

CHALLENGES OF NATURAL RESOURCES LAW RELATED TO THE EXISTENCE OF CUSTOMARY LAW COMMUNITIES IN THE MANAGEMENT OF LEGAL AND EFFECTIVE NATIONAL PARK

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Abstract

In Indonesia, the regulation of natural resources sector needs serious attention because the field of natural resources often intersects directly between state law and customary law in the local community. This study aims at explaining how the law of natural resources regulates the relevance of the existence of customary law communities in the management of legal and effective national park. Legal means referring to the policies or rules that are valid and effective, it means that they can properly realize the goals and functions of conservation area. This study was normative legal research based on the secondary data with the method of data collection using tracking legislation and literature study that related to the main problem. The primary data was needed to support the secondary data obtained through field research with interview and observation method. The data obtained were analyzed qualitatively and presented in the descriptive form. The result of this study showed that the law of natural resources in the management of national park regulated the existence of customary law communities was not being placed as strength or opportunity but positioned as a threat. The existing policies and regulations relating to the management of the national park have not yet provided a definite direction related to the management of national park with the existence of customary law communities. The various policies that exist only regulated the sporadically based on time, place and certain condition relating to this matter, there was no constitution that specifically regulated to the existence of customary law communities. This situation certainly had an impact on the ineffectiveness of national park management because there would be omission or neglect of certain things in conservation activity.

Keywords : *Natural Resource Law, Customary Law Communities, National Park.*

A. INTRODUCTION

The interaction between human and nature as a place of life is a natural thing. Protection and preservation of nature is an inseparable part of its utilization activity. Activity for protection, preservation, and utilization of nature are generally known as conservation.

Conservation comes from the word “*to conserve*” which means treating something for the purpose of utilization in the long run based on the slogan of Gifford Pinchot (1865-1914) (considered as the father of American Forestry) which was popular at that time, namely “*the greatest good for the greatest number for the longest time*”. Pinchot thought that nature is a resource and should be used to provide a result as maximum as possible for many people in the time as long as

possible. Pinchot also believed that natural resources should be owned and managed by government to fulfill the conservation goal.

Modern conservation in many references is originated from the North American continent, in the United States and Canada exactly. The appointment of Yellowstone National Park in the United States aims at protecting the vast landscape that is considered as a milestone in the history of modern nature conservation.

International Union for Conservation for Nature (IUCN) in 1994 has stipulated the definition of protected area so that the whole world has the same understanding, namely a land and/or waters area that is set for protection and preservation of biodiversity and related to the natural resources and cultural, and managed legally or effectively (Guthridge-Gould, 2010).

In Indonesia, forest protection both spiritual purpose and regulating natural resources are known in various forms. A certain place, for example, is considered haunted and sacred, including the belief in the guardian of forest. This haunted and sacred area is usually due to the close relationship with protection of water sources (Hermawan et al. 2014).

This practice is carried out by various ethnic groups in Indonesia, in which it is examined such as in the Bedouin, Kasepuhan, Java, etc. There are also temporal practices such as in the form of sanction or hunting restriction at certain times such as the sasi tradition which is often found in the east of Indonesia (Hermawan et al. 2014).

The belief in sacred place, haunted place, and the existence of a spirit of guardian forest save many forests in Indonesia, especially in the local protected areas.

Generally, protected area term is often known as a conservation area. Although the use of conservation area term to call protected area is incorrect, but the matching of these two words are often done. The term of conservation area is specifically used in the Decree of Director General of Forest Protection and Nature Conservation (Dirjen PHPA) No. 129 of 1996 concerning the Pattern of Management of Nature Reserve Area, Nature Conservation Area, Hunting Park, and Protected Forest. In the Decree of Director General of PHPA, protected forest area is included in the conservation area, but in the Constitution No. 41 of 1999 concerning Forestry separates protected forest from conservation area. This separation is motivated by the desire to focus on management goal. The purpose of conservation area management focuses on biodiversity conservation effort, while the protected forest is set more at the goal of soil and water conservation. (Wiryo in Hermawan, et al. 2014).

The concept of conservation area is relatively acceptable because of the value contained in its desire of the State or society to protect the area that has

intellectual and aesthetic meaning and human moral responsibility to preserve existing life form.

In order to monitor the expansion and development direction of conservation area in the world, a world congress on the national park is periodically held. In the congress of direction and strategy for management of conservation area in the world has been determined. Up to now, the National Park Congress has been held five times, including once held in Indonesia, it was in 1982 in Bali, which has prompted the emergence of several national parks in Indonesia such as West Bali National Park, Ujung Kulon National Park, Baluran National Park, Leuser National Park, and Komodo National Park. The appointment of five national parks is an early milestone in the history of development of national park in Indonesia which has influenced by the history of the development of conservation area in Indonesia in this modern era.

