law community along by the fact it is still existed and acknowledged. However, the law still gives wide regulation on existing of the customary community as stipulated in the forestry law. Article 67 of the Forestry Law states that "customary law community, as long as it exists and recognizes shall have the rights to: (a) collect forest products for daily needs of concerned communities; (b) undertake forest management in accordance with prevailing customary laws which is not contradicting the laws; and (c) be empowered for improving their welfare.

Strong suspicion that the companies do not realize that the local communities in the surrounding areas are part of the environment that affect its sustainability. Unfavorable relationship between the company and its environment will potentially lead to conflict. Before the reform era, the potential conflicts between local communities and companies deemed too threatening because it can easily be overcome. The society is still fear to the authorities. Since the reform era, the conflicts increase between the local communities and the company's existence. The existence of the local communities currently tends to be more courageous in fighting for their rights.

Direct impact of companies for the public benefit is the job opportunities for local workers, program support, and coaching. The indirect impacts are the opening of roads and transportation companies that can be utilized by the community, the needs of the workers of the company (such as fruits, vegetables, fish, meat), and to promote the local economy. The size of the effect is highly dependent on the level of awareness of companies, its employees, and the readiness of human resources of local community in utilizing existed opportunities.

The lack of human resources of local community has always been a major problem for them to compete. They are eliminated by settlers in taking advantage of the opportunities. The problem of the local community can actually be solved by improving education and training. Analysis of the impact on the existence of IUPHHK to the local community including its contribution to the customary rights becomes one way to see how far the level and correlation IUPHHK role in improving the welfare of society. In addition, this is one important step to determine the extent of its influence on the level of conflict that could threaten the company and harm the customary law communities through contributions IUPHHK to the customary rights. Therefore, it is important to understand that the empowerment of communities in IUPHHK in Papua province plays a very crucial role in the utilization of timber that could have implications for the welfare of society.

2. Recognition of the Government to Existence of Customary Law Community

The existence of customary law community will be approached to the concept of pure recognition. In its development, the concept of pure recognition turns into the conditional-layered recognition that is reflected in the law related to the customary law community and its rights, as well as the traditional territory. It is seen that the ratio of thought that developed in Indonesia is a state interest above anything else.

The result of second Amendment of the 1945 Constitution, in Article 18B Paragraph 2 embraces the concept of the conditional-layered recognition. This is effect that the customary law community has lost its protector in the basic state norms and some laws that misinterpret laws to the concept of recognition of the customary law community in the 1945 Indonesian Constitution before the amendment applied. Another matter of concern is the ratio of the Indonesian people think that puts the position of the customary law community in falling behind. It is well known that policies developed in the era of new order is intended to provide a foundation of legalistic-formal for uniformity any action, which is the exploitation of the rights of the socio-cultural of the customary law community. In this context, the government has seized the right and the land of the customary law community with a pretext for the benefit of countries in which there is a tendency of the economic interests of individual or groups. This action basically as a whole violates the human rights of the customary law community.

Supposedly after the reform, the government must already introduce human rights values that uphold the liberation of pluralism, distinctiveness and uniqueness owned by the customary law community. Although Indonesia has not ratified the ILO Convention 169 of 1989, but at least the government can take the ratio of thought and experience developed in the International World today. Of course the ratio of thought must be tailored to the circumstances of Indonesia. An example of it can be seen in restriction of the right of self-determination. It is because if it is not restricted, this rights part of human rights would be dangerous for the sake of the basis for certain parties to threaten the integrity and unity of the country.

In other words, as long as the government does not adopt the ratio of thought developed in the international world today, it can be said that the government adheres to the ratios and the application of practices of colonialism as it had been done by the Dutch government for the Indonesian nation to enact Agrarische Wet in 1870 with the principle Domein verklaring to provide justification of deprivation of the customary law community.

