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WORKSHOP IN POLITICAL THEORY AND POLICY ANALYSIS
Forest Land Resource in Indonesia and Common Property Resource and A Quest for its Survival
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Abstract:

Key words : Forestry Development, Adat Law, CPR.

Forest lands had been historically recognized as the common properties of indigenous community living in and around forest complexes on islands outside Java. In general forest lands as well as the forest have been the main sources of living of these particular communities.

The common forest land Property Right (CPR) is known to constitute one of the components of the traditional law of the indigenous communities in different parts of Indonesia. The right to utilize the forest land and the forest is attached to the household or to the clan. The right to manage the resource is in the hands of the Head of that particular community, be it the village Head or the Head of a clan. The status of the common property right varies with the respective ethnic group and thus with the location. It is also determined by the characteristic of the process and by the course of the development before and after the termination of the Dutch administration.

In the 1960 Basic Agrarian Law (BAL), it is formulated that the right to manage the Common Land Resource is in the hands of the State. This right could be transferred to other parties as dictated by the State. This philosophy is essentially the same as the principle adopted in the traditional law, i.e. the right to manage the Common Property is in the hands of the respective community, represented either by the village Chief, or by the Head of the clan, of the hamlet or of the household depending on the social structure of that particular society. In the 1960 BAL, it is the State that acts on behalf of the entire society, i.e. the nation.

One of the negative impacts of the forest concession system adopted during the last 25 years is the widening gap in the welfare between the indigenous people and those engaged in logging business. Also the less accessibility of the forest resource to indigenous community often create friction between the indigenous people and the forest concession companies as well as their employees.

It is not surprising that during the last 10 years there is a growing concern on the issue of CPR of the indigenous community inhabiting areas in and around the forest.

This paper attempts to analyze the legal status of CPR with references to BAL and to BFL, the improvement of the welfare of indigenous community in connection with the Forestry Development programs launched by the Government.

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INTRODUCTION

A piece of land plays an important part in the agricultural community, whose daily life is dependent on the availability as well as on the right of access to the land. It is, therefore, not surprising if within the past decade, issues on land considerably emerged along with the utilization and/or procurement of the community's land for the national development in Indonesia.

In the case of forestry development outside of Java, the main issues are related to the right of the community on the nearby located forest lands, and on the vegetation growing, as well as animals living on that land.

It has been for centuries that the communities in and around the forests are very much dependent on the forests for their living. In a number of places in Indonesia, the forest lands and anything available thereon have been the common resources of the local community.

The law governing the right of access of each member of the community to the resources is the unwritten traditional law or Adat Law, locally known as " Hukum Adat ". The person in charge of the well functioning of Adat Law, is called " the Kepala Adat " who has right in the name of the community. His responsibility is among others to keep each member of the community to get the equal access to that forest resource, to set rules for access to particular trees or to other forest products available in the forest, to settle disputes regarding land boundaries, etc.

The forest land is locally known as Tanah Ulayat (Traditional Common Property Land or CPFL).

The forestry development, especially outside Java, is carried out based on forest concession system by private as well as by State companies. In a number of cases, the forest

concession area may also cover forest lands considered by the local communities as their properties. Consequently, the legal access of the local people to such CPFL is disappearing, and the right to utilize the vegetation growing on such land is becoming limited.

The experience of adopting such forest concession system during the last 25 years resulted in the better accessibility of the villages located in remote areas. The people became exposed to the outside world and better facilities may also be provided by the Government, e.g., better education, health care and economic development of the community. However, negative impact was also observed as external factors might create social and economic gaps between the local community and those employed by the forest concession companies. The less accessibility of the forest resource to the local community might also induce frictions between the indigenous people and the new settlers employed by the forest concession companies, e.g. the 1993 incidence in West Kalimantan. As the time passes through, the gap is getting wider.

