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Licensing Instruments as a Means of Protection and Control of Forest Use of Traditional Communities

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Abstract. *The concept of recognizing the rights of customary law communities is outlined in the 1945 Constitution of the Republic of Indonesia Article 18B paragraph (2) of the 1945 Constitution which explains that the State recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with developments. public. Customary law communities will be recognized as still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia. The principle of Licensing for the Use of Customary Law Community Forests is a government policy in directing certain activities in protecting Customary Law Community Forests. Licensing instruments can prevent the danger of loss of indigenous communities' forests. The licensing instrument divides a small number of objects. Permits provide direction by selecting people and activities. Control of forests by the state continues to pay attention to the legal rights of indigenous peoples, as long as their existence still exists and is recognized, and does not conflict with national interests and the existence of respect for the rights of indigenous peoples. In this case, the state does not have the legal power to make customary forests into state forests.*

Keywords: *Customary Legal Communitie; Forests; Licensing.*

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1. Introduction

The concept of a state of law which places authority in rules must be given based on laws and regulations which are based on the principle of legality, where every government action related to the regulation of customary law communities must be based on the principle of legality, therefore every government action must remain based on statutory regulations which contain norms of behavior containing orders, prohibitions, permits and dispensations as well as norms stipulated by the authority of the agency that gives the order. The granting of authority in the forestry sector is regulated in several statutory regulations, namely:[1]

a) Law Number 23 of 2014 concerning Regional Government which regulates the division of government affairs including the forestry sector with the classification of concurrent or optional government affairs. Article 14 states "the division of authority is only divided into two, namely the authority of the central government and provincial governments, except for those relating to the management of district/city grand forest parks which are the authority of district/city regions."

b) Law Number 41 of 1999 concerning Forestry article 66 states that "in the context of implementing forestry in Indonesia the government transfers some authority to regional governments with the aim of increasing the effectiveness of forest management in the context of developing regional autonomy".

c) Law Number 21 of 2001 as amended by Law Number 35 of 2008 concerning special autonomy for the province of Papua gives the provincial government the authority to regulate regional government as outlined in Article 4 states "the authority of the Papua Province includes authority in all areas of government except for foreign policy, defense and security, monetary and fiscal matters, religion, judiciary and certain authorities in other fields determined in accordance with statutory regulations."

In Soewoto Mulyo Soedarmo's opinion, authority can be obtained through recognition of power (attribution) or delegation of power (overdracht). Delegation of power can be divided into two types, namely granting power (mandaatsverlening) and delegation (delegatie).[2]In line with this, Philipus M Hadjon stated that authority can be obtained through three sources, namely

[1]Arief Sindharta, Reflections on Law, Bandung, Citra Aditya Bakti, 1996, p 100
[2]Soewoto Mulyo Soedarmo, Regional Autonomy, a Historical, Theoretical and Juridical Study of the Delegation of Power, Juridika, 1990, p. 275

attribution, delegation and mandate. Authority is obtained through attribution, delegation and mandate which is regulated in regulations with the aim of providing formal authority, the delegation of authority is stated in statutory regulations.[3]

Regulation of customary law community forest utilization activities must be carried out using various legal administrative facilities available to the government, whether realized in real actions or legal actions. One of the legal actions taken in the field of forestry law is the application of permits to carry out these tasks for which the government grants permits contained in a juridical instrument in the form of permits. One manifestation of a juridical instrument is that licensing provisions that were previously not permitted become permitted.[4]

Based on Government Regulation of the Republic of Indonesia Number 6 of 2007 concerning Forest Governance and Preparation of Forest Management Plans and Forest Utilization as most recently amended by Government Regulation Number 3 of 2008, forest utilization activities have been regulated through area utilization activities, environmental service utilization and utilization forest products and non-timber forest products that can be made in all forest areas, including conservation forests (except nature reserves, jungle zones and core zones in national parks), protected forests and production forests. The types of Forest Utilization Permits include:[5]

1. IUPK (Area Utilization Business Permit) is a business permit granted to utilize areas in protected forests and/or production forests.

2. IUPJL (Environmental Services Utilization Business License) is a business permit granted to utilize environmental services in protected forests and/or production forests.

