



Community Based Forest Management License: The Urgency of Forest Management for Indigenous Peoples Development

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ABSTRACT

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The position of customary law communities ' property rights (MHA) over customary forests has not been fully protected by law which causes conflicts regarding customary forests. Weak legal protection leads to discrimination for MHA, namely by loss of residence, loss of agricultural land, and even leading to punishment for defending its rights. In fact, the existence of Indigenous Peoples has been guaranteed in the constitution, namely in Article 18B of the 1945 NRI Constitution. However, in reality, the problem of property rights to customary forests is still often encountered and even boils down to human rights violations, namely the criminalization of Indigenous Peoples who are fighting for their rights. The postulate gives rise to two formulations of the problem. First, what are the problems with forest management regulation on the protection and empowerment of Indigenous Peoples? Second, How is the concept of forest management that protects and empowers Indigenous Peoples in accordance with the *ius constituendum*? To answer this problem, the author recommends improvements related to existing arrangements and the establishment of government policies as a concrete effort in enforcing the rights of MHA. Existing laws must provide protection and protection of the human rights of indigenous peoples and be accompanied by customary forest management based on the Community Based Forest Management (CBFM) License as a mechanism in settlement and to protect and implement MHA.

1. Introduction

The position of property rights of Indigenous Peoples (MHA)¹ customary forests have not been fully protected by law. The MHA in

¹ The Indigenous Peoples (MHA) referred to by the author are the unity of the community in one autonomous customary territory, where they regulate their living system independently (among others: legal, political, economic) and are formed by the community itself not

forest areas is very vulnerable to the risk of agrarian conflict considering that many natural resources that are targeted for exploitation are in this zone.² This certainly reaps forest conflicts between indigenous peoples and the government. The existence of this dispute is a reflection that indigenous peoples are vulnerable peoples in defending their sovereignty, autonomy and identity in the face of efforts to weaken and affirm the rights of indigenous peoples through the implementation of various policies by the government.³ Weak legal protection leads to discrimination for MHA, namely by loss of residence, loss of agricultural land, and even leading to punishment for defending its rights.⁴

In fact, the right to ownership of customary forests by the MHA has been affirmed by law, namely in Article 1 number 6 of Law Number 41 of 1999 concerning Forestry (Forestry Law) which based on the Constitutional Court Decision Number 35 / PUU-X / 2012 defines customary forests as forests that are within the territory of indigenous peoples. The Constitutional Court's decision is of the view that the existence of customary forests in their unity with customary rights has been guaranteed by the state through a constitution that is often called "living law",⁵ then the state must respect and protect the right to customary forests. This is reinforced by Article 67 of the Forestry Law which states that Indigenous Peoples have the right to carry out forest management activities based on applicable customary law.⁶ This means that the existence of indigenous peoples is recognized by state law as one of the entities that have the right to manage customary forest areas and the resources in them, then consequently all matters related to customary forests must be based on the consent of the rightful customary law community.⁷

The 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) has actually recognized the existence of the MHA. However, judging from

formed by other forces. Besse Sugiswati. (2012). "Perlindungan Hukum Terhadap Eksistensi Masyarakat Adat di Indonesia". *Perspektif*. 17 (1). Hlm. 2.

² Atik Winanti, Andriyanto Adhi Nugroho, Yuliana Yuli. (2019). "Access To Justice: In Considering Losses of Giving the Right of Exploitation (Studies in Mesuji Lampung)". *Veteran Law Review*. 2(2). Hlm. 21.

³ M Syamsudin. (2008). "Beban Masyarakat Adat Menghadapi Hukum Negara" *Jurnal Hukum*. 15(3). Hlm. 343.

⁴ Fitria Nurhayati. (2021). *Masyarakat Adat dan Konflik*. katadata.co.id. Retrived 26 July 2022. <https://katadata.co.id/padjar/infografik/60176fce4fa52/masyarakat-adat-dan-konflik>.

⁵ Living law is a law that is accepted, and is carried out (*observed*) and obeyed by the people concerned because it meets a sense of justice for them and is in accordance with and recognized by the constitution. See in Putusan MK No. 35/PUU-X/2012.

⁶ See in Pasal 67 Undang-Undang Nomor 41 Tahun 1999 tentang Kehutanan. LN No. 167., TLN No. 3888.

⁷ Direktorat Jenderal Pengendalian Perubahan Iklim, Mengakui Hutan Adat dan Masyarakat Adat. Retrieved 25 July 2022 Pukul 14.00. http://ditjenppi.menlhk.go.id/dari-media/368-mengakui-hutan-adat-dan-masyarakat-adat.html?fbclid=IwAR0Em59HXuLgx-6SRFRLIOSOiUQG_rGCVKHMzDopIWwXjKruNiqCyLW0s08.

the social reality in practice, MHA has not received justice. This axiom is proven by the fact that one of the cases of customary forest land in Kinipan, Central Kalimantan in 2020 is still warm in the ears of the Indonesian people. The Kinipan Customary Law Community opposes oil palm companies that want to convert community customary forests into 1,242 ha of oil palm plantations for oil palm plantations that have derogated the lives of the Kinipan people, besides that the strongest reason is that they want to maintain their ancestral heritage. However, this action actually led to violent realization without a fundamental reason against the kinipan traditional leader, Effendi Buhing.⁸