Traditional rights of the customary law community is understood deeply as the public's right to enjoy all the resources associated with the forest products to meet the needs of the customary law community, including the right of people to enjoy healthy environment. In terms of the protection efforts of the customary law community, the protection issue in Papua province has been experiencing interference with respect to increase the utilization of forest areas. The decline of the quality of forests associated with illegal logging is continuously ongoing and difficult to control.

The difficulty of efforts to control illegal logging practices is due to weak supervision of law enforcement officers. The weak supervision of law enforcement officers is also caused by a lack of infrastructure and mentality of law enforcement officers who are vulnerable to bribe. The difficulty of controlling the problem of forest destruction is difficult to handle even if it is described like a thread that has been tangled requires seriousness to fix it. The Special Law of Papua (Perdapus) No. 23 of 2008 paragraph b explains that community land rights of the customary law community and or individual rights of citizens of

the customary law community on the ground have limitations. The usage of land actually has led to environmental degradation, inequality of structure authority, ownership and use, lack of environmental capacity, increasing conflict and lack of attention of the interests of indigenous/local people and other vulnerable groups. The letter c further states that the recognition, respect, protection, empowerment and the development of community land rights and customary law or individual rights of citizens of indigenous people on the ground is viewed from the standpoint of international, national and regional.

George Soros¹ states that one of the causes of poverty is the lack of legal certainty for disadvantaged communities. Access to justice must be one of the agenda of the MDGs. There are eight goals expected by 189 countries at the At the Millennium Summit in New York. The 7th Agenda in the MDGs is “ensure Environmental Sustainability”. The 7th agenda has some targets, among others:

- 1) To integrate principles of sustainable development into country policies/programs and reverse the loss of environmental resources.
- 2) To reduce by half the number of people who do not have access to healthy minimum water in the year 2015.
- 3) To achieve significant improvement in the lives of at least 100 million people living in slums in the year 2020.

Aspect of justice is important to explain what factors contribute to justice in the welfare of the customary law community related to IUPHHK. As proposed by John Rawls, in a justice society where freedom of citizens considered to be established; the rights secured by justice are not subject to political bargaining or the calculus of social interests.²

John Rawls further explains that justice is the primary virtue of social institutions, as truth in the system of thought.³ One theory must be rejected or revised if it is not true. Likewise laws and institutions, no matter how efficient and neat, they are to be reformed or abolished if it is not fair. According to Webster Noah⁴, justice is part of the value that is abstract so it has many meanings and connotations. In conjunction with the concept of justice, justice is defined, as follows:

- a) Righteous and honest;
- b) Impartially and fair on the facts;
- c) Correct or right;
- d) Vindictive, reward or punishment, and rightfulness, based on achievements or mistakes;
- e) Sound reason and validity of rightfulness; and
- f) Correct (right), fair (just), or lawful.

The description as mentioned above shows that the low quality of human life as citizens shows that justice as a common goal is still far from expectations. In Indonesia, it is easy to find citizens whose lives are very well established and *vice versa* is so easy to find people who are far from living a decent life. Justice is symbolized by a sheet or measuring device that is not one-sided. Injustice is described like a one-sided balance; efforts to position a balance in order to be normal (not biased).

In the state administration, it is not easy to do as what is described above. However, it does not mean to let the issue of injustice continues to cause major problems occur. The state as an organization always have ups and downs that is determined not only the leader (head of state) but also can be influenced by citizens behavior. In a sovereignty state, the people have entrusted to the government as executor, which determines the direction of government policy. Roger H. Soltau suggests that the general purpose of the State is “the freest possible development and creative self-expression of its members”.⁵

In the Government Decree No. 34 Year 2002 concerning Forest Management and Forest Management Planning, Forest Utilization and Forest Area, in Article 15 states that forest utilization efforts are aimed to obtain optimum benefits for the welfare of society as justice while maintaining sustainability. Sustainable use of forests is done by taking into account economic, social and ecological. The forest is not just a collection of trees that can provide wood; forest ecology is really a life support system. In the forests, there is a wide range of useful functions for humans. Among the life chain can interact and influence each other. Therefore, damage or loss of one of the life chain will affect the other. The forest management in Indonesia has not shown property right on land forest. This has complex implications. In many places, the problem of mutual claims takes place either vertical conflict between communities with HPH/IUPHHK or even horizontal conflict amongst the communities.