3. IUPHHK (Business Permit for Utilization of Timber Forest Products) and/or IUPHHBK (Business Permit for Utilization of Non-Timber Forest Products) is a business permit granted to utilize

[3]Philipus M Hadjon, Normative Function of Administrative Law in Realizing Clean Government, Inauguration Speech for the Position of Professor at Unair 10 October 1994, quoted in his book Emanuel Sojatmoko, Legal Forms of Inter-Regional Cooperation, Surabaya, Revka Petra Media, 2016, p. 21
[4]Siti Sundari Rangkuti, Environmental Law and National Environmental Policy, Surabaya, Airlangga University Press, 2003, p. 115.
[5]See Government Regulation Number 3 of 2008

forest products in the form of wood and/or non-timber in natural forests in production forests through harvesting or logging activities, as well as enrichment, maintenance and marketing.

4. IUPHHK Ecosystem Restoration in natural forests is a business permit granted to develop areas in natural forests in production forests that have important ecosystems so that their function and representation can be maintained through conservation, protection and restoration activities of forest ecosystems including planting, enrichment, thinning, animal breeding, release. flora and fauna to restore biological elements (flora and fauna) and non-biological elements (soil, climate and topography) in an area to their original species, so that biological and ecosystem balance is achieved.

5. IUPHHK and/or IUPHHBK in plantation forests are business permits granted to utilize forest products in the form of wood and/or non-timber in plantation forests in production forests through land preparation activities, nursery of forest wood plants, planting, maintenance, harvesting and marketing of production results. forest.

6. IPHHK (Timber Forest Product Collection Permit) is a permit to collect forest products in the form of wood in production forests through harvesting, transportation and marketing activities for a certain period of time and volume.

7. IPHHBK (Permit to Collect Non-Timber Forest Products) is a permit to collect non-timber forest products in protected forests and/or production forests, including rattan, honey, fruit, latex, medicinal plants, for a certain period of time and volume.

Licensing instruments in Indonesia play an important role in spatial planning through Space Utilization Permits. Space utilization permits are enforced by Law Number 26 of 2007 concerning Spatial Planning, which includes location permits, space principle permits, building construction permits and space quality permits given by the Government to individuals or legal entities before utilizing space based on statutory regulations. applies. So, in the context of business activities in Indonesia, business actors are required to obtain permission first to obtain a location as a means of starting their business through a location permit.[6]

Constitutional Court Decision Number 35/PUU-X/2012. which contains the definition of customary forests, from what was originally said to be "state forests located in the territories of

[6]Urip Santoso, 2012, Spatial Planning Law, Surabaya: Airlangga University Press, p 161

customary law communities" to "forests located in the territories of customary law communities", the word "state" was deleted. On this basis, three definitions of forest are now known based on their status, namely:[7]

1. State Forest is forest that is on land that is not burdened with land rights. This state forest is owned by the state. All forms of control and management must have permission from the state.

2. Private Forest is forest that is on land which is encumbered with land rights, in the terminology of the law before the current forestry law it is called owned forest. Ownership of this private forest can be in the hands of individuals or legal entities.

3. Customary Forest is a forest located in the territory of a customary law community.

Guarantee of legal certainty in containing the rights of customary law communities by issuing Business Permits for the Utilization of Timber Forest Products of Customary Law Communities so that indigenous communities obtain legal legitimacy for the government's recognition of customary law community forest utilization rights. in the legal use of forests recognized by the government. Utilization of these forests can guarantee the rights of customary law communities in the management and use of law and obtain benefits from forest products and services optimally, fairly and sustainably for welfare as well as guaranteeing sustainable forest management in customary law community forests.

A problem that can be identified in this legal research is, first, what is the concept of recognizing the rights of Indigenous Peoples from a legal perspective? The second problem is, what are the principles for licensing customary law community forest use?

2. Research Methods

This research is legal research, using normative (juridical) legal research methods. This legal research uses a statutory and regulatory approach and a comparative approach. This research was conducted using primary legal materials, namely in the form of statutory regulations and secondary legal materials in the form of legal books and legal journals related to the problem

[7]Constitutional Court Decision Number 35/PUU-X/2012

under study. This research uses library and internet studies in collecting legal materials. The legal material analysis technique used is syllogism using deductive logic.