Constitution No. 5 of 1990 concerning The Conservation of Natural Resources and Ecosystem (UUKH) in Article 1 point 14 states that National Park (TN) is natural conservation area that has the original ecosystem, managed by zoning system that is utilized for research purpose, science, education, supporting cultivation, tourism and recreation. Then, in Article 32 of UUKH states that the national park area is managed by a zoning system consisting of core zone, utilization zone, and other zones based on the need of national park area. Based on the explanation of this article, it is described that what is meant by core zone is the part of national park area which is absolutely protected and is not permitted by any changes of human activity. The utilization zone is a part of national park area which is used as a recreation center. Other zones in the national park area are both zones outside because their functions and conditions are defined as certain zones such as jungle zone, traditional zone, the utilization of rehabilitation zone, and so on.

Zoning of conservation area is a process to regulate the allocation of space in a conservation area into zones or management blocks based on their designation. The zoning step of this conservation area includes preparation, collection, and analysis of data, drafting of design, public consultation, boundaries design and stipulations by considering studies of the ecological, social, economic and cultural aspects of the community. (Minister of Forestry Regulation No. 56 of 2006).

The main problem related to national park zoning is regarding the flexibility, both in the form of flexibility in determining zone types and management flexibility in each zone. The problem that often arises in structuring national park space includes the following points below (Hermawan, 2008):

1. The appointment of zoning is impressed without a clear basis
2. The determination of zoning seems to be the authority of forestry ministry only

3. The existing zone is not able to arouse the sense of responsibility of the surrounding communities
4. There is no accommodation of local interests and initiatives within the current framework of national park management, for example, customary forest and village forest
5. Recognition of the area is managed by people/communities
6. The core zone is already damaged
7. An area in damaged condition or population of animal is threatened
8. The area has been opened before the establishment of the national park
9. There has been traditional use
10. Limited zoning option
11. The position and role of the community is limited

The practice of natural resource management in Indonesia is characterized by transformation of the control of resources that has previously controlled by traditional common property into governance or ownership by the state property, for example in state forest or national park is categorized as state property, in which the legal claim is held by Government (Suwardjono, 2011).

Actually, forest has a strategic role in improving people's welfare, including customary law communities who live around and in the forest. However, the customary law communities are often stigmatized as an isolated tribe, underdeveloped community, immoral ethnicity also scapegoated as "thieves" when they manage their own forests which have been carried out for a generation, only on the basis of state unilateral forest tenure (Woro and Lumboko, 2005).

Stigma, as mentioned above, creates discomfort for the community because basically the idea of conservation of customary law communities grows in harmony with the development of community. This was revealed to the explanation of Customary Head of customary law communities of Moronene Hukaea Laea that there was no difference interesting between the customary law communities of Moronene Hukaea Laea and the government, in this case, the TNRAW hall, it can be said that the customary law communities of Moronene Hukaea Laea have the same view as the national park effort to conserve forest resources, which differs only in view of determination of the area as a particular zone/area as mentioned above.

Conflict of interest between national park interest and customary law communities interest are faced, even though each of interests can work together. The customary law communities naturally has a holistic lifestyle governed by its customary law about how the relationship between the human and the universe.

A mindset of customary law communities in Indonesia is cosmic (*participerend kosmisch*), which means that this whole life as a unity (*totaliter*), human is a part of nature that cannot be separated from living thing and other creatures in the world or in the supernatural world (Wignodipoero, 1973). Every

magic power is a part of cosmos, from the whole physical and spiritual life (*participatie*), this balance must always exist and occur, and if it is disturbed, it must be restored. Restoring the state of balance is manifested in several ceremonies, abstinence or rites (*rites de passage*) (Muhammad, 1976).

Participierend kosmisch is local wisdom that teaches human must be always respect and friendly with this universe, if human respect and friendly with nature then nature will be friendly and provided what is needed by human (Nugroho, 2015). This principle is based on the principle of basic human right to a good and healthy environment as stated in Principle 1 of Stockholm Declaration in 1972 which reads: "*Man has the fundamental right to freedom, equality and adequate condition of life, in an environment of a quality that permits life of dignity and wellbeing, and has bears solemn responsibility to protect and improve the environment for present and future generation.*"

Regarding conflicts and potential conflicts that usually occur between national park and community inside or outside the forest, including customary law communities, is that the root of various conflicts and problems in natural resources management that involve customary law communities have been due to injustice in natural resource allocation.