¹ See George Soros, *the Cause of Poverty Due to No Legal Certainty*, his Speech, 25 March 2013.

² John Rawls, *A Theory of Justice*, Pustaka Pelajar, Yogyakarta, 2006, p. 6,

³ *ibid.* p.3.

⁴ Noah Webster, in H.M.Erfan Helmi Juni, *Philosophy of Law*, CV. Pustaka Setia, Bandung, 2012, p. 397.

⁵ See Aminuddin Imar, *Right to Control the State*, Prenada Kencana, Jakarta, 2012.

The conflict in the forestry sector, in fact, has become an obstacle factor in the process of sustainable forest management because of the economic aspect, particularly from the companies. The conflict results the lack of certainty in doing business in the field of forestry and to encourage indifference to future of forest resources. From the social aspect, the conflict led to claim over the area, both by large groups, small, and individually. While the ecological aspects, it would threaten the carrying capacity of forest areas, which in turn resulted in greater destruction of forest resources.

The facts show that the mutual claims on forestlands between HPH/IUPHHK as government partners in forest management and forest communities of long standing. The ownership conflict occurred in almost every region in Indonesia. Such condition as mentioned cause the parties in forest management to obtain short-term benefits in the form of the maximum profit without regard to safety aspects and preservation of forest resources. The forestland conflicts between HPH/IUPHHK and community happens because of the ownership/forestland tenure rights of local communities. The customary community in Indonesia continue to be victims of human rights violations. The violations of human rights are very vulnerable on Indonesian customary law communities. In addition, the conflict is rooted in a matter of legitimacy and legality.

Referring to the customary law and customary rights based on historical-cultural aspects and facts on the ground, the employers base tenure areas being managed on a formal legal rule. Both sides insist that each legal basis is referred to most powerful legality. The new paradigm of forest resource management is now more focused on the system of community-based forest management, where people are the main actors in the development of forest resources in the future.

A form of protection against the customary law communities on the real forest can also be seen in the participation of the customary law communities. Public participation of the customary law communities embodies in various forms. The participation in the form of participating in the enjoyment of natural resources is including on a healthy environment of the forest. Even the shape of the role and the participation of the customary law communities in determining planning forest use directly have supported preventive supervision of possible irregularities in the use of forests.

The public participation pursuant to Article 68 of Law No. 41 of 1999 on Forestry affirms, as follows:

- (1) Community has the right to enjoy a healthy forest environment produced by forests
- (2) Apart from the right as referred to in paragraph (1), community can:
 - a. utilize forest and forest products in accordance with prevailing laws and regulations;
 - b. be informed about plans of forest allocation, forest product utilization and forestry information;
 - c. provide information, suggestions and considerations for forest development; and
 - d. undertake supervision regarding the implementation of forest development, either directly or indirectly.
- (3) Communities within and around the forests shall have the right to receive a compensation for losing access to their surrounding forests due to its designation as forest area, in accordance with prevailing laws and regulations.
- (4) Every one has the right to get compensation for losing their ownership of land due to its designation as forest area, in accordance with prevailing laws and regulations.

While Article 69 of the Act also stipulates that:

- (1). Communities shall be obliged to participate in maintaining and preventing forest areas from disturbance and damage.
- (2). In implementing forest rehabilitation, community can request assistance, guidance and support from non-governmental organizations, other parties or government.

Article 70 (1) states that (1) Community shall take part in the forestry development. (2) Government shall be obliged to encourage people participation through various effective and efficient forestry activities. (3) To encourage people's participation, government and local government can be assisted by forestry stakeholders forum. (4) Further provisions as referred to in paragraph (1) and paragraph (2) shall be regulated by a Government Regulation.

