Sociological Perspective and Legal Protection of Customary Land: Solution to Determination of Traditional Forest in Indonesia

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Submission date: 08-Mar-2023 03:03PM (UTC+0700)
Submission ID: 2031975881
File name: document_7.pdf (128.69K)
Word count: 2267
Character count: 12700

Sociological Perspective and Legal Protection of Customary Land: Solution to Determination of Traditional Forest in Indonesia

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Abstract: This study is motivated by the perspective of government officials and the mechanism for determining customary forests which is often the cause of conflict between indigenous peoples and plantation entrepreneurs who accept concessions from the government. The aims of this study are to evaluate the legal positivism perspective that continued domein verklaring during the Dutch colonialism saw customary forests as state forests as long as they had not been determined by the government so that they could be concessioned to plantation entrepreneurs. The results showed that in order to prevent conflicts and to simplify and speed up the mechanism for determining customary forests, an idea is offered to apply the legal processing (*rechtsverwerking*) analogy in customary law that has been accepted by the national land law. The physical control of customary forests by customary communities by collecting products, utilizing and conserving the forest, regulated in customary law and not denied by indigenous peoples, who border, is sufficient as a sign that the customary forest is under the control of the customary community concerned. Likewise, for the stipulation mechanism, it is necessary to give authority to the local government to be able to determine customary forests.

Keywords: Physical tenure, customary forest, domain statement, legal positivism.

1. INTRODUCTION

The conflict between indigenous peoples and oil palm plantation companies is often in Indonesia (Sirait, 2009; Colchester, 2011). For instance, Benuaq Dayak customary leader from Muara Tae Village, West Kutai Regency, Petrus Asuy (recipient of the Equator Price Award from the United Nations) in 2016 received a death threat from Songkeng, a former Muara Tae official who claimed to be the owner of a customary forest covering 4,000 hectares of the remaining area previously 11,000 hectares. Petrus Asuy was threatened because he did not want to sign the land verification document for payment of land compensation for oil palm plantations from PT. BSMJ. Not only that, Muara Ponaq village also claims to be the owner of the customary forest based on the Decree of the West Kutai Regent Number 146.3/K.525/2012 concerning the Establishment and Confirmation of Territorial Boundaries Between Muara Ponaq Village, Siluq Ngurai District and Muara Tae Village, Jempang District (Hardjanto, 2020). The area of oil palm plantations has increased from year to year, it can be seen in the following data:

According to the latest data, according to the Decree of the Minister of Agriculture No.833/KPTS/SR.020/M/12/2019, it is stated that the area of Indonesian oil palm cover in 2019 will reach 16,381,959 hectares. Oil palm plantations in Indonesia indeed contribute a lot of foreign exchange. Chairperson of the Joint Communication Division of the Indonesian Palm Oil Association (GAPKI) Topan Mahdi said the value of foreign exchange contributions from palm oil exports in 2019 reached US $ 19.5 billion (Wartaekonomi.co.id, 2020). However, the oil palm plantation business in Indonesia is not without problems. It is not uncommon for the acquisition of plantation land to come into conflict with indigenous peoples and communities around the plantations (Hammar, 2019; Utomo, 2019). According to the Consortium for Agrarian Reform, agrarian conflicts related to plantations are caused by several factors,

No	Year	Community Plantation	Large State Plantation	Large Private Plantation	Total
1	1980	6.175	199.538	88.847	294.560
2	1990	291.338	372.246	463.093	1.126.677
3	2000	1.166.758	588.125	2.403.194	4.158.077
4	2010	3.387.257	631.520	4.366.617	8.385.394
5	2020*	6.090.883	643.488	8.261.639	14.996.010

Note: * Estimation.
Source: Directorate General of Plantation, Ministry of Agriculture, December 2019.

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E-ISSN: 1929-4409/21

including the release of forest areas for plantation purposes on lands belonging to indigenous peoples (Agrarian Reform Consortium Team, 2020). In connection with conflicts between plantation and mining companies due to the lack of designation of customary forests, the authors raise two issues, that are the implementation of recognition of customary forests in related laws always negate the existence of customary forests and an effective and efficient solution for the recognition of customary forests from customary communities as an effort to accelerate the designation of customary forests.

2. LEGAL POSITIVISM IN TRADITIONAL FOREST MANAGEMENT

Since Indonesian independence until now, the government's perspective is still using the domein verklaring perspective which is based on legal positivism (legal positivitism) thinking. Legal positivism is an approach to the legal theory which is concerned with 'posited law' that is the law which has been laid down, or 'posited', by institutions like Parliament and the court (Leiboff & Thomas, 2004). In the perspective of legal positivism, the customary forest will be recognized if it is stipulated in writing in regulation or decision from an authorized institution (executive, legislative, and even judicial), and regardless of morals, that is, it does not matter whether the determination is fair or unfair.