Although the government has stepped up in the drafting of a special law as a guarantee of the MHA's position, the Indigenous Peoples Bill only stops at black on white (*according to the letter*) regarding the administrative system of MHA recognition, rather than straightening out the rights of indigenous peoples who have been treated unfairly. Based on the presentation from the Secretary General of the Indigenous Peoples Alliance of the Archipelago (AMAN), the Indigenous Peoples Bill is still problematic by 60% in terms of its substance.⁹ For example, when the Indigenous Peoples Bill places the protection of indigenous peoples after recognition through local regulations as stated in Article 47 of the Indigenous Peoples Bill,¹⁰ and when this bill cannot determine the deadline for determining legality, MHA's property rights over their customary forests will always be in a backward position when they maintain property rights to their forests which are often taken over for investment, especially now that there is Law Number 11 of 2020 concerning Job Creation (Copyright Law) which privileges investment so that it can derogate MHA rights to their customary forests.

The conflict of the Kinipan Society is a manifestation of the state's inconsistency with the legal instruments it creates itself. If it is based on the thinking of Satjipto Rahardjo, the law must protect a person's interests by allocating a power to him to act in the context of these interests.¹¹ At the level of implementative legal protection should be carried out with the protection of Human Rights (HAM) and a tangible form of protection is given to the community in order to enjoy all the rights granted by law.¹² To protect the nature and purpose of the law is

⁸Apriska Widiangela, Ika Putri Rahayu, dan Lailatul Komaria. (2021). "Analisis Yuridis Problematika Pengakuan Masyarakat Hukum Adat Kinipan". *Jurnal Hukum Lex Generalis*. 2(3). Hlm. 4.

⁹Sri Utami. (2020). 60% Substansi RUU Masyarakat Hukum Adat Bermasalah. Media Indonesia. Retrieved 19 July 2022. <https://mediaindonesia.com/politik-dan-hukum/342462/60-subtansi-ruu-masyarakat-hukum-adat-bermasalah>.

¹⁰ "Masyarakat Adat yang telah ditetapkan oleh Pemerintah Daerah melalui Peraturan Daerah diakui sebagai Masyarakat Adat menurut ketentuan Undang-Undang ini", See in Pasal 47 Rancangan Undang-Undang Masyarakat Adat

¹¹ Satjipto Rahardjo. (2006). *Ilmu Hukum*. Bandung: Citra Aditya Bakti. 18.

¹² Satjipto Rahardjo. (2000). *Ilmu Hukum*. Bandung: PT. Citra Aditya Bakti. Hlm . 53.

to provide protection (protection) to the community, which must be realized in the form of legal certainty.

Based on the presentation of this material, the author is interested in conducting research on the legal formulation of forest management that accommodates the interests of Indigenous Peoples as an irreplaceable component in maintaining the sustainability and local wisdom of customary forests. The formulation of the problems in this study will focus on: 1) What are the problems of forest management regulation in Indonesia towards the protection and empowerment of Indigenous Peoples? 2) What is the concept of forest management that protects and empowers Indigenous Peoples in accordance with *the ius constituendum*? The objectives or objectives of this study include: 1) To understand the problem of forest management regulation in Indonesia towards Indigenous Peoples 2) To understand the urgency of formulating a more ideal forest management concept to protect and empower Indigenous Peoples.

2. Method

This research uses a type of normative legal research that places the construction of a system of laws and regulations based on the rules in laws and regulations.¹³ This research uses a regulatory approach,¹⁴ conceptual approach,¹⁵ and a comparative approach.¹⁶ This study was carried out to analyze the laws and regulations and the concept of CBFM in Indonesia compared to the Philippines. The source of law used is the primary legal material of the applicable laws and regulations from the authoritative party,¹⁷ secondary legal materials that describe secondary legal materials and their implementation,¹⁸ and tertiary legal materials that are non-legal materials relevant to the problem in this study.¹⁹

This study uses document study techniques as a way of collecting data. The data analysis method uses descriptive-analytical, which is to explain the problem in detail to find a solution²⁰ and prescriptive analysis with reference to finding a solution to the problem to be

¹³ Amiruddin dan Zainal Asikin. (2012). *Pengantar Metode Penelitian Hukum, Ctk. Keenam*. Jakarta: Rajawali Pers. Hlm. 118.

¹⁴ Johny Ibrahim. (1984). (The approach to legislation is oriented towards reviewing using positive law. *Teori dan Metodologi Penelitian Hukum Normatif*. Malang: Bayumedia. Hlm. 391.

¹⁵ Conceptual approach oriented towards studying with concepts. Peter Mahmud Marzuki. (2008). *Penelitian Hukum, Ctk. Kedua*. Jakarta: Kencana. Hlm. 96.

¹⁶ Comparative approach oriented towards reviewing using comparative laws or regulations between countries, Peter Mahmud Marzuki. (2005). *Penelitian Hukum: Edisi Revisi*. Jakarta: Kencana Prenada Media Group. Hlm. 93.

¹⁷ Bambang Sunggono. (2003). *Metode Penelitian Hukum, Cet 5*. Jakarta: PT RajaGrafindo Persada. Hlm. 57.

¹⁸ Sri Mamudji, et al. (2005). *Metode Penelitian dan Penelitian Hukum*. Depok: Fakultas Hukum Universitas Indonesia. Hlm. 31.

¹⁹ Peter Mahmud Marzuki. (2005). *op cit*. Hlm. 183-184.

