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Analysis of Customary Forest Legal Arrangements Post Constitutional Court Decision No. 35/2012

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Abstract: The objective of this article is to examine the legal framework governing customary forests in the wake of the Constitutional Court's Decision No. 35 of 2012. Does the legislation contravene any established legal principles? What are the consequences of this decision? The research method employed is normative, with a conceptual and legislative approach. The findings of the study demonstrate that the legal regulations pertaining to customary forests subsequent to Constitutional Court Decision No. 35 of 2012 are not in accordance with the established legal hierarchy structure. This has an impact on the legal certainty of regulations on customary forests. One of the problems caused by the above is that the regulations on Customary Law Communities rights in the three ministerial regulations continue to change and have the potential to deviate from the spirit of Constitutional Court Decision No. 35 of 2012. As a result, the authority and rights of MHA over Customary Forests could be more explicit and are likely to always change when there is a change of minister. The results of this study make two (two) recommendations. First, legal regulations on Customary Forests must be addressed when preparing and discussing the Customary Law Community Bill. Second, there must be an explanation or proper interpretation of MHA rights over Customary Forests as intended in Constitutional Court Decision No. 35 of 2012

Keywords: Customary Forest. Customary Law Communities (MHA), Constitutional Court's Decision No. 35 of 2012

1. Introduction

Constitutional Court (MK) Decision No. 35/2012 judicial *review of* Law No. 41/1999 on Forestry. Several provisions in Law No. 41/1999 on Forestry were declared unconstitutional and have no binding legal force (Wihelmus Jemarut et al., 2023). Among them are Article 1 number 6, Article 4 Paragraph (3), Article 5 Paragraphs (1) and (2), and the phrase "and paragraph (2)", Article 5 Paragraph (3). In general, this decision is known as the Constitutional Court Decision that changed the regime of customary forests as state forests, to customary forests as the rights of Customary Law Communities (Tobroni, 2016).

Constitutional Court Decision No. 35/2012 on customary forests was followed up by several Environment and Forestry ministerial regulations (LHK). First, Minister of Environment and Forestry Regulation No. 32/2015 on Forest Rights or "*Hutan Hak*". The regulation was revoked and replaced with Minister of Environment and Forestry Regulation No. 21 of 2019 on Customary and Forest Rights. One year later, the regulation was revoked and replaced with Minister of Environment and Forestry Regulation No. 17 of 2020 on Customary Forests and Forest Rights (Sukrino, 2016). These ministerial regulations are technical regulations that operationalize Constitutional Court Decision No. 35 of 2012. They do not have legal protection in the form of laws or Government Regulations.

Law No. 6 of 2023 on the Stipulation of Government Regulation in Lieu of Law No. 2

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of 2022 on Job Creation into Law (hereinafter referred to as the Job Creation Law) amends Law No. 41 of 1999 on Forestry. However, the Job Creation Law does not accommodate the articles declared unconstitutional by Constitutional Court Decision No. 35/2012. This means that the Constitutional Court Decision No. 35/2012 on Customary orests is not or has not been affirmed by any law (Gusman & Raspati, 2024). However, some of the Minister of Environment and Forestry Regulations on customary forests above are technical regulations made based on Law No. 41 of 1999 on Forestry whose provisions on customary forests have been declared unconstitutional and have no binding legal force ((Putusan Mahkamah Konstitusi Nomor 35/PUU-X/2012, n.d.).

The above review shows that there is uncertainty in the hierarchy of regulations on customary forests after the Constitutional Court Decision No. 35/2012. Through this article, the researcher analyzes the legal arrangements regarding customary forests after the Constitutional Court Decision No. 35/2012. Have any legal principles been violated? What are the consequences?

2. Methods

This article is the result of a normative study on customary forests after Constitutional Court Decision No. 35/2012. As a normative study, this research uses normative research methods. In normative research, the main source is library sources in the form of legal materials (Soerjono Soekanto, 2007). The legal materials used in this article are primary legal materials in the form of legislation related to customary forests and secondary legal materials in the form of books and journals that review the same thing. In normative research, primary legal sources in legislation meet the validity and reliability of legal research because they are authoritative sources of law. Meanwhile, secondary legal sources are supporting elements that explain primary legal sources. The legal sources collected are classified based on the period before the Constitutional Court Decision No. 35 of 20212, the Constitutional Court Decision No. 35 of 2012, and the Constitutional Court Decision No. 35 of 2012. In conducting the analysis, the researcher conducted legal comparisons and textual analysis by the research objectives.