This situation is a challenge for the law of natural resources to change policy direction related to the management of legal and effective National Park as a medium to maintain the availability of natural resources and human livelihoods, both individuals and groups in the frame of Republic of Indonesia, especially for the customary law communities in the national park area so that it can fulfill a sense of justice.

Research Method

Research method can be interpreted as a general approach to events/phenomena that are determined by the researcher to be explored in more depth. It means that the research method is the logic that directs a research. The explanation of the research method is based on the nature of research as a discovery of information through certain procedures or standard procedures (Arief, 2010).

This study was normative legal research based on the secondary data with the method of data collection using tracking legislation and literature study related to the main problem. The primary data was needed to support the secondary data obtained through field research with interview and observation method.

This study used a statute approach and conceptual approach (Marzuki, 2009). The data obtained was then analyzed qualitatively and presented in the descriptive form.

B. DISCUSSION

The basic of natural resource management concept in Indonesia rests in Article 33 paragraph (3) of 1945 Constitution of the Republic of Indonesia that is known as the right to control the State. Then, the existing policies and legislation refer to the basic, namely:

1. Constitution No. 5 of 1960 concerning the Basic Agrarian Constitution

Basic Agrarian Constitution adheres to the view of the unity of land, water, space/air space including natural resources. Related to the applicable law in Indonesia, in Article 2 paragraph (4) and Article 5, this constitution explains that not only written law but also unwritten law/customary law that is still alive and does not conflict with national and state interest, and does not conflict with religious elements.

In the Basic Agrarian Constitution also regulates the importance of soil fertility, the prohibition of neglect of land and so on so that this constitution also pays attention to and adheres to the concept of protection and the concept of allotment of natural resources in its arrangement.

2. Constitution No. 5 of 1990 concerning Conservation of Biological Resources and Its Ecosystem

This constitution explains in Article 4 that the conservation of living natural resources and its ecosystems is the responsibility and obligation of government and society. Article 37 stipulates the role of community, paragraph (1) states that the participation of people in the conservation of living natural resources and its ecosystem is directed and driven by the government through various activities that are efficient and effective. Then, paragraph (2) explains that in developing the participation of people, the government fosters and increases the awareness of conservation of living natural resources and its ecosystem among the people through education and counseling.

It can be seen in this constitution that the community is placed as an object in conservation activity and its involvement is only in the implementation of the program made by government.

3. Constitution No. 41 of 1999 concerning Forestry

This constitution adopts an ecosystem approach as can be seen in Article 1 states that "a forest is an ecosystem unit in the form of a stretch of land containing biological natural resources dominated by trees in the fellowship of natural environment, which cannot be separated from one another". But, this constitution also adopts a relatively conventional approach in looking at an ecosystem that is not placing human as part of an ecosystem. Article 21 of this constitution explains that the forest management by the state includes several activities, such as forest governance and preparation of forest management

plans, utilization and use of forest areas, rehabilitation, reclamation, protection and conservation of forest.

The conservation area in Indonesia is designated and determined by government based on certain criteria on their designation, in which the management of National Park is the authority and responsibility of Environment and Forestry Ministry, Directorate General of KSDAE through National Park Management activity.

The formation of Rawa Aopa Watumohai National Park began in 1980 with the designation of area as a forest reserve for nature reserves based on a letter from the Minister of Agriculture No. 22/Ment/III/1980 then in 1990 through the Decree of Minister of Forestry No. 756/KPTS-II/1990 on December 17, 1990 was confirmed as a conservation area of Rawa Aopa Watumohai National Park (TNRAW) (Yayasan Suluh, 2015).

Based on the Decree of Director General of Natural Resources and Ecosystem Conservation Number SK.343/KSDAE/SET/KSA.0/9/2016 on September 30, 2016, concerning Zoning of Rawa Aopa Watumohai National Park, Konawe Regency, South Konawe Regency, East Kolaka Regency, Bombana Regency, Province of Southeast Sulawesi. In the traditional zone, the Lauka Laea area is included in the glorious lantern forest block, given the traditional use of the customary law communities of Moronene which is currently being processed to be designated as a customary law communities.

The process has complex obstacles and problems so that since its recognition in regional regulations in 2015, it has still not been resolved.

Regarding the existence of customary law communities explicitly stated in Article 18B of 1945 Constitution of the Republic of Indonesia which states that:

1. The State recognizes and respects regional government units that are special characteristics which are regulated by the constitution;
2. The State recognizes and respects customary law communities units and their traditional rights insofar as they are still alive and based on the development of society and the principles of Unitary State of the Republic of Indonesia regulated in the constitution.