²⁰ Soerjono Soekanto dan Sri Mamudji. (2001). *Penelitian Hukum Normatif*. Jakarta: Rajawali Pers. Hlm. 69.

pursued as an alternative to perfection.²¹ Drawing conclusions is carried out using a deductive thinking method, which is from a general nature to a special nature based on logic that can be affirmed.²²

3. Results & Analysis

3.1 Problems of Forest Management Regulation in Indonesia towards the Protection and Empowerment of Indigenous Peoples

Law as a protector of the rights and interests of everyone without exception is a most basic essence so that a formulation that does not correspond to this essence is a contradiction. The axiom is in line with Munchsin's paradigm which states that the law exists to protect all individuals through the harmony of relationships of values and rules in attitudes and actions in order to create order in the lives of fellow human beings.²³ The main essence of the existence of law as a protector certainly applies to everyone without exception such as one of the elements of the rule of law, namely equality before the law.

As a country of law that prioritizes equality before the law, Indonesia must guarantee legal protection of all its people regardless of ethnicity, race, religion, social status, and other backgrounds. This was confirmed by A.V Dicey who came up with the rule of law that the meaning of equality before the law for all citizens in a country applies both as personal representation and officials.²⁴ Furthermore, equality before the law requires the absence of special treatment (privilege) for all citizens, especially regarding the judiciary or dealing with the law.²⁵ The state as the mandate holder of the people must maintain the basis of equality in all communities regardless of their interests, capacities, and way of life.²⁶ Of course, legal protection to everyone by promoting equality applies to the MHA as one of the vulnerable groups in the country.

The Constitution as the highest social contract between the government and the governed has recognized the legal protection of the MHA so that all regulatory formulations at all levels of the hierarchy of laws and regulations must accommodate this. Efforts to provide protection to the MHA are polemics that should not be ignored because according to Jimly Assiddiqie, the protection of the MHA has been guaranteed by the state.²⁷ As mandated by the constitution as the highest law that has

²¹ Muhaimin. *Op. Cit.* Hlm. 71.

²² Soerjono Soekanto dan Sri Marmudji. *op. Cit. Hlm.* 65.

²³ Muchsin. (2003). Disertasi : "Perlindungan dan Kepastian Hukum bagi Invenstor di Indonesia". Fakultas Hukum, Universitas Sebelas Maret. Surakarta. Hlm. 14.

²⁴ A.V. Dicey. (2007). *Pengantar Studi Hukum Konstitusi, terjemahan Introduction to the Study of The Law of the Constitution.* penerjemah Nurhadi. Bandung: Nusamedia. Hlm. 251.

²⁵ Muhammad Ishar Helmi. (2013). Penerapan Azas "Equality Before The Law" Dalam Sistem Peradilan Militer. *Jurnal Cita Hukum.* I (2). Hlm. 308.

²⁶ Bani Syarif Maula. (2018). "The Role of Judicial Review In Protecting Religious Minority Rights In Indonesia". *Veteran Law Review.* 1 (1). Hlm. 3.

²⁷ Jimly Assiddiqie. (2003). *Konsolidasi Naskah UUD 1945.* Jakarta: Penerbit Yarsif Watampoe. Hlm. 32-33.

recognized the existence of the MHA through Article 18B Paragraph (2) of the 1945 NRI Constitution which reads:

“Negara mengakui dan menghormati kesatuan-kesatuan masyarakat hukum adat beserta hak-hak tradisionalnya sepanjang masih hidup dan sesuai dengan perkembangan masyarakat dan prinsip Negara Kesatuan Republik Indonesia, yang diatur dalam undang-undang”.

Based on the provisions contained, it can be seen that the state's recognition of the MHA has a consequence on the birth of the state's obligation to accommodate the interests of maintaining, protecting, and advancing the MHA. This is in line with the concept of human rights, namely to respect, to protect, to fulfill. This protection must be carried out by the government both from violations in the form of actions to commit and actions to do nothing / omission.²⁸

Legal protection of the MHA is a constitutional mandate, but this issue is unfortunately not as simple as thought. The existence of MHA in Indonesia is often found in forestry areas considering the origins of the archipelago people, not a few who started their civilization in the forest, even now. The forest is a very sacred place for the MHA where its management is based on customary rights in local customary law. However, the classic problem that does not end in the form of dualism between national law and customary law often leads to the exclusion of MHA rights by the state. This is because Indonesia, which is a Civil Law country as a result of the concordance of the Dutch nation, prioritizes the principle of legality, namely no law other than what is written in the law itself²⁹ so often the deeply rooted schools of positivism make customary rights in customary law that are still in the form of unwritten rules excluded.

Seeing the problems that have been presented according to *the sein watershed*, the existing legal construction has not been able to provide justice for the MHA in exercising its customary forest rights, the state should be accountable not only to written rules, but it is necessary to heed the protection of human values.³⁰ Therefore, there is an urgency to implement a strong mechanism as an alternative solution to resolve the late and never-ending dispute between the state and the MHA as its own citizens whose rights must be fulfilled.

For MHA, land and forests are not just economic resources, but an inseparable part of the overall life of MHA. This means that the disregard for the relationship between MHA and the right to customary

²⁸ Retno Kusniati. (2011). “Integrasi Standar Perlindungan, Penghormatan, Dan Pemenuhan HAM Dalam Tugas Dan Fungsi Satuan Kerja Perangkat Daerah”. *Jurnal Ilmu Hukum*. 2 (1). Hlm. 91-92.