Given the existing condition, the indigenous community either implicitly or explicitly became aware of what they are missing. As a result, they would like to get their welfare improved by getting their right on the forest land (CPFL / tanah ulayat) back. At the moment the welfare of indigenous community vis a vis their right to CPFL is one of the national issues.

This study attempts to analyse the legal status of CPFL with reference to the 1960 Basic Agrarian Law (BAL) and the 1967 Basic Forestry Law (BFL), and the improvement of the welfare of indigenous communities in connection with the Forestry Development Programs launched by the Government.

THE LEGAL STATUS OF CPFL

Two latest products of legislation which are relevant for discussing the legal status of CPFL are "the 1960 Basic Agrarian Law (BAL)" and "the 1967 Basic Forestry Law (BFL)..

A. The Status of Tanah Ulayat (CPFL) in the 1960 National Basic Agrarian Law (BAL)

After the termination of Dutch Administration, it was realized that the 1870 Agrarian Law and Regulations promulgated earlier were not favorable for the local people, especially for the low-income farmers. In addition, conflicts between the indigenous and foreign business people sometimes were unavoidable.

Therefore, one of the points stated in BAL was the abolishment of the laws and regulations adopted during the Dutch Administration in order to avoid the unwanted incidents. Matters related to earth, water and air and the richness contained therein are to be managed based on BAL.

Articles contained in BAL which are significant for the status of CPFL are number 2 points 1 , 3, 4, 5, 6, 22, 50, and 58 and Rules on The Conversion of Land Status before the issuance of BAL, into the New Status based on BAL.

In accordance with Article 33 of the 1945 Indonesian Constitution, the first and the second point of Article 2 of BAL indicate that the right to manage the earth, water and air is in the Hands of the State.

Three areas of right are to be regulated by the State, i.e., the right of the individuals and that of the private institutions on lands, the common property right, and the special right to utilize the land --for meeting the needs of other countries, for social activities, and for Government's needs.

Point 1 of Article 2 of BAL clarifies the jurisdiction of the State as the manager of the resources (the Earth, Water and Air) which are to be utilized for improving the welfare of all the people, i.e., the nation. The right of the State covers the following :

- to regulate and to allocate the utilization of the resource and the maintenance of the earth, water, and air.
- to determine and to regulate the legal relationship between the people and the earth, water and air
- to determine and to regulate the legal relationship between the people and their activities related to the earth, water and air.

Further, the State may delegate the authority to determine and to manage the land, to the Central Government (Article 2 point 2), which in turn may further forward the authority to the Provincial Government, to the Traditional Law Communities, or to the Government's Institutions (article 2 point 4).

The place and status of the Traditional Law (Hukum Adat = Adat Law) is contained in article 5, which states that the Traditional Law forms the foundation for BAL. For the implementation of " CPFL / Hak Ulayat " (provided that the system of Hak Ulayat still sustains in that particular community), it is constrained by Article 3, which states that condition should be met, i.e.,:

- a) the National and the State interests,
- b) principle of Indonesian socialism,
- c) all the regulations contained in BAL, as well as the higher level of laws and regulations,
- d) Adat Law and regulations on other matters,
- e) Religious elements.

By putting the above mentioned constraints, what would be defined and created by this article is the Adat law which is valid for the whole nation, i.e., one Adat law for all the indigenous communities in the whole country.

Vollenhoven recognized 19 different traditional laws in Indonesia (Holleman and Sonius, 1981). With the large number of the traditional laws, it can be imagined the tremendous task we have to create a nationally acceptable Adat Law. What he meant by " Adat Law " is the Pagan, i.e., the Adat Law which was not influenced by external factors yet such as other religion and culture.

Further he mentioned that if for some reasons the local traditional law is accepted to be implemented in a given location -- because the national adat law has not been formulated yet --, the Adat law which was the least affected by external factors, should be searched.

Article 22 of BAL indicates that the land ownership (Hak Milik) needs to be legalized by the Government through registration and / or certification. Its existence and recognition is to be regulated by the Government.