3. Results and Discussion

3.1. Legal Arrangements on Customary Forests

Constitutional Court Decision No. 35/2012 was revolutionary and changed the way national law views customary forests. A nearly 50 (fifty) year old regulation, dating back to Law No. 5 of 1967, which stipulated that customary forests were part of state forests, was declared unconstitutional and contrary to the 1945 Constitution (Rahmat, n.d.). Therefore, the study of the legal regulation of customary forests is seen as a whole: (1) before Constitutional Court Decision No. 35/2012, (2) after Constitutional Court Decision No. 35/2012, and (3) after Constitutional Court Decision No. 35/2012. In the third section, the legislation that has been derived from the Constitutional Court Decision will be examined.

a. Customary Forests Prior to Constitutional Court Decision No. 35/2012 on Customary Forests

A law that specifically regulates forestry only came into existence in 1967. In the previous period, the regulation on forests can be referred to the regulation on customary rights of Customary Law Communities (MHA) (Sukirno, 2016). Article 3 of the Basic

Agrarian Law states that the implementation of customary rights and similar rights of customary law communities, as long as the reality still exists, must be in accordance with national and state interests, and must not conflict with the Law and higher regulations. In the Explanation of Article 3 of the Basic Agrarian Law, recognition of customary rights will be considered as long as the reality still exists in the legal community concerned (*Undang-Undang Republik Indonesia Nomor 5 Tahun 1960 Tentang Peraturan Dasar Pokok-Pokok Agraria*, n.d.). The granting of ulayat rights is made to the legal community that is given "*recognitie*" as the holder of ulayat rights (Safiuddin, 2018).

In the early days of the New Order, Law No. 5 of 1967 on the Basic Provisions of Forestry emerged. This law started the categorization of customary forests as state forests (Widowati et al., 2014). In the explanation of this law, state forests include all forests that are not owned forests. State forests include forests that are either based on customary law or based on legislation controlled by indigenous peoples. In the explanation of Article 17 of Law No. 5/1967 on Basic Provisions of Forestry, it is explained that the customary rights of a customary law community cannot be justified to hinder the implementation of government development programs (*Undang-Undang Republik Indonesia Nomor 5 Tahun 1967 Tentang Ketentuan-Ketentuan Pokok Kehutanan*, n.d.).

Law No. 5 of 1967 was replaced by Law No. 41 of 1999 on Forestry. This law continues to interpret customary forests as state forests and maintains the coditionality of state recognition of customary rights (Apricia, 2022). Article 67 paragraph (1) of Law No. 41/1999 on Forestry stipulates that customary law communities have the right to collect forest products; conduct forest management based on prevailing customary law, which must not conflict with the law; and receive government empowerment in order to improve welfare (Jemarut et al., 2022). Article 67 paragraph (2), in order for these rights to be implemented, there must be a determination of the existence of customary law communities through Regional Regulations. Article 67 paragraph (3), further provisions on customary rights and the establishment of the existence of customary law communities, will be regulated in a Government Regulation (Jemarut et al., 2023). Until now, the Government Regulation in question has not been issued. Several ministerial regulations regulate customary rights and determine the existence of MHA. Among them are the Minister of Environment and Forestry, the Minister of Home Affairs, the Ministry of Agrarian Affairs, and Spatial Planning/Head of the National Land Agency (explained in the third sub-chapter in this section).

b. Constitutional Court Decision No. 35/2012 on Customary Forests

The applicants for Constitutional Court Decision No. 35/2012 on Customary Forests are the Indigenous Peoples Alliance of the Archipelago (AMAN), the Kenegerian Kuntu Customary Law Community Unit, and the Kasepuhan Cisitu Customary Law Community Unit. This decision judicially *reviewed* Law No. 41/1999 on Forestry. There are several articles in Law No. 41/1999 that are being challenged, namely Article 1 number 6; Article 4 Paragraph (3); Article 5 Paragraph (1), Paragraph (2), Paragraph (3), and Paragraph (4); Article 67 Paragraph (1), Paragraph (2), and Paragraph (3). The basis of this test is that Law No. 41/1999 is contrary to the 1945 Constitution. There are several articles used as the basis of the test, namely Article 1 Paragraph (3), Article 28D

Paragraph (1), Article 28C Paragraph (1), Article 28G Paragraph (1), Article 18B Paragraph (2), and Article 28I Paragraph (3).