²⁹ Marco Manarisip. (2012). “Eksistensi Pidana Adat Dalam Hukum Nasional”. *Lex Crimen*. I (4). Hlm. 25.

³⁰ Rantawan Djamin. (2012). “Membangun Konstruksi Hukum Indonesia Di Atas Pondasi Pancasila”. *Jurnal Ilmu Hukum*. 15 (1). Hlm. 63.

forests that has been occurring has resulted in the destruction of the overall order of MHA life.³¹ Further reviewing the condition of the problems and fulfillment of human rights experienced by several MHA including:³² *First*, the unilateral transfer of land functions/status; *Second*, the fact that customary forests are the source of life for generations; *Third*, the impact of changes in governance and the status/function of forests is the loss of MHA's sources of life and livelihoods, the destruction of cultural governance, ecosystem damage, the decline in the quality of life and welfare of MHA.

The existence of injured MHA rights is not something that can be covered up, according to the records of the Consortium for Agrarian Renewal throughout 2020 there were 241 cases of agrarian conflicts involving MHA, of which there were 41 cases in forestry conflicts while the Aliansi Masyarakat Adat Nusantara (AMAN) recorded 40 cases of forestry.³³ Bahkan catatan lima tahun terakhir, hanya sepertiga kasus hutan adat yang terselesaikan oleh Direktorat Pengaduan Konflik, Tenurial dan Hutan Adat (PKTHA).³⁴ Violations of customary forest property rights experienced by MHA have implications for the loss of life resources, the loss of places of religious/belief rituals, as well as traditional cultural activities, the loss of livelihood sources, and changes in management patterns and pollution of natural resources, thereby reducing agricultural and conservation products of MHA in their customary territories.³⁵

Not stopping at the issue of property rights to customary forests, the conflict then boils down to violations of human rights, namely the criminalization of MHA who are fighting for their rights. This is evidenced by the data reported from the Year-End Record Aliansi Masyarakat Adat Nusantara (AMAN) there were 40 cases of criminalization and violence against Indigenous Peoples in 2020. In detail, the forty cases can be grouped as follows:³⁶

³¹ Tim Inkuiri Nasional Komnas HAM. (2016). *Inkuiri Nasional Komisi Hak Asasi Manusia: Hak Masyarakat Hukum Adat Atas Wilayahnya di Kawasan Hutan*. Jakarta: Komisi Nasional Hak Asasi Manusia Republik Indonesia. Hlm. 25.

³² Yuliana Primawardani. (2017). "Perlindungan Hak Masyarakat Adat dalam Melakukan Aktivitas Ekonomi, Sosial dan Budaya di Provinsi Maluku". *Jurnal HAM*. 8 (1). Hlm. 3.

³³ Maria SW Soemardjono. (2021). Konflik Agraria Tak Kunjung Usai. kpa.or.id. Retrived 27 July 2022. http://kpa.or.id/media/baca2/opini/69/Konflik_Agraria_Tak_Kunjung_Usai/.

³⁴ Direktorat PKTHA. pskl.menlhk.go.id. Retrived 27 July 2022. <http://pskl.menlhk.go.id/pktha/pengaduan/frontend/web/index.php?r=site%2Fdirektora-t-pktha>.

³⁵ Atikah Nuraini, Dian Andi Nur Aziz, dkk. (2016). *Ringkasan Temuan dan Rekomendasi untuk Perbaikan Hukum, dan Kebijakan tentang Penghormatan, Perlindungan, Pemenuhan, dan Pemulihan Hak Masyarakat Hukum Adat atas Wilayahnya di Kawasan Hutan*. Jakarta: Komisi Nasional Hak Asasi Manusia Republik Indonesia. Hlm. 18.

³⁶ Catatan Akhir Tahun 2020 Aliansi Masyarakat Adat Nusantara. (2020). *Resiliensi Masyarakat Adat di Tengah Pandemi Covid 19: Agresi Pembangunan dan Krisis Hak Asasi Manusia (HAM)*. Jakarta. Hlm. 29.

Tabel 1. 2020 Year-End Note of the Indigenous Peoples Alliance of the Archipelago regarding conflicts between MHA and various parties

Parties to Conflict with MHA in 2020	Total
MHA vs Plantation	10
MHA vs Mining	5
MHA vs Dams and hydropower plants	6
MHA vs Government and Local Government	5
MHA vs KPH	6
MHA vs Industrial Park	3
MHA vs TNI	1
Environmental Pollution of Indigenous Territories	4

Source: Resiliensi Masyarakat Adat di Tengah Pandemi Covid 19: Agresi Pembangunan dan Krisis Hak Asasi Manusia (HAM), Aliansi Masyarakat Adat Nusantara

Based on the facts of criminalization above, it shows that the conflict over the right to customary forests is not just a matter of property rights, but more than that where other MHA human rights are also held hostage, such as the right to a sense of security guaranteed by Article 30 of Law Number 39 of 1999 concerning Human Rights (Human Rights Law).³⁷

Violations of human rights in addition to the case of the Kinipan indigenous people, were also experienced by the Bisapae Indigenous People in 2020, due to the reluctance of the Bisapae Indigenous People to agree to an offer to extend the loan and use permit on the Pubabu customary forest land, the building of houses that became refugee camps for residents who defended their customary territories was torn down by law enforcement officials. In addition, women and children at the site were intimidated, both verbal and physical.³⁸ Human rights neglect and violations are further exacerbated by cases of dispossession of customary forests experienced by Papuans. This is evidenced since the 1980s until now the presence of PTPN II Tanjung Morawa has acquired more than 50 hectares of land owned by the Arso and Prafik communities in Manokwari without compensation.³⁹ Another case occurred in the struggle for the customary rights of the Yerisiam tribe of