Unlike the individual character of the ownership adopted in the western communities, Article 6 of BAL indicates that the right on land bear a social functions. In other words the Public Interest is supposed to be placed above the Individual Interest. The spirit of this article is in line with that of the 1945 Indonesian Constitution.

Article 58 of BAL also indicates that before the National Adat Law could be promulgated, all the existing written as well as unwritten regulations relating to the right on earth, water and air and the richness contained therein, can be used, as long as they are in line with the spirit of BAL, and their appropriate interpretation is given.

Points on conversion of the land status /ownership based on regulations adopted prior to 1960 are to be made in accordance with the points stated in BAL. The equivalence of all the status of land promulgated during the Dutch Administration, are given in BAL.

The deadline for the conversion of any right on various status of land was the year 1979, except for Tanah Adat, for which according to the Ministry of Domestic Affairs decree no. 26/ DDA/1970, no deadline was set.

B. The Status of Tanah Ulayat (CPFL) in the National Basic Forestry Law (BFL)

In the 1967 National Basic Forestry Law (In Indonesian known as Undang-undang no. 5 tahun 1967 tentang Ketentuan-ketentuan Pokok Kehutanan or UUPK), hereafter referred to as BFL, no article specifically dealing with forest land, is encountered. Indeed, the subject of the law is Forest. In Article 1 a Forest is defined as "An area covered by trees which form a biological community with its environment, and gazetted by the Government as a forest".

As forest can not be established without the availability of the soil, implicitly it is understood that one of the components of the forest is the upper layer of the soil in which the root system of the trees may develop.

Article 5 Point (1) of BFL indicates that the right to manage the forests is in the Hands of the State. This article is in line with Article 33 Point 3 of 1945 Indonesian Constitution and Article 2 Point 2 of BAL.

The strong grip of the State on CPFL is revealed by Article 2 Point 1 on the definition of State (owned) Forest as those forests covering lands which do not belong to anyone. Forests growing on lands not owned by the State are defined as " Hutan Milik " / private forest (article 2 point 2).

It is indeed not clear whether the private forest ownership stated in BFL is based on the Dutch Law or on the Adat Law (Common Property Right of the traditional community). Because the legal proof for the forest ownership by the indigenous community can not be made available, the statement in

Article 2 implies that State Forests cover all the forests consisting of those gazetted by the Government, as well as those developing on lands owned by Traditional Communities. As a matter of fact the principle and implication contained in Article 2 Point 1 and Point 2 similar to those indicated in the Article 1 of Agrarian Decree of 1870 (Agrarisch Besluit of 1870) which had been abolished in BAL, i.e., the principle of State ownership.

The State thus has the authority :

1. To design, to plan and to regulate forest areas according to the function of the forest, which covers the following activities: a) the planning, b) the allocation, c) the reservation, and d) the utilization;
2. To regulate the management system of the forest
3. To determine and to regulate :
 - a. the legal relationship between the people and the forest; as an example : the right of the individuals on the nearby located forest
 - b. the legal relationship between the legal organization and the forest; as an example : the right of legal organization on the forest concession area
4. To look after : the security of the forest :
as an example : against theft of timber and forest land encroachment.

By looking at the scope of the State authority, one can see that the State set a broader authority on the forest as compared to that one on the land. As a compensation for the abolishment of the forest community ownership right, the Government has the following policy :

- a. To make a general plan for the allocation, the reservation, the establishment and the sustainable utilization of the forest so as to provide the secured source of income for the people in and around the forest (Point c of Article 6 of BFL);

- b. To allow the local community to obtain, directly or indirectly, some benefits from the forest, as long as the traditional right system of the community still exist, and provided the activities do not disturb the functions of the forest (Article 17 of BFL);
- c. To require the local community to participate in the protection of the forest from devastation as a compensation for the privilege given to them to get some benefit from the forest.

The expected involvement of the local community in the management of the forest is further clarified in BFL as follows : In order to get the people's support and supervision, the people and the mass organization shall be requested by the Government to participate, through the institution which is to be established for that purpose, in making the policy for the forest management.