3. Results and Discussion

3.1. Concepts Related to Recognition of the Rights of Indigenous Peoples from a Legal Perspective

Customary law communities are a group of people who have lived for generations in a certain geographical area because of ties to ancestral origins, a strong relationship with the environment, and a value system that determines economic, political, social and legal institutions.

Legal regulations that provide legal recognition both regarding their existence and the rights inherent in customary law communities. The 1945 Constitution of the Republic of Indonesia Article 18B paragraph (2) of the 1945 Constitution (post-amendment) states that "The State recognizes and respects the existence of customary law community units and their traditional rights as long as they are still alive and in accordance with the development of society and principles The Unitary State of the Republic of Indonesia, which is regulated by law."

Recognition of the existence of customary law without any previous conditions has been stated in the explanation of Article 18 number II of the 1945 Constitution, as follows: "In the territory of the State of Indonesia there are approximately 250 zelfbesturende landschappen and volksgemeenshappen such as villages in Java and Bali, lands in Minangkabau, hamlets and clans in Palembang and so on. The area has an original layout, and therefore can be considered a special area.[8]

The Republic of Indonesia respects the position of these special regions and all state regulations regarding these regions will remember the rights of origin of those regions. One form of recognition of customary law communities is that they are designated as legal subjects, as parties who can submit requests for legal review of the 1945 Constitution. However, the concept is still too general and requires further explanation. Article 28I paragraph (3) reads: "Identity the

[8]See Explanation of the 1945 Constitution of the Republic of Indonesia Article 18B paragraph (2)

culture and rights of traditional communities are respected in line with developments over time and civilization."[9]

This article recognizes the existence of the culture of a community group, although it is not clear which community is meant. When this article is connected to Article 18 B paragraph 2, there is a possibility that what is meant by traditional community in Article 28 I paragraph 3 is a customary law community with its traditional rights.

Customary law communities according to Law Number 32 of 2009 concerning environmental protection and management, Customary law communities are groups of people who have lived for generations in certain geographical areas because of ties to ancestral origins, a strong relationship with the environment, and the existence of a system of values that determine economic, political, social and legal institutions. Customary law communities will be recognized as still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia. Meanwhile, the elements for recognition are as follows.[10]

1. The community is still in the form of a community association (rechtsgemeenschap).

2. There are institutions in the form of traditional rulers

3. There is a clear area of customary law.

4. There are legal institutions and instruments, especially customary courts, which are still adhered to

3.2. Principles of Licensing for Customary Law Community Forest Utilization

In licensing law, the government's main task is to realize state goals, one of which is through public services and also the government in the social life of society. With increasing

[9]Jimly Asshiddiqie in the book Towards a Democratic Rule of Law. quoted in the article by Riwanto Tirto Sudarmo et al, the Legal Study Team regarding the Protection of Indigenous Peoples in Border Areas was formed based on the Decree of the Minister of Law and Human Rights of the Republic of Indonesia Number PHN30.LT.02.01 of 2011, p. 20

[10], http://ahendrikpangerang.blogspot.com/2017/12/makalahekssis-community- Hukumadat.html accessed on 20 June 2021 at 19:45 WIB

development in various sectoral fields, it will also encourage the government to be more active and intensive in various areas of community life.[11]

According to NM Spelled and JBJM Ten Berge, permits are divided into two terms, namely in the narrow sense it is called a permit, while permission in the broad sense means that licensing is an approval from the authorities based on laws and government regulations for certain circumstances according to the provisions regulations.[12]It is further differentiated from the form of licensing proposed by Tatiek Sri Djatmiati as quoted by I Gde Aswata stating that licensing can take the form of registration, recommendations, certificates, determining quotas and permits to carry out business activities.[13]AM Doneer, quoted by I Made Arya Utama, stated that licensing can be divided into three categories, namely license, dispensation and concentration.[14]

A permit is an instrument in Administrative Law which has a regulatory and control function for controlling community activities. Apart from that, permits can provide legal certainty for government actions and legal protection for permit holders. A permit is a form of granting a prohibition given by the Government to an individual or legal entity based on statutory regulations.[15]