Community-based forest management should be a key strategy in view of the problems are interlinked to rural areas, forest degradation, and governmental democracy. The conditions as mentioned above are needed to study and discuss. The protection of the Rights of the customary community is stated in Article 43 of Perdasus No.23 of 2008, as followings:

- (1) The Government of Papua Province shall recognize, respect, protect, empower and develop the rights of the customary community to be guided by the provisions of applicable legislation.
- (2) The rights of the customary community in paragraph (1) shall include community land rights of indigenous law and the rights of individual citizens customary law communities concerned.
- (3) The implementation of customary rights, so far as reality is still there, done by the custom authorities of the customary law communities concerned in accordance with the legal customary provisions, with respect for land tenure former customary rights acquired by unauthorized parties based on a procedures and legislation.
- (4) The readiness of communal land and the land of individual citizens of any customary law necessity is done through consultation with the customary community and their relevant citizen to obtain an agreement on the delivery of the necessary land or compensation.
- (5) The Provincial Government, Regency/City provide active mediation in an attempt to dispute resolution and customary land rights of individual files in a fair and prudent.

3. Community Empowerment on IUPHHK in Papua Province

Speaking of sustainable forest management should be preceded with community empowerment. Although it is understood that sustainable forest management is one of the efforts in the empowerment. In this context, the community empowerment is a prerequisite that must be met in a sustainable forest resource management. It is against the backdrop that the people who are powerless given stimulants in the form of anything, it still will not power to a reality in the case of programs of community empowerment raised by Perum Perhutani. If communities are empowered in advance to the various stimulants, it shape will be used to improve productivity in the management of the territory forest leading to a welfare improvement.

Empowering communities is an attempt to increase the dignity of society that in the present conditions are not able to escape from the trap of poverty and underdevelopment. In other words, it is to enable and empower the community's independence. This may imply that the community empowerment is to enable and independent effort to encourage, motivate and raise awareness of its potential to be more efficient and effective. It can be interpreted that one of the empowerment community forms is how to change the mindset of a person from feelings of inadequacy to be felt capable. The presence of enlightenment on the forest communities of their power and potential can provide a common awareness that the change to prosperity is a necessity.

As a process, the empowerment is a series of activities to strengthen the power or empowerment of vulnerable groups in society, including the poor. For the purpose of empowerment refers to the state or the results to be achieved by a social change that people become empowered, have the knowledge and ability to make ends meet. The empowering communities can be done in a way that includes (1) Creating an atmosphere or climate that allows the community to thrive potential (enabling); (2) strengthening potential or power possessed by the people (empowering). In this framework, it is necessary positive steps in increasing the level of education, health status, and access to sources of economic progress such as capital, technology, information, employment and markets. This empowerment concerns the construction of basic facilities and infrastructure both physical as roads, irrigation, electricity and social care facilities such as education, health and the availability of funding agencies, training and marketing of products; (3) empowering means to protect.

In the process of empowerment, the communities are created to produce on its own efforts that can be interchanged with other parties. It means that those programs are not charity for helping the communities. Related to some facts as mentioned before, forest management efforts based empowerment can be done with the following strategies:

- (1) Giving of forestry land assets that are directly related to the forest communities. This effort is to reduce direct contact with the forest communities while reducing the land grabbing because the public has been given to the forestry land assets that can serve as a buffer zone;
- (2) Providing public access to forest areas both in terms of the utilization of forest products, maintenance and supervision. The access to these forests is not just limited to the management of forest land intercropping systems which the period is very limited, but also the access in the utilization of biodiversity forests which makes it possible to improve the well-being and opportunities to participate in supervising and securing the forest areas of various possible destruction and logging;
- (3) Increasing the space of interaction between forest communities and institutions authorized in concession to the spirit of equality and partnership. The spirit of equality and partnership would not negate subordinated to society, but rather fosters the empowerment of forest communities that allow ideas and local initiatives in forest management can be operationalized in a modern;
- (4) Expanding of employment in forest exploitation that allow forest communities involved. These efforts in the short term to reduce the unemployment rate while reducing pressure on forests;
- (5) Shifting the paradigm of forest management from timber management characterized by timber extraction into forest management based on management resources that promote participatory forest management resources and community-based.