In Court Decision No. 35/2012 on Customary Forests, the Constitutional Court heard and decided the following points.

1) Article 1 point 6 of Law N0. 41 Year 1999

Article 1 point 6 states that customary forests are state forests located within the territory of customary law communities. The Court ruled that the word "state" is contrary to the 1945 Constitution and has no binding legal force. Thus, Article 1 point 6 of Law No. 41 Year 1999 becomes: "Customary forests are forests located within the territory of customary law communities". The Court is of the opinion that the existence of customary forests in unity with the customary rights area of a customary law community is a consequence of the recognition of customary law as "*living law*". Recognition of customary law is not only enshrined in the 1945 Constitution, but is also scattered in various laws. Placing customary forests as state forests is a disregard for the rights of customary law communities.

2) Article 4 Paragraph (3)

The Court ruled that Article 4 Paragraph (3) is contrary to the 1945 Constitution and has no binding legal force. The word "pay attention to" in Article 4 Paragraph (3) must be interpreted more strictly, namely that the state recognizes and respects the units of customary law communities and their traditional rights. Similarly, the phrase "as long as the fact still exists and is recognized" should be interpreted as long as it is still alive and in accordance with the development of society.

3) Article 5 Paragraph (1)

The Court ruled that Article 5 Paragraph (1) is contrary to the 1945 Constitution and has no binding legal force as long as it is not interpreted as "State forest as referred to in paragraph (1) letter a, does not include customary forest".

4) Article 5 Paragraph (2)

The Court decided that Article 5 Paragraph (2) is contrary to the 1945 Constitution and has no binding legal force.

5) The phrase "and paragraph (2)" Article 5 Paragraph (3)

The Court decided that the phrase "and paragraph (2)" in Article 5 Paragraph (3) is contrary to the 1945 Constitution and has no binding legal force.

Constitutional Court Decision No. 35/2012 emphasized that customary forests are not state forests. Thus, based on their status, forests are divided into two: rights forests and state forests. Forest Rights consist of individual/legal entity forests and customary forests.

c. Customary Forests after the Constitutional Court Decision No. 35/2012 on Customary Forests

After the Constitutional Court Decision No. 35/2012, several ministries responded through regulations and ministerial circulars. In 2014, there was a Joint Regulation of the Minister of Home Affairs, Minister of Forestry, Minister of Public Works, and Minister of Land in Regulation No. 79/2014; PB.3/Menhut-11/2014; 17/PRT/M/2014; 8/SKB/X/2014 on Procedures for Settling Land Tenure within Forest Areas (Simarmata, 2015). The Joint Regulation states that to settle land tenure within forest areas, an IP4T Team (Inventory of Land Tenure, Ownership, Use and Utilization) is formed. This team only consisted of government elements and did not involve the community, traditional leaders, academics or NGOs. With the change of ministers from the Susilo Bambang Yudhoyono administration to the Joko Widodo administration, this Joint Regulation was not followed up. Subsequently, technical regulations relating to Constitutional Court Decision No. 35/2012 were regulated by the respective ministries.

First, the Ministry of Environment and Forestry (MoEF). In response to the Constitutional Court Decision No. 35/2012 on Customary Forests, the Ministry of Forestry issued Circular Letter No. 1/Menhut-II/2013 on the Constitutional Court Decision No. 35/PUU-X/2012 dated May 16, 2013 addressed to Governors, Mayors/Mayors and all Heads of Forestry Services. This letter presented the essence of the Constitutional Court's decisions and emphasized that the determination of customary forests remains with the Minister of Forestry (Suparto, 2021). However, until the end of his term, Minister Zulfilki Hasan did not issue a derivative regulation referring to the Constitutional Court Decision.

At the beginning of her administration, Minister Siti Nurbaya (Minister of Environment and Forestry, Working Cabinet 2014-2019 and Minister of Environment and Forestry, Advanced Indonesia Cabinet 2019-2024) issued Minister of Environment and Forestry Regulation No. 32/2015 on Forest Rights. This Regulation regulates the procedures for establishing forest rights, one of which is customary forest. This Regulation emphasizes that the Minister's determination of customary forests is carried out after the local government determines the Customary Law Community. The determination of Masyarakat Hukum Adat in this Regulation is through "regional legal products". This means that the Ministry of Environment and Forestry does not require a Regional Regulation or Decree of the Regional Head as the legal basis for the Customary Law Community (Wihelmus Jemarut et al., 2023).