³⁷ "Setiap orang berhak atas rasa aman dan tenteram serta perlindungan terhadap ancaman ketakutan untuk berbuat atau tidak berbuat sesuatu", See in Pasal 30 Undang-Undang No. 39 Tahun 1999 tentang Hak Asasi Manusia, LN. 165, TLN. 3886

³⁸ Kabar Latuharhary. (2020). Masyarakat Adat Pubabu Kembali Mengadu ke Komnas HAM, [komnasham.go.id](https://www.komnasham.go.id). Retrived 27 July 2022. <https://www.komnasham.go.id/index.php/news/2020/8/10/1517/masyarakat-adat-pubabu-kembali-mengadu-ke-komnas-ham.html>.

³⁹Nico Wamafma. (2020). Retrived 31 July Pukul 23.00. <https://www.greenpeace.org/indonesia/cerita/4840/industri-sawit-rampas-hutan-dan-ruang-hidup-masyarakat-adat-papua/>.

Yaur District who were given false hope by PT Jati Darma who stood on their land. Initially the corporation was formed for the welfare of the people, but no promises were kept instead violence and persecution were given to the people of Jerezam. Not only the problem of violence, environmental conditions are getting worse due to dredging of the land which results in river drought and disrupts the livelihoods of residents.⁴⁰

The latest report in 2021 also shows that there is no good development on the MHA, even worsening. Based on the 2021 Year-End Notes from AMAN and Perhimpunan Pembela Masyarakat Adat Nusantara (PPMAN) noted that there were 13 cases of dispossession of indigenous territories covering an area of up to 251,000 ha where the impact was felt up to 103,717 people who were victims of loss. To make matters worse, there were cases that claimed lives due to being shot in a case of clashes between the Toruakat Indigenous Peoples in Bolaang Mongondow, North Sulawesi and PT. Bulawan Daya Lestari / BDL which is a mining company. There are also interesting findings in the form of 240,000 ha of customary territory that was seized for the benefit of Social Forestry, namely Village Forests, HKM, as well as HTR and Partnerships. In fact, the recognized customary forest has only covered an area of 56,903 ha consisting of 75 Customary Forest Decrees (SK).⁴¹

The fact that the rampant practice of repression of the MHA should be a slap in the face to the Indonesian government that violations of customary forest rights are not a simple matter, but result in invaluable losses, ranging from property to life threatened.⁴² Non-fulfillment of MHA rights will result in the maximum powerlessness of MHA human resources. Indigenous Peoples are also a component of Indonesian society that has a role in national development. Given that the essence of National Development is the development of the whole Indonesian people and the development of Indonesian society as a whole,⁴³ then in this case it also includes the human development of MHA. Customary forests as an inseparable part of the life cycle of indigenous

⁴⁰ Sandrayati Moniaga, dkk. (2016). *Konflik Agraria Masyarakat Hukum Adat Atas Wilayahnya di Kawasan Hutan*. Jakarta: Komisi Nasional Hak Asasi Manusia Republik Indonesia. Hlm. 995-996.

⁴¹ AMAN. (2021). Laporan Catatan Akhir Tahun 2021 Aliansi Masyarakat Adat Nusantara: Tangguh Di Tengah Krisis. <https://www.aman.or.id/organization-document/catatan-akhir-tahun-aman-2021:-tangguh-di-tengah-krisis> .

⁴² Arimbi Heroepoetri, Aflina Mustafainah, Saur Tumiur Situmorang. (2016). *Pelanggaran Hak Perempuan Adat dalam Pengelolaan Kehutanan-Laporan Komisi Nasional Nasional Anti Kekerasan terhadap Perempuan (Komnas Perempuan) untuk Inkuiri Nasional Komnas HAM: Hak Masyarakat Hukum Adat atas Wilayahnya di Kawasan Hutan*, Jakarta: Komisi Nasional Hak Asasi Manusia Republik Indonesia. Hlm. 46.

⁴³ Bappeda. (2016). Makna, Hakikat, Tujuan Pembangunan Nasional. Retrived 27 July 2022. <https://bappeda.bulelengkab.go.id/informasi/detail/artikel/makna-hakikat-tujuan-pembangunan-nasional-49>.

communities of their inhabitants,⁴⁴ is an important instrument in improving the human development of MHA through the use with local wisdom in managing natural resources and environmental sustainability with its customary laws and spiritual and religious abilities.⁴⁵

The management of MHA customary rights over certain forest areas cannot be separated from the positive law that exists in Indonesia which is still not perfect, thus creating this problem. Based on the agrarian conflict between the MHA and various parties, it can be seen that the most frequently used reason is "in the national interest". This is inseparable from Article 18B Paragraph 1 of the 1945 NRI Constitution which became a declarative recognition of the existence of the MHA by providing some restrictions. These boundaries have elements that become cumulative requirements, namely as long as they are alive, in accordance with the development of society, in accordance with the principles of the Republic of Indonesia, regulated in law. This formulation is not much different from the situation in the colonial period where indigenous peoples who were not subject to european civil law could enact their own laws as long as they did not conflict with the principle of justice in general. This requirement actually leads to the exclusion of the MHA with a discriminatory element because it places european law above customary law so that it slowly leads to formal law to develop a modern society based on the chain of production to consumption.⁴⁶

The four elements of the MHA recognition requirements in Article 18B Paragraph 1 of the 1945 NRI Constitution are further regulated in the law so as to create requirements based on national interests based on the modern economy. Law Number 5 of 1960 concerning the Basic Regulation of Agrarian Principles, Law Number 17 of 2019 concerning Water Resources, Law Number 31 of 2004 concerning Fisheries, Law Number 39 of 2014 concerning Plantations, and Law Number 41 of 1999 concerning Forestry which has been updated with the Ciptaker Law. In the case of MHA customary rights in forest areas, the applicable requirements for recognition of existence are the Forestry Law.