In addition, the participation of the local people is also needed in the natural resource conservation efforts (Article 37 of Law no. 5, 1990).

The statement in Article 17 of BFL was clarified in Article 6 of the Government's Regulation no. 21, 1970 on Forest utilization. Upon meeting the requirements stated in Article 17 of the 1967 NBFL, the implementation of the traditional right is outlined in Article 6 of the aforementioned Government's Regulation, as follows :

- a. The implementation of the traditional right to get some benefits from the forest should be orderly carried out in such away that it does not disturb the utilization of the forest;
- b. The implementation of the right should be carried out with the consent of the Concession Holder. The latter should give the permission and the activities should follow the procedure agreed upon by both parties based on the result of the negotiation supervised by the Provincial Forest Service;

c. For the sake of security, the right of the indigenous people to get some benefits from the forest while the latter are being exploited, is frozen.

It is clear from the aforementioned descriptions that the Status of CPFL is still recognized by BAL (Article 58 of BAL on the conversion of right, and Article 2 Point 1 on the delegation of the authority from the State). The deadline for the conversion from the ownership based on Adat Law to that based on BAL is indefinite by the blessing of the Decree of the Minister of Internal Affairs no. 26/ DDA/1970 (as long as the decree is still valid).

One of the considerations put to that Decree is the present socio- economic and cultural conditions of the local people in general in Indonesia, i.e. among others, most of them are illiterate, ignorant, and live in comparatively isolated areas.

If one goes by the articles contained in BAL, then there is still hope for the local people to obtain their indigenous rights back provided the system of CPFL still exists in that particular community. The legal status on the land could also be obtained by certification.

On the contrary, BFL only recognizes the forest instead of the forest land, although the term forest implicitly also covers the soil and thus the land. So there appears to be a conflict of jurisdiction between the two.

BAL is by nature a general law covering matters on Earth, Water, and Air, whereas BFL is a specific law covering only forest which is part of the Earth, i.e. only the upper layer of the lithosphere. Substancewise BFL should be the subordinate of BAL. But since the two laws have equal legal status, BFL is overriding BAL based on the principle of speciality "Lex specialis derogat lex generalis". It can be concluded that there is no place at all for the CPFL in both Laws.

FORESTRY DEVELOPMENT PROGRAMS TO COMPENSATE THE FOREST LAND
COMMON PROPERTY RIGHT OF THE INDIGENOUS PEOPLE

Few programs had been designed with the objective of raising the indigenous people's welfare. They are known as the Community Development Program by the Forest Concessionaires (HPH Bina Desa Hutan), Profit sharing, Credits for Peasant carrying out Conservation (KUK or Kredit Usaha Tani Konservasi), Involvement of the local people in the Establishment of Industrial Forest Plantations, etc.

1. Forest Community Development Program by the Forest Concessionaires (HPH Bina Desa Hutan)

This national program was launched by the Ministry of Forestry in 1991 by a Ministerial decree no. 691/Kpts-II/ 1991. This program is known as Bina Desa HUTan (BDH) program. Its objective is to maintain the forest ecosystem sound through the improvement of the welfare of the local communities within and around the forest concession area all over Indonesia. Among the number of targeted goals, the main one is to eradicate the swiddening practice of the indigenous people by encouraging them to become sedentary farmers.

In 1989 there were 561 units of forest concessions up land covering about 60 million hectares of forest lands (FAO and Ministry of Forestry, 1990).

The diagnostic study on the socio economic and cultural conditions as well as the natural endowment that are potential at the community disposal is done by third party. The results of the study is supposed to be an appropriate program for that particular society under study. The program is for each forest concession, developed for 20 year activities. The implementation of the program as well as the needed budget, is taken care by the forest concession holders /Companies (HPH). The Provincial Forest Office (Kanwil = Kantor Wilayah Kehutanan) is supposed to periodically moni-

tor the progress of the implementation of the designed program .