In 2019, the Minister of Environment and Forestry issued Ministerial Regulation No. 21/2019 on Customary Forests and Forest Rights. This regulation revokes Ministerial Regulation No. 32 of 2015. In this regulation, customary forests are mentioned separately from rights forests. This regulation includes technical provisions related to the determination of customary forests up to the application forms. In order to apply for a customary forest, there must be a local regulation (Peraturan Daerah/Perda) for customary forests located within the state forest area, or a regional regulation or decree of the regional head for customary forests located outside the state forest area. This regulation changes the provisions of Ministerial Regulation No. 32/2015, which states that the establishment of a Customary Law Community in the form of regional legal prod-

ucts, regardless of the form.

A year later, the Minister of Environment and Forestry issued Ministerial Regulation No. 17/2020 on Customary and Forest Rights, which revoked and replaced Ministerial Regulation No. 21/2019 on Customary and Forest Rights. According to Armansyah Dore, Ministerial Regulation No. 17/2020 on Customary and Forest Rights does not carry the spirit of reregulation that should create societal change. The reason is that this regulation repeats some of the same things in the previous regulation (Heru Saputra Lumban Gaol & Rizky Novian Harton, 2021). In addition, the new Ministerial Regulation differentiates between local regulation and local regulation on the establishment of Customary Law Community. Another thing that is different is that in the previous two regulations, the status of forests is state forests, customary forests and forests rights. This regulation emphasizes that forest status consists of state forests and rights forests. This regulation also regulates the determination of Customary Law Community, which was not regulated by the previous two regulations. New in this regulation is the involvement of universities as a verification team (but must be state universities).

Second, the Ministry of Home Affairs. The connection between the Ministry of Home Affairs and Constitutional Court Decision No. 35/2012 is that the legal subjects of Customary Forests are Customary Law Communities. So, Customary Forests can only be established if a customary law community has already been established (Sedubun, 2020). The Ministry of Home Affairs regulates the procedures for recognizing Customary Law Communities through the Regulation of the Minister of Home Affairs No. 52 of 2014 concerning Guidelines for the Recognition and Protection of Customary Law Communities. This regulation stipulates that a Regent/Mayor Decree determines the existence of Customary Law Communities. Recognition and protection are carried out in several stages, namely the identification, verification, validation, and determination stages of Customary Law Communities. The Regent/Mayor identifies by involving customary law communities or community groups. The identification results are verified and validated by a Committee formed by the Regent/Mayor. Based on the recommendations of the Committee for the Establishment of Customary Law Communities, the Regent/Mayor determines the Customary Law Community through a Regional Head Decree.

Third, the Ministry of Agrarian Affairs and Spatial Planning/Head of the National Land Agency. The establishment of customary forests is also related to the recognition of land rights. If forestry is regulated in regulations of the minister of forestry, matters relating to customary land are regulated in regulations of the minister of Agraia.

Since the issuance of the 1960 Law on Agrarian Principles, a derivative regulation on customary rights only existed in 1999 through Minister of Agrarian Affairs Regulation No. 5 of 1999 Guidelines for the Settlement of Customary Rights of Customary Law Communities (Sofyan Pulungan, 2023). This regulation stipulates that the determination of the existence of customary rights is carried out through Regional Regulations. This determination does not apply to lands that already have land rights under the Agrarian Law.

In 2015, Agrarian Regulation No. 5/1999 was revoked and replaced by Agrarian Regulation No. 9/2015. This regulation stipulates the Procedures for Determining

Communal Land Rights of Indigenous Peoples and Communities in Certain Areas. The regulation states that indigenous peoples who meet the requirements can have their land rights confirmed. This regulation also regulates the requirements of the Customary Law Communities in question. Communal Rights are determined by the Regent/Mayor. The determination is reported to the National Land Agency for registration.

Ministerial Regulation No. 9/2015 was eventually revoked and replaced by Ministerial Regulation No. 18/2019 on Procedures for Administration of Customary Land of Indigenous Peoples. Until the Ministerial Regulation No. 18/2019 on the Procedures for Administration of Customary Land of Indigenous Peoples, the determination of communal land rights was carried out by the local government and registered at the local Land Office (Article 5 paragraph (3)). This last regulation was eventually revoked and replaced by Agrarian Ministerial Regulation No. 14 of 2024 on the Administration of Land Administration and Registration of Customary Land Rights of Customary Law Communities.