In the context of customary forests, government officials related to forest designation still adhere to the *domein verklaring* perspective. The perspective of the new domein verklaring adherents is that they only recognize cultivated land, so that forests that have not been cultivated - even if they are recognized as part of the customary rights of indigenous peoples - have not yet been designated as customary forest as state forest. The existence of customary forests in West Sumatra can be divided into two: (1) customary forest belonging to the people and belonging to the tribe (genealogical, communal, and private domain); (2) customary forest is belonging to the genealogical-territorial and public domain. This customary forest belonging to the village is one of the assets of the village. For the use of traditional forest, for example, taking timber and forest products, residents are required to pay a fee to the village as the tribal income as well as a preventive effort so that the forest is not simply used up to meet the needs of the people who live now, but must also be able to support the lives of future generations (sustainable forest management).

3. PHYSICAL CONTROL OF CUSTOMARY FORESTS

Even though the rights of indigenous peoples are recognized in various laws and regulations, for example, recognition of customary rights in Article 3 of the Basic Agrarian Law, recognition of the rights of indigenous peoples in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, and various laws and regulations others, but the implementation is not as easy as in the various regulations. In addition to cutting the length of the flow of customary forest designation, from the identification, verification and validation and stipulation of a regional regulation on the existence of indigenous peoples to the Ministry of Environment and Forestry, there needs to be a legal breaking through to facilitate the designation of customary forests.

This legal breakthrough can be taken from the analogue of the *rechtverwerking* principle in customary law (Termorshuizen-Arts, 2010). The principle of *rechtverwerking* is a principle that contains the substance of the loss or abolition of land rights after a certain time has passed, there is no intensity of legal relations which is physically and naturally marked by the growth of shrubs on the ground, the absence of stakes or huts, and the absence of trees. Large plants planted intentionally and continue to be maintained and there is no embankment/channel structure or the loss of the building is due to not being maintained (Ismail, 2007; Wahanisa *et al*., 2021). In other words, according to the principle of rechtsverwerking, a person can lose his land because there is no physical control for a certain period of time so that the land becomes neglected or not cultivated. Conversely, if someone controls the land in good faith without interference from other parties for a certain period of time and is recognized by local public officials, then that person can be considered the owner.

The legal processing (*rechtsverwerking*) principle has been accepted in the national land law, in particular, Article 24 paragraph (2) and Article 32 paragraph (2) Government Regulation No.24 of 1997 (Gov. Reg. No.24 of 1997). As is well known, the land and forestry regime in Indonesia is held by two government authorities. For land, it is managed by the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency, while for forestry it is managed by the Ministry of Environment and Forestry. Even though both of them manage relatively the same things, namely agrarian affairs, since the New Order regime there has been management sectoralism.

Referring to Gov. Reg. No. 24 of 1997 which implements rechtsverwerking, what is wrong if in the forestry sector also applies analogue rechtsverwerking. This means that if the subject, in the form of customary communities, and the object, namely customary forest, has a legal relationship in the form of physical control, and is recognized by the bordering indigenous communities, and there is customary law regulating its use and preservation, then it is an indication that the customary forest is controlled by culture.

Physical control does not have to be enforced like on land for agriculture which has to be cultivated continuously, but members of the customary community who take and utilize forest products, and maintain forest conservation, can be categorized as having had physical control over customary forests. In addition, physical control can also be supported by notes both in writing and oral traditions regarding control over the customary forest. By identifying, verifying and validating the physical tenure of customary forests by local governments, it can be carried out in a declarative (affirmative) recognition and designation of customary forests. Through research on evidence of physical control over customary forests by local governments, a long chain of customary forest designation can be broken. If the central government objects to the authority of the regional government, it can be done by sharing the authority between the central government (Ministry of Environment and Forestry) and the Regional Government (Regency and Province) to designate customary forests with certain areas.

4. CONCLUSION

The results showed that government officials who serve and handle location permits for plantation companies still have a legal positivism perspective, namely still imposing domain statement (new domein verklaring) that customary forests that have not been determined by the government are considered state forests, so that they can be concessioned to plantation entrepreneurs. This positivist perspective has led to the recurring conflicts that have occurred since the conversion of forest function for plantations was encouraged by the government. To overcome this, there needs to be a simple solution in the recognition and determination of customary forests, namely that the local government applies the legal processing (*rechtsverwerking*) principle in the land sector, by identifying, verifying and validating the physical control of customary forests by customary communities.

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Received on 26-02-2021 Accepted on 22-04-2021 Published on 30-04-2021

https://doi.org/10.6000/1929-4409.2021.10.113

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