Article 67 of Constitution No. 41 of 1999 concerning Forestry regulates as follows:

- (1) The customary law communities insofar as it is in reality still exist and is recognized as having the right on the:
 1. Collecting of forest products to fulfill the daily needs of customary law communities concerned.
 2. Conducting forest management activities based on applicable customary law and do not conflict with the constitution; and
 3. Getting empowerment in order to improve their welfare.

- (2) Inauguration of existence and deletion of customary law communities as referred to as paragraph (1) is determined by regional regulation.
- (3) Further provision as referred to paragraph (1) and (2) are regulated by Government Regulation.

The existence of customary law communities as regulated above must fulfill the following elements:

1. The community is still in association form (*rechtsgemeenschap*);
2. There is an institution in the form of their customary mastery devices;
3. There is a customary law area clearly;
4. There is an institution and legal instrument that is still adhered to;
5. Hold collection of forest products in the surrounding forest area to fulfill their daily needs.

Recognition and protection of customary law communities right are indeed important because customary law communities has existed before the Unitary State of the Republic of Indonesia is formed. However, in the development, the customary law communities must adapt to the principles and the Unitary State of the Republic of Indonesia through normative requirements in the legislation. On the other hand, these normative requirements become obstacles to the existence of customary law communities.

The problem arises and there is no constitution that specifically regulates to the customary law communities. It is still unclear how the form of law or substance of the regulation of customary law communities is spread in various regulation of constitution. At the local level, what is stated in regional regulation still requires further elaboration.

Construction of national law related to the existence of customary law communities, customary right, and customary territory including the authority of customary law communities toward the customary rights in their customary territory is not explicitly and clearly regulated. Recognition given to the existence of customary law communities does not automatically coincide with the recognition of their customary territory as happened to the customary law communities of Moronene Hukaea Laea, which has received recognition from Local Government of Bombana Regency with the issuance of Local Regulation (Perda) of Bombana Regency No. 4 of 2015 concerning recognition, protection and empowerment of customary law communities of Moronene Hukaea Laea. This recognition is only limited to the existence of customary legal communities of Moronene Hukaea Laea, it is not including customary territory and customary right to their customary forest as a whole. In Article 6 of the Local Regulation of Bombana Regency No. 4 of 2015 regulates the issue of customary territory, in paragraph (1), it is explained that the local government recognizes the customs territory of customary law communities of Moronene Hukaea Laea. However, further stipulated in paragraph (4) explains that the area of customary territory and

the boundaries of customary territory are further regulated after an agreement has been reached with the Ministry of Home Affairs, Ministry of Environment and Forestry, National Land Agency of the Republic of Indonesia. This half-acknowledgment has an effect on the practice of TNRAW area management.

The relationship between customary law communities of Moronene Hukaea Laea and Rawa Aopa Watumohai National Park as a face-to-face directly still hold potential conflict related to the extent of customary territory that overlaps with the TNRAW management area, even though physical conflicts do not occur when the first time a national park is set by government.

In the TNRAW area, there are other groups of people who illegally enter the area and carry out agricultural activities but lack supervision or strict action from TNRAW. This is a concern for the customary law communities of Moronene Hukaea Laea. If legal recognition has been given for their existence and their authority, then with regarding to interference from other parties, the customary law communities of Moronene Hukaea Laea actually has customary law related to the effort to safeguard customary territory. However, the strength of this customary law does not apply to other communities who have also taken part in the area because the existence of customary law communities, customary territory, and customary law have not yet received complete recognition as a unit. The power of customary law currently only applies to the customary law communities of Moronene Hukaea Laea so that the real contribution of the customary law communities of Moronene Hukaea Laea in an effort to safeguard the conservation area is felt minimal.

Unclear law status will have an impact on the ability to act and for customary law communities, clarity of legal status including customary territory and rights/authority over customary territory is a unity of identity. The recognition that does not fulfill the element of unity as an identity creates confusion in terms of the actualization of self-identity so that the activities carried out including conservation efforts that are part of daily activities are limited.

On the other hand, the management of TNRAW Hall is bound by various policies and legislation regarding the management of the national park, but there is no policy and regulation that provides a definite direction related to the management of national park area in relation to the existence of customary law communities. The various policies that exist only regulate sporadically based on time, place and certain condition related to this. The result of the interview with TNRAW explained that in the national park area, in which the customary law communities of Moronene Hukaea Laea lived, there had been a legal vacuum which raised doubts about TNRAW's action in law enforcement. This situation certainly had an impact on the ineffectiveness of the management of TNRAW area because there would be omission or neglect of certain things in conservation activity. On the other hand, the customary law communities of Moronene Hukaea

Laea has its own problems in its efforts to identify itself as the subject of a person with right in relation to natural resources (forest) including in efforts to contribute the conservation activity within the region.