As for the objectives of licensing according to Prajudi Atmosudirjo, which can generally be described as follows:[16]

1. Want to direct or control certain activities.

2. Permits prevent harm to the environment.

3. The desire to protect a particular object

[11]I Gde Astawa, Functional Relationship Between State Administrative Law and Law No. 4 of 1982 concerning Basic Provisions for Environmental Management and Their Implementation in the Thought Dimensions of State Administrative Law, Yogyakarta, UII Press, Second Cet, 2002, pp. 308-309.
[12]NM Spelled and JBJM Ten Berge, Introduction to Licensing Law, Edited by Philipus M Hadjon, Surabaya, Juridika, 1993, pp. 1-2
[13]I Gde Aswata, Loc Cit. Pg 16
[14]I Made Arya Utama, Environmentally Friendly Licensing Legal System in Realizing Sustainable Regional Development, Bandung, Law Journal, Unpad Postgraduate Program, 2006.
[15]Philipus M Hadjon, 1993, Introduction to Licensing Law, Faculty of Law, Airlangga University: YURIDIKA, p 148
[16]Prajudi Atmosudirjo, State Administrative Law, Jakarta, Ghalia Indonesia, 1983, p 94

4. Permission to share small items

5. Permits provide direction by selecting people and activities

Control of Indonesia's natural resources is always tied to and cannot be separated from the provisions in Article 33 paragraph 3 of the 1945 Constitution of the Republic of Indonesia. Article 33 paragraph 3 of the 1945 Constitution is the constitutional basis regarding state control over natural resources. The phrase "earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people" in Article 33 paragraph 3 of the 1945 Constitution has become a doctrinal phrase which forms the philosophical and juridical basis for managing Indonesia's natural resources.

Control by the state for the greatest prosperity of the people in the context of the constitution independently without any interpretation of this article is indeed a weakness of Article 33 paragraph 3. This article was not created to provide detailed limitations regarding the concept of state control for the greatest prosperity of the people. This is why many laws have been formed that deviate from state control for the greatest prosperity of the people. In the explanation of article 33 of the 1945 Constitution before it was amended, the principle of state and company control (production) is based on collectivity, that is, it is carried out by all, under the leadership or members of society, which is ultimately aimed at realizing the welfare of the people.[17]

The Constitutional Court through Decision Number 001-021-022/PUU-I/2003 provides an interpretation of the phrase "controlled by the state" in Article 33 of the 1945 Constitution: The words "controlled by the state" must be interpreted to include the meaning of control by the state in a broad sense originating from and originates from the concept of sovereignty of the Indonesian people over all sources of wealth "earth and water and the natural wealth contained therein", including the understanding of public ownership by the people's collectivity of the sources of wealth in question. "The collective people are constructed by the 1945 Constitution which gives a mandate to the state to carry out policies and actions for management, regulation, management and supervision for the purpose of maximizing the prosperity of the people."[18]

[17]Ibid, p. 96
[18]See Constitutional Court Decision Number 001-021-022/PUU-I/2003

In the forestry sector, according to Article 4 of Law Number 41 of 1999, it is stated that all forests within the territory of the Republic of Indonesia, including the natural wealth contained therein, are controlled by the state for the greatest prosperity of the people. Control of forests by the state gives the government permission to:[19]

1. regulate and manage everything related to forests, forest areas and forest products

2. Determining the status of certain areas as forest areas or forest areas as non-forest areas

3. regulate and regulate legal relations between people and forests, as well as regulate legal actions regarding forestry

Based on these laws and regulations, the meaning of controlling the state clearly places limits on the actions and legal relations that can be carried out by the state. Control by the state has a utility impact on the prosperity of the people so that control by the state must be causally related to prosperity, even though control is carried out by the state, if control does not provide prosperity then control is not in accordance with the control mandated in Article 33 of the 1945 Constitution.[20]