This program could be interpreted as a fulfilment of the statement in article 17 of BFL, and that in Article 6 of the 1970 Government's Regulation, as well as that in Article 37 of the Law on the Conservation of Natural Biological Resources and their Ecosystems.

By the end of 1993, 356 units of forest concession, and 455 villages covering 6. 070 household were involved in this guidance program (Directorate General of Forest Utilization, 1994).

Based on results of field observation on several villages having the BDH program, it revealed that the income of the indigenous people is slightly increase and employment opportunity of the local people is not significant. The way out to the core of the problem has not been touched yet. It is not known yet how to make the indigenous community surrounding the forest concession areas become economically independent, sound, and improved their wellbeing from time to time for the long run, vis a vis with the sustainability of the forest ecosystem and the profitable operation of Forest Concession (Hadi, 1995).

The results also indicated that there is a tendency that the indigenous communities become so dependent on the existence of HPH due to the communities ware mis- diagnostic and to the mis - treatment by the HPH. Since the success of the implementation of the program by each forest concessionaire becomes one of the creteria in approving the logging target for the next comming year, the HPH tends to emphasize on providing physical things. The latter are relatively easy to carry out provided the funds is available, and the results are obvious, can be seen by the inspectors of the Provincial Office as well as by the officer of the Ministry of Forestry.

For the successful results, it is not only the Ministry of Forestry and the associated institutions at the Provincial, at the District as well as at the village level, but also other institutions responsible for the development of the local communities, are expected to be involved in the program.

What should still be taken care of is the thorough guidance and supervision by the Government. It appeared that such thorough guidance and supervision, indeed, need to be carried out as the actual implementation of the guidance program in the field may significantly differ from the submitted reports, provided the diagnostic study is correct.

Evaluation on the implementation of the program should also be done periodically so as to make room for correction of the improper diagnostic study and activities done by HPH, for minimizing or alleviating the negative impact of the activities, and for accommodating the social changes occurring within the society.

2. Profit Sharing

The Ministry of Forestry also requires all the State Forestry Corporations to set aside 5 % of their annual profits to be allocated for helping the local communities explore and utilize the natural resources available in the villages in and around the forests under their respective jurisdictions. It would be beneficial if HPHs are required to have the same program.

3. Credits for Peasants Carrying out Soil Conservation (KUK)

The peasant living in and around the forest areas are encouraged to plant trees for soil conservation purposes. The trees can be sold when they are ready. The credit is provided through the bank as a loan with low interest. This program applies for the conservation area on Java as well as on

islands outside Java. The progress is not quite satisfactory as many of the borrowers can not pay the loan back.

4. Involvement of the Indigenous People in the Establishment of Industrial Forest Plantations

Since 1984 The Ministry of Forestry initiated to launch a program to establish Industrial Forest Plantations (HTI) in different locations in Indonesia. The objective of establishing such plantations is not only to improve the productivity of the forest land, and thus reduce the pressure on the natural forest, but also to create more employment and business opportunities for the indigenous people. It is planned that ultimately about 6 million hectares of such plantations shall be established.

However the progress is slow. By the end of Pelita V, plantations established covered only 1.09 million hectares. One of the serious problems (mostly in West Kalimantan, and West Kalimantan) was the claim of CPFL by the indigenous communities.

According to the Indonesian Loggers Association, in 1995, 207 companies had applied for the allocation of forest lands to be converted into industrial forest plantations, covering a total area of about 5.8 million hectares in different provinces in Indonesia.

An Agroforestry program on the industrial forest plantation areas has been exercised in several locations. Food crops are planted during the first two or three years of the plantation being established, as long as the light intensity is adequate for raising the food crops. The limiting factors at the program so far is the prevailing pest. If this problem can be solved, a successful result of the program could be expected.