The Agrarian Ministerial Regulation No. 14 of 2024 on the Implementation of Land Administration and Registration of Customary Land Rights of Customary Law Communities totally changed the process of determining customary land rights in Ministerial Regulation No. 18 of 2019 on Procedures for Administration of Customary Land of Customary Law Communities. In the old regulation, after the determination of Customary Law Communities by the Regional Head, the Regional Head registered the customary land at the local Land Office. Meanwhile, Permen No. 14 of 2024 requires a process of applying for management rights to the Minister (Article 15). This regulation also distinguishes customary land rights into two categories, namely management rights and property rights.

3.2 Analysis and Recommendations

Based on Law No. 11 of 2011 concerning the Formation of Legislation as amended by Law No. 15 of 2019 and Law No. 13 of 2022 concerning the Second Amendment to Law No. 12 of 2011 concerning the Formation of Legislation, the hierarchy of legislation in Indonesia is: (a) Constitution of the Republic of Indonesia Year 1945; (b) Decree of the People's Consultative Assembly; (c) Law / Government Regulation in Lieu of Law;(d) Government Regulation; (e) Presidential Regulation; (d) Provincial Regional Regulations; and (f) District/City Regional Regulations

Legal arrangements on Customary Forests are incomplete in terms of the theory of hierarchy of legislation. Constitutional Court Decision No. 35/2012 judicially *reviewed* Law No. 41/1999 on Customary Forests. However, Minister of Environment and Forestry Regulation No. 32/2015 on Forest Rights, Minister of Environment and Forestry Regulation No. 21/2019 on Customary Forests and Forest Rights, and Minister of Environment and Forestry Regulation No. 17/2020 on Customary Forests and Forest Rights, which regulates Customary Forests, are based on Law No. 41/1999 on Forestry, whose articles on Customary Forests have been declared unconstitutional. Meanwhile, Constitutional Court Decision No. 35/2012 is of the *non-self-implementing* type (Asy et al., 2013). However, it could be justified (to fill a legal vacuum) if there has been no change in the law being judicially *reviewed*. Law No. 6 of 2023 on Job Creation amends Law No. 41 of 1999 on Forestry. The amended law also does not regulate Customary Forests whose meaning in Law No. 41/1999 on Forestry has been declared unconstitutional (Gusman & Raspati, 2024).

According to researchers, this has the effect of weakening the legal force for the recognition of Customary Forests. Another impact is that ministerial regulations that technically regulate the recognition and determination of Customary Forests do not have a definite basis, resulting in changes that may deviate from the spirit of Constitutional Court Decision No. 35/2012 on Customary Forests. Therefore, the researcher recommends that the point about Customary Forests be given attention in preparing and discussing the Draft Law on Customary Law Communities.

4. Conclusions

Constitutional Court Decision No. 35 of 2012 changed the categorization of Customary Forests as state forests as regulated in Law No. 5 of 1967 and Law No. 41 of 1999. This Constitutional Court Decision confirms that Customary Forests are customary forests of Customary Law Communities. The procedures for determining Customary Forests are regulated in Ministerial Regulation of the Environment and Forestry No. 32 of 2015 concerning Forest Rights, which was amended by Ministerial Regulation of the Environment and Forestry, No. 21 of 2019 concerning Customary Forests and Forest Rights, and which was amended by Ministerial Regulation of the Environment and Forestry No. 17 of 2020 concerning Customary Forests and Forest Rights. The legal basis for the three ministerial regulations above is Law No. 41 of 1999 concerning Forestry. Regarding Customary Forests in Law No. 41 of 1999, it has been declared unconstitutional by Constitutional Court Decision No. 35 of 2012. The Job Creation Law (Law No. 6 of 2023), one of which amends Law No. 41 of 1999, also does not regulate Customary Forests. The above impacts the legal certainty of regulations on customary forests. One of the problems caused by the above is that the regulation of Customary Law Communities rights in the three ministerial regulations continues to change and has the potential to deviate from the spirit of the Constitutional Court Decision No. 35 of 2012. Therefore, the researcher recommends that the point about Customary Forests be given attention in preparing and discussing the Draft Law on Customary Law Communities. As a result, the authority and rights of MHA over Customary Forests are unclear and are likely to change when there is a change of Minister. There are 2 (two) recommendations from the results of this study. First, legal regulations on Customary Forests must be addressed when preparing and discussing the Customary Law Community Bill. Second, there needs to be an explanation or proper interpretation of MHA rights over Customary Forests as intended in the Constitutional Court Decision No. 35 of 2012.

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