



Legal Protection of the Rights of the Batak Toba Customary Law Community to Customary Forests in Samosir Regency in the Perspective of Environmental Law and the Human Rights of Indigenous Peoples

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Abstract: This study examines the legal protection of the rights of the Toba Batak customary law community over customary forests in Samosir Regency from the perspective of environmental law and human rights. The fundamental problem that is studied is the normative gap between national legal guarantees and the conditions of legal uncertainty experienced by the Batak Toba customary law community due to the lack of the formation of a Regional Regulation on the recognition of customary law communities as required by Article 67 paragraph (2) of Law Number 41 of 1999 concerning Forestry. This study uses a normative juridical method that is prescriptive with a legislative, conceptual, and case approach, using the framework of Philipus M. Hadjon's legal protection theory and John Rawls' theory of justice. The results of the study show that although the normative foundation for the protection of the rights of the Batak Toba customary law community has been progressive starting from the 1945 Constitution to the Constitutional Court Decision Number 35/PUU-X/2012, it cannot be fully operationalized effectively because it depends on Regional Regulations that have not yet been formed, so that preventive and repressive legal protection has suffered systemic failures. This study concludes that the fulfillment of the state's obligation to provide meaningful legal protection for the Toba Batak indigenous people is not only a juridical demand but also a demand for justice that cannot be postponed.

Keywords: Legal Protection, Batak Toba Customary Law Society, Customary Forest

Introduction

Indigenous peoples in Indonesia have a close relationship with forests as part of their social, economic, and cultural life. Customary forests are not only a place to make a living, but also a spiritual space and symbol of collective identity that is inherited from generation to generation. ¹ However, indigenous peoples' rights to forests are often not fully recognized by the state. This problem is rooted in the problematic normative construction in Law Number 41 of 1999 concerning Forestry, especially Article 1 number 6 which defines customary forests as state forests that are within the territory of customary law communities, so that it implicitly places customary forests as the public domain of the state, not as the collective property of indigenous peoples.²

This normative gap is even more evident when it is associated with Article 67 paragraph (2) of the Forestry Law which states that the recognition of customary law communities is determined through Regional Regulations. This provision places the sustainability of the legal protection of indigenous peoples in an instrument whose formation is entirely dependent on the *political will* of the local

¹ Sandra Moniaga, "Hak-hak Masyarakat Adat atas Tanah dan Sumber Daya Alam di Indonesia," *Jurnal Hukum Internasional* 2, no. 2 (2005): 273.

² Mia Siscawati, "Masyarakat Adat dan