The establishment of industrial forests so far were mainly carried out by transmigrants purposely arranged for this project. The reason behind the program is that the large number of labours from Java more acquainted with intensive agriculture is required. The latest development is the idea to incorporate the indigenous communities surrounding the project to be involved in the establishment of the industrial forest plantations. They will be trained to plant also other commercial plant species such as rattan, medicinal plants or other multi-plant species producing non-wood forest products which are light tolerant. So far no report has been available on the implementation and on the result of this program.

ANALYSIS

1. The Follow Up of BFL

Based on the afore-mentioned discussion it is clear that there is no opportunity for the indigenous people to have their traditional right back. The issues emerging on the right on CPFL is due to the facts that so far the system of forestry development had not been successful yet in improving the welfare of the indigenous communities

The Short - Term /urgent Solution of the Problem may be as follows :

- a. In case time is not right yet to give the right on CPFL back to the indigenous communities, the way out is to allow them to get their share by materializing the ideas promulgated in Article 6b, 6c, and 17 of BFL and 1970 Government Regulation No. 21 (through the formulation of Government Regulation/regulations /Decrees on the guidance for the implementation of those Articles.
- b. Monitoring and Supervising system on the Community Welfare Development Program need to be established. For this

purpose the institution for this purpose should be established.

2. General VS Specific Policy

Indonesian Ecolabelling Institute (locally known as Lembaga Ekolabel Indonesia, or is short LEI) had been established with the function to ensure the sustainable management of the forest in Indonesia, among other by recognizing the legal status of the CPFL in relation to the surrounding communities.

The legal recognition of the CPFL may be implemented by involving the indigenous communities in all phases of the forest management activities, i.e., from the process of granting the forest concession to the management of the forest, through a system known as the " participatory forest management " or " Joint forest management " .

Whenever such policy could be accepted to be implemented in general, the following problems which may arise and should taken into account, are dealing with :

- a. The compability of the policy with BFL. The changes is accomodated by Article 2 of BAL. Unless the BFL should be revised, there is no legal basis for the changes. .
- b. The feasibility of the expectation that the indigenous community can sustainably manage the forest based on the assumptioon that they are endowed with traditinal knowl- edge to keep the forest function sustained.
- c. This policy may be a precedence for communities in Java and some parts of Sumatra whose right on CPFL had been taken away during the Dutch Administration ?
- d. How would be the predence for other communities which do not recognize the right on CPFL, as the change in the policy may also affect them.

- e. The short term impact on the sustainability of the forest in connection with the existing commitment to adopt the forest concession system?
- f. The ability of indigenous community to carry out large scale utilization of the forest requiring appropriate technical and managerial, and marketing skill as well as large capital ?.

It is worthy to carry out some trials by selecting communities which indeed had shown to have the needed skills and system for the sustainable management of the forest. Carefull selection employing reliable and accurate data are required if successful result is to be expected.

SUGGESTIONS

1. Three - Party Communication Forum

Establishment of communication forum involving three parties engaged in the forest management is badly needed at different levels. The three parties are the Forest Concession Company, the Indigenous community (including the Regional Government's Authority), and the Regional Representative of the Ministry of Forestry, before the existing system of forestry development gives more serious unwanted negative impact.

2. Monitoring and Supervision on System of Community Welfare Development Program

In line with the implentation of the participatory forest mnagement system, an institution in charge of the moonitoring and supervision of activities to improve the welfare of the indigenous communities, need to be established.

3. Special Policy

A pilot project need to be exercise to give a chance for a

sound traditional system of forest management to flourish. Thorough selection of the potential communities need to be carried out based on appropriate data collected. The result of a diagnostic on a particular community is the key of success of the project.

4. Revision of BFL

In due time, recognition of the right of indigenous community on CPFL to be legalized and thus it should be incorporated in the revised BFL. The revision of BFL is currently being processed.

The recognition of the right of the indigenous communities needs to be reflected in all the Articles related to the management of the State forests. In other words, the recognition of the right on CPFL need to be integrately reflected in the Articles dealing with the forest management.

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