Based on Decision Number 35/PUU-X/ 2012 which explains that the Constitutional Court granted part of the Judicial Review of Law Number 41 of 1999 concerning forestry which was handed over to the community by Indonesian customs. The Constitutional Court's decision emphasized that customary forests are not state forests. This is because the state in Article 1 point 6 of Law Number 41 of 1999 concerning forestry is in conflict with the 1945 Constitution of the Republic of Indonesia Article 18 B paragraph (2) concerning the existence of respect for the rights of indigenous peoples. In this case, the state does not have the legal power to make customary forests, namely forests located in the territories of customary law communities, into state forests. Article 2 paragraph 3 of the Forestry Law is also contrary to the 1945 Constitution of the Republic of Indonesia as long as it does not mean control of forests by the state, it still pays attention to the rights of customary law communities as long as they are still alive and in accordance with community development and state principles regulated in the Law. Paragraph

[19]See Article Law Number 41 of 1999 concerning Forestry
[20]Redi Ahmad, Natural Resources Law in the Forestry Sector, Jakarta, Sinar Graphics, 2015, p 6

5 of Paragraph 1 is declared contrary to the 1945 Constitution of the Republic of Indonesia and has no permanent legal force.[21]

1. Supervision, namely the enforcement of preventive administrative law or preventive orders before a violation occurs.

2. Imposing administrative sanctions, namely the enforcement of repressive administrative law which is carried out if a violation has occurred without going through trade procedures to return to the original conditions before the violation occurred.

Article 43 of the Papua Special Autonomy Law explains that the Papua provincial government is obliged to recognize, respect, and must be able to protect, empower and develop the rights of indigenous peoples guided by applicable legal regulations.[22]Furthermore, Law No. 41 of 1999 concerning Forestry article 67. Customary law communities as long as they in fact still exist and recognize their existence have the right to collect forest products to meet the daily needs of the indigenous community concerned, and carry out forest management activities based on applicable customary law and does not conflict with the law and obtains community empowerment in order to improve their welfare.[23]

Control of forests by the state continues to take into account the rights of customary communities, as long as their existence still exists and is recognized, and does not conflict with national interests. In accordance with the principles of forestry administration as outlined in Law Number 41 of 1999, forestry administration must be carried out with the principles of benefit and sustainability, democracy, justice, togetherness, openness and integration based on noble morals and accountability. The concept of control by the state is the soul of the principle. -as the management of the forestry. Control by the state is related to an understanding of the principle of ownership. Forest exploitation by the state does not constitute state ownership.

People's prosperity must be a necessity in every control and exploitation of Indonesia's natural resources in accordance with Article 33 paragraph 3 of the 1945 Constitution. The context of control of natural resources must be able to provide maximum benefits for all Indonesian people, which is the most important part of control of natural resources. Welfare does not mean

[21]See Constitutional Court Decision Number 35/PUU-X/2012
[22]See Article 43 of Law Number 35 of 2008 concerning Amendments to Law Number 21 of 2001 concerning Special Autonomy for Papua
[23]See Article 67 of Law Number 41 of 1999 concerning Forestry

that natural resources must be exploited and produce economically, but natural resources which are entrusted to children and grandchildren must provide benefits for the long term of their existence so that the benefits received are not only intergenerational benefits but also intergenerational benefits.

4. Conclusion

The concept of recognizing the rights of customary law communities has been outlined in the 1945 Constitution of the Republic of Indonesia, Article 18B paragraph (2) of the 1945 Constitution, in which the State recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with development of society. Customary law communities are groups of people who have lived for generations in certain geographical areas because of ties to ancestral origins, a strong relationship with the environment, and the existence of a value system that determines economic, political, social and legal institutions. Customary law communities will be recognized as still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia. Principles of Licensing for the Utilization of Customary Law Community Forests are the government's desire to direct certain activities, Permits to prevent harm to the environment of indigenous communities, desires to protect certain objects, Permits to divide small amounts of objects, Permits to provide direction by selecting people and activities - activity. Control of forests by the state continues to take into account the rights of customary communities, as long as their existence still exists and is recognized, and does not conflict with national interests. And it is very important to respect the existence of respect for the rights of indigenous peoples. In this case, the state does not have the legal power to make customary forests into state forests.

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The 1945 Constitution of the Republic of Indonesia