Based on Article 4 Paragraph (3) of the Forestry Law which states that the rights of MHA remain recognized as long as they still exist, are recognized for their existence, and do not conflict with national interests. The third element, which is not contrary to the national interest, is actually very risky about the interpretation that cornered the

⁴⁴Ahmad Ubbe, dan Tim Kerja. (2013). *Laporan dalam Penelitian Hukum Tentang Peran Masyarakat Hukum Adat Dalam Penanggulangan Pembalakan Liar*. Jakarta: Badan Pembinaan Hukum Nasional Kemenkumham RI. Hlm. 73.

⁴⁵Jenni Krisitiana Matuankotta. (2018). "Peran Aktif Masyarakat Hukum Adat Dalam Pembangunan Ekonomi". *SASI*. 24 (2). Hlm. 101-113.

⁴⁶Rosalina. (2010). "Eksistensi Hak Ulayat Di Indonesia". *Jurnal Sasi*. 16 (3). Hlm. 49-50.

MHA. Not to mention that the parties who often conflict with the MHA regarding customary land rights are the government, local governments, state or private companies, and the Indonesian National Army (TNI) which in fact has interests with a wider impact on the state materially than the MHA which is nothing compared to modern society. As a result, the MHA has always been the losing party and even oppressed in the name of "national interest". Furthermore, in the general explanation of the Forestry Law in the third paragraph, it is also stated that the phrase "prioritizing the national interest" so that the interests of only a few MHA are increasingly not negated.

The regulatory problem of MHA customary rights can actually be overcome a little with the Indigenous Peoples Bill as its main legal umbrella. This is because until now there has been no *lex specialis* that regulates MHA in Indonesia has been posited. Article 19 of the Indigenous Peoples Bill states that the protection of indigenous peoples includes the protection of indigenous territories, protection as subjects of law, return of customary territories to be managed, utilized, and preserved in accordance with customs, their customs, the provision of compensation for the loss of the right of indigenous peoples to manage indigenous territories, the development and maintenance of local culture and wisdom, the improvement of living standards, the preservation of local wisdom, and the preservation of indigenous treasures. Even the rights of the MHA have also been formulated in Chapter IV on the Rights and Obligations of the Indigenous Peoples Bill. This of course has shown good faith in providing comprehensive legal protection of all MHA interests, but there are still obstacles in accommodating MHA living in forest areas.

Forests are areas rich in abundant natural resources so that they can support the country's economy. The national interest based on Article 4 Paragraph (3) of the Forestry Law, of course, should not be ruled out after the passage of the Indigenous Peoples Bill despite its polemics which are often the juridical reason for the burial of the rights and interests of the MHA. The Indigenous Peoples Bill still does not show a more absolute embodiment between the equilibrium of MHA interests and the national interest, so there is still a looming uncertainty. Given the many national interests in forest areas that cannot be ruled out, as well as the rights of MHA that must still be protected, it is necessary to formulate a concept of forest management that can accommodate the interests of all parties so that no more disputes occur.

Based on these problems, we can reflect on the neighboring country, namely the Philippines, which has first declared success in establishing legal protection regulations and empowering their MHA in the forestry area. The concept applied by the Philippines is Community Forest Based Management which is described in one of its legal umbrellas, namely the Indigenous People's Rights Act (Republic Act No. 8371). We

need to apply the principle of observability, imitation, and modification in accordance with the circumstances and legal needs of MHA in Indonesia in order to realize a more ideal concept.

3.2. The Concept of Forest Management That Protects and Empowers Indigenous Peoples in Accordance with the *Ius Constituendum*

Recognition of the existence of MHA and its customary rights, including natural resources in its customary forest areas must be truly realized by fulfilling the right to manage and utilize its customary forests. This is solely an effort to succeed in human development which according to the *United Nation Development Program* is measured from *productivity, equality, sustainability, and empowerment*.⁴⁷ MHA has the potential to develop for the better, but sometimes it does not develop due to factors it experiences such as discrimination and the marginalization of MHA rights to customary forests.