In Indonesia, the recognition of conservation area managed by the community is supported by the decision of the Constitutional Court No. 35/PUU-X/2012 as a result of a judicial review of Constitution No. 41 of 1999 concerning Forestry about a customary forest. The decision of Constitutional Court stipulates that customary forest is recognized as a community-owned forest and not State forest. This is one good step for the recognition of the role of community, especially the customary law communities in the forest management in Indonesia. Although the contribution of community-managed conservation area has not been widely included in the regional conservation system. The management of area based on the local law and the status of land ownership which is usually the status of customary land makes this area not legally recognized as a conservation area by the government. However, in practice, the community conservation area indirectly actually save the world's biodiversity.

TNRAW Hall as the embodiment of State must be present for the customary law communities of Moronene Hukaea Laea to be able to develop their existing potential so that these capabilities become opportunities and strengths for regional management effort to achieve conservation goals. This includes being able to encourage and facilitate the effort of customary law communities of Moronene Hukaea Laea to identify itself as a unit of customary law communities, which has equal rights and obligations over natural resources.

TNRAW Hall as a technical implementation unit from director general of the KSDAE of Ministry of Environment and Forestry or as a representative of the central government in the region can form policies that can synergize with the customary law communities in the future so its able to cover the legal vacuum felt in TNRAW now and can also be input in the preparation of future legislation regarding the management of legal and effective national park related to the existence of customary law communities.

C. CONCLUSION

Based on the description of the discussion above, it can be concluded that the challenges of the law of natural resources related to the existence of customary law communities in the management of legal and effective national park is the existence of good willing from the state to implement the mandate of Article 33 paragraph (3) and Article 18B paragraph (2) of the 1945 Constitution of Unitary State of the Republic of Indonesia by:

1. Improving the constitution on the conservation of natural resources and its ecosystem with wider opportunities for customary law communities to

- participate, not only as objects of management but also as subjects in natural resource management, especially in the National Park area.
2. Establishing a constitution that strictly regulates the existence of customary law communities and their rights and obligations, especially for natural resources.
 3. The National Park Hall develops regional management policies by taking into account the characteristics of local national park, especially related to the existence of customary law communities in the National Park area.

REFERENCES

Book

- Arief, B.N., 2010. Kebijakan Legislatif dalam Penanggulangan Kejahatan dengan Pidana Penjara. Genta Publishing. Yogyakarta.
- Guthridge-Gould, S. 2010. 50 Years of Working for Protected Areas: A Brief History of IUCN World Commission on Protected Areas. Gland. Switzerland, IUCN.
- Hermawan, M.T.T., Marhaento, H. dan Khorul, L. 2008. Kaji Ulang Zona Inti Taman Nasional Alas Purwo. Fakultas Kehutanan Yogyakarta-BTN Alas Purwo.
- Hermawan, M.T.T., Faida, L.R.W., Wianti, K.F., Marhaento, H., Anindia, A. 2014. Pengelolaan Kawasan Konservasi. Gajah Mada University Press.
- Marzuki, P. M., 2009. Penelitian Hukum. Edisi Pertama, Cetakan Kelima. Kencana Prenada Media Group. Jakarta.
- Muhammad, B. 1976. Asas-asas Hukum Adat Suatu Pengantar. Pradjna Paramita. Jakarta.
- Nugroho, B. D., 2015. Hukum Adat, Hak Menguasai Negara atas Sumber Daya Kehutanan dan Perlindungan terhadap Masyarakat Adat. PT. Refika Aditama. Bandung.
- Wignodipoero, 1973. Pengantar dan Azas-azas Hukum Adat. Alumni. Bandung.
- Woro, C., dan Rumboko, L., 2005. Multikulturalisme dalam Pembangunan Kehutanan: Tantangan dan Peluang Ke Depan, dalam buku Multikulturalisme, Membangun Harmoni Masyarakat Plural. Universitas Atmajaya Yogyakarta.

Legislation

- Undang-undang No. 5 Tahun 1960 tentang Undang-undang Pokok Agraria
- Undang-undang No. 5 Tahun 1990 tentang Konservasi Sumber Daya Alam Hayati dan Ekosistem
- Undang-undang No. 4 Tahun 1999 tentang Kehutanan

Peraturan Daerah Kabupaten Bombana No. 4 Tahun 2015 tentang Pengakuan,
Perlindungan dan Pemberdayaan Masyarakat Hukum Adat Moronene
Hukaea Laea
Keputusan MK No. 35/PUU-X/2012