The paradigm resources management allows the entire officer of forestry to have a more complete provision in the forest management. It is not just technical capabilities in the forest management, but it also has the ability to interact with the forest communities in a participatory manner that emphasizes togetherness.

3.1 Legal Aspects Peoples' Rights Around the Forest

Management of forest resources and components surrounding communities is essential in preserving the forest. Local communities have been fused with the natural environment of mutual influence due to they are living and foraging around the forest. On the other hand, the life of local communities around the forest has not yet lifted the economy, remains poor.

The governmental policy has harmed the rights and local source of life of the customary community. This is because the commercial timber extraction is more important than the use of forests by the local communities. For example, Government Decree No. 21 of 1970 concerning Concession (HPH) and Rights of Use Forest Product junto Government Decree No. 18 Year 1975 on Concession (HPH) and Government Decree No. 28 of 1985 on Plant Industry.

3.2 Rights of Local Communities

The local community is a social unit consisting of citizens of the Republic of Indonesia who live in and/or around the forest that make up a community, which is based on the livelihoods related to forest, history, attachment to place of residence, and setting the order of life together.

In Article 1 point 34 of the Law No. 27 Year 2007 on the Management of Coastal Areas and Small Islands, the local communities is "a group of people who run the system daily lives by habits that have been accepted as values that are generally accepted but not completely depends on coastal resources and certain small islands. This formula is different from the concept of the local communities around the forests are highly dependent and influence each other in everyday life.

Recognition of the existence of the customary diversity in Indonesia has been set in article 18B paragraph (2), Article 28 paragraph 3rd Amendment of the 1945 Constitution, article 4 of Decree No. IX/MPR/2001, and Article 3 and Article 5 of the Law No. 5 of 1960. In many cases, the local communities are often marginalized their rights.

In explanatory of the Law No. 5 of 1960 reveals, "if the rights of the customary law community are used to the benefit of national development, then it should be given "recognitie" or some sort of compensation. This means that the local communities around the forest, even though their traditional rights are recognized by the state through legislation, but if necessary for the sake of development must be submitted to obtain compensation. However, in reality their land is taken for granted because it is not certified.

The rights of traditional communities around the forest is set also Article 4 paragraph (3) of the Law No. 41 of 1999 on Forestry jo the Law No. 19 of 2004 to formulate that Forest control by the state shall respect customary laws, as long as it exists and its existence is recognized and not contradicting national interests. Article 67 paragraph (1) of the Law No. 41 of 1999 jo the Law No. 19 of 2004, the customary law community recognized its existence if, in fact, meet the elements, among others:

1. The community is still in the form of association (*rechtsgemeenschap*);
2. There are institutions in the form of the customary authorities;
3. There is a clear area of customary law;
4. There are institutions and legal instruments in particular customary justice which still adhered to; and
5. It is still holding to harvest in the surrounding of forest areas to meet the needs everyday life.

The local communities around the forest in the forest looking at a vast space of life is not only meaningful production or economic, but it is also a source of other benefits both ecological and related to cultural aspects. So, the religious meaning occupies a respectable position. The interests of the local communities around the forests pose a strong commitment to use forest resources as well as possible. Obviously, they have local wisdom in forest management.

4. Conclusion

The recognition of the existence of the customary diversity in Indonesia has been set in article 18 B paragraph (2), Article 28, paragraph 3rd Amendment of the 1945 Constitution, article 4 of Decree No. IX/MPR/2001, and Article 3 and Article 5 of Law No. 5 of 1960. In many cases, the local communities are often marginalized their rights. The existence of this recognition actually put the rights of the customary law community to exploit forests including HPH/IUPHHK. It is also the reason why empowerment of the customary law communities should be done. The empowerment is done by creating an atmosphere or climate that allows the community to thrive potential (enabling); and strengthen the potential or power possessed by the people (empowering).

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