Recognition of the existence and rights of indigenous peoples as stated in the constitution and the Forestry Law apparently has not really protected the rights of the MHA. Looking at the harm and injustice gained by the MHA when leaned on John Rawls' thoughts on the concept of Maximin (*Maximum Minimorum*) that every policy made should weigh how much benefit it produces and how much benefit it will cause.⁴⁸ If the policy made produces a profit greater than the loss of the policy, it can be said to be good. Based on the *philosophy ratio* of Rawls, it is currently very urgent that there is a mechanism that can bring together and harmonize the interests of MHA with related parties so as to provide benefits for MHA. As a step to get to the general welfare, the substance of this mechanism must be compiled into legal protection efforts which according to Philipus M. Hadjon are divided into 2 (two) types, namely preventive legal protection to prevent disputes in the form of directing government actions in decision making and the second is repressive legal protection, which leads to conflict resolution.⁴⁹

We can see the form of legal protection in MHA regulation through the Community Based Forest Management (CBFM) regulation in the Philippines which has first applied this concept massively and institutionally. The application of the CBFM concept in the Philippines is a long step that can be classified in three periods, namely the Pioneering Period (1971-1985), the Experimentation and Heavy Infusion Assistance Period (1988-1994), and the Institutionalization and

⁴⁷ Setiawan, M B, dan Abdul Hakim. (2013). "Indeks Pembangunan Manusia". *Jurnal Economic*. 9 (1). Hlm. 19.

⁴⁸ John Rawls. (1985). "Justice as Fairness: Political not Metaphysical". *Philosophy and Public Affairs*. 14 (3). Hlm. 237.

⁴⁹ Philipus M. Hadjon. (1987). *Perlindungan Hukum Bagi Rakyat Indonesia: Sebuah Studi Dengan Prinsip-prinsipnya, Penanganannya oleh Pengadilan dalam Lingkungan Peradilan Umum dan Pembentukan Peradilan Administrasi Negara*. Surabaya: Bina Ilmu. Hlm. 35.

Expansion Period (1995 - present). The breakthrough CBFM was first implemented in the Philippines in 1971 through the Kainging Management and Land Settlement Regulations (Forestry Administrative Order No. 62) which focused on preventing the spread of forest exploitation through the placement of usable fixed areas.⁵⁰ Meanwhile, the various developments of CBFM through various legal products have resulted in several regulations that became the main pillar of protection and development of the Filipina MHA, namely in 1997 with the passage of the Indigenous People's Rights Act (Republic Act No. 8371). In this regulation, it has been concrete recognition of customary rights land ownership inherited from generation to generation where it is carried out by issuing a Certificate of Ancestral Domain (CADT)⁵¹ on behalf of the MHA community published by the National Commission on Indigenous People (NCIP).

Recognition of the ownership of customary land rights to MHA in the Philippines is so strong that there are other certificates such as the Certificate of Ancestral Lands⁵² Title and NCIP⁵³ as an Institution that focuses on managing all efforts to protect and MHA rights under the Indigenous People's Rights Act (Republic Act No. 8371). In addition, there is a *Community Forestry Agreement* (CFMA) with its legal basis Department of Environment and Natural Resources Administrative Orders Number 96-29 (DENR Orders No. 96-29) which regulates cooperation between local communities (in this case MHA) and other interested parties who can manage shared forest wealth for 25 years and can be renewed for another 25 years (total 50 years).⁵⁴ This is of course a hint that the protection of MHA in the Philippines is carried out in various instruments that provide legal certainty to him due to the institutionalization of the concept of CBFM.

The application of CBFM in the Philippines is not only based on one rule, but is an integral part of various regulations and national development plans with its development covering a variety of uses of

⁵⁰J.M. Pulhin, M. Inoue, T. Enters. (2007). "Three decades of community-based forest management in the Philippines: emerging lessons for sustainable equitable forest management". *International Forestry Review*. 9(4). Hlm. 870-872.

⁵¹"Certificate of Ancestral Domain Title – refers to a title formally recognizing the rights of possession and ownership of ICCs/IPs over their ancestral domains identified and delineated in accordance with this law", See in Chapter II Section 3 Point (c) Indigenous People's Rights Act (Republic Act No. 8371).

⁵²Certificate of Ancestral Lands Title – refers to a title formally recognizing the rights of ICCs/IPs over their ancestral lands, See in Chapter II Section 3 Point (d) Indigenous People's Rights Act (Republic Act No. 8371)

⁵³National Commission on Indigenous Peoples (NCIP) – refers to the office created under this Act, which shall be under the Office of the President, and which shall be the primary government agency responsible for the formulation and implementation of policies, plans and programs to recognize, protect and promote the rights of ICCs/Ips, See in Section 3 Point (k) Indigenous People's Rights Act (Republic Act No. 8371)

⁵⁴ "Community Based Forest Management Agreement – an agreement entered into by and between the government and the local community, represented by the People's Organization, as forest managers, which has a term of twenty-five (25) years and renewable for another twenty-five (25) years." See in Article I Section 3 DENR Orders No. 96-29

forest areas and mixed lands, including:⁵⁵ *First*, forest land within the existing reforestation project area; *Second*, Grass fields that can be areas of expansion of highland agriculture; *Third*, Areas with residual productivity and forests with a long-standing age; *Fourth*, Multifunctional use zones and protected buffer areas and water source reserves. All protections in the CBFM concept are directed by participatory planning and use an approach of prioritizing the community rather than the upper group to identify and take into account the development and protection of the existence of MHA according to the resources they have and master.

In essence, Indonesia has implemented several efforts to protect and empower MHA in its legal policy making, it's just that it is still not equal in its steps when compared to the Philippines. As an effort to reconceptualize the protection and empowerment of the MHA, the strategy to achieve *human-centric-oriented* development, where policy making regarding the sustainable use of natural resources in an area is located in the hands of the local community is the CBFM Program. The program is a forest management based on local wisdom that encourages economic activities that are balanced with conservation, including strengthening the basic rights of indigenous peoples.⁵⁶ In terms of rights to customary forests, the optimal application of CBFM in MHA can be the answer because the concept of forest management which is loaded with the realization of recognition of the rights of indigenous peoples.⁵⁷ Recognition and fulfillment of indigenous peoples' rights is essential for the sake of survival, as well as the enforcement of existing customary laws.

Community Based Forest Management has not been comprehensively implemented by MHA, it is still an optional collaboration. In fact, this CBFM can be a sure first step for MHA as the holder of rights to its customary forests so as not to experience rights violations and adverse forest conflicts. To answer the existing problems, the author offers a proposal for ideas in the form of cBFM reconceptions to focus on the problem of customary forests experienced by MHA as well as as the initial gateway for MHA to improve human development. The following are the key points of CBFM as a mechanism that will be implemented by Indigenous Peoples in exercising customary forest rights:

⁵⁵Ernesto S. Guiang, Salve B. Borlagdan, Juan M. Pulhin. (2001). *Community-Based Forest Management in the Philippines: A Preliminary Assessment*. Manila: Institute of Philippine Culture Ateneo De Manila University. Hlm. 8.

⁵⁶Alfons Yoshio. (2020). CBFM, Solusi Kesejahteraan dan Kelestarian Alam Papua., katadata.co.id. Retrived 29 July 2022. <https://katadata.co.id/ariemega/infografik/5fd8240954775/cbfm-solusi-kesejahteraan-dan-kelestarian-alam-papua>.

⁵⁷Aminah. (2011). "Pengelolaan Hutan Berbasis Masyarakat (PHBM) Sebagai Upaya Pengakuan Hak Masyarakat Adat". *Pranata Hukum*. 6 (1). Hlm. 22.

1. In the event that the MHA allows a corporation to stand in its customary forest, before customary forest management interventions run, for example in the form of plantation investments and others, *CBFM* must be made in the form of written permission for what is then called a *Community Based Forest Management (CBFM) License*.
2. *The CBFM License* must contain MHA participation in related party cooperation projects. This participation is in the form of job training or *work training* in accordance with the potential and allocation of personnel needed. This *training* process is as a forum for developing MHA *skills* and science so that MHA human development can really run and improve.
3. *The CBFM License* must contain the participation of the MHA in the supervision (*supervisor*) of cooperation projects. This is because the establishment of cooperation in customary forest areas must not damage the survival of MHA and its customary forest resources, it is necessary to supervise the implementation of reforestation so that it can be utilized sustainably or for generations by MHA.
4. *The CBFM License* must contain revenue sharing or provide benefits to the MHA and its territory.
5. *The CBFM License* must contain the possibility of violations that occur resulting in sanctions, and their resolution through family deliberations or through the Forum of Customary Courts. However, if it finds a dead end and violations committed by non-state people, administrative efforts will be made to the Ministry of Environment and Forestry (KLHK), while if the main mastermind is the State itself, the dispute can be submitted to the State Administrative Court (PTUN).
6. With regard to other matters adjusted according to the agreement of the MHA and related parties.
7. For the sake of recognized legal protection and certainty, the *CBFM License* must be integrated into the Forestry Law. As for the implementation, the legal position is guaranteed, the *CBFM License* must be formed in a Government Regulation.

Until now, the entire Indonesian nation, especially the government as a policy maker, should not drag on turning a blind eye, because although the constitution and laws have recognized the existence of MHA, but at the technical level customary forest rights as a fundamental right of MHA are often violated by many parties. MHA as part of the Indonesian nation is also an important asset in national development, but with the deprivation of rights MHA becomes powerless and is underestimated as a weak group.

Based on this idea, the urgency of implementing a CBFM concept-based program in Indonesia is an important thing that needs to be done through institutionalization in the Forestry Law to provide legal protection and empowerment to MHA in Indonesia, especially those living in forest areas. As stated by Laura Goodwin and Vivek maru that

"legal empowerment is about giving people the power to understand and use the law". The axiom means that the best legal protection is to ensure that everyone can fight for and exercise their rights to the fullest.

4. Conclusion

Based on the description of the discussion that has been presented, it can be argued that Community Based Forest Management (CBFM) is a concrete solution that needs to be internalized in Indonesia's positive law, namely the Forestry Law to protect MHA in forest areas. This is due to the many agrarian conflicts between Indigenous Peoples (MHA) and stronger parties who often benefit through the priority of national interests over customary land rights. The Indigenous Peoples Bill can indeed provide better legal certainty if passed, but it is still lacking to provide legal protection for the MHA given the many deficiencies in the formulation of the rule, especially when faced with national interests. Therefore, the internalization of CBFM in forest management in Indonesia is urgent to protect and eradicate MHA.

As for the form of advice, the author recommends the Community Based Forest Management (CBFM) *License* as a settlement mechanism to the government as follows:

1. Integrating the application of the Community Based Forest Management (CBFM) License into the Forestry Law with the provisions of the content that the author has described above. Because through the contents contained in the CBFM License, it can reduce customary forest conflicts, in addition to the CBFM License which involves MHA's participation in work training, it will be a forum for MHA to improve its skills and knowledge which in turn can advance the Indigenous Law Community itself.
2. The implementation of the Community Based Forest Management (CBFM) License is stated in the form of a Government Regulation so that the legal position is clear and can be implemented strictly.

This mechanism in the end as *a win win solution* for MHA with related parties, especially for Indigenous Peoples will get a new breakthrough in improving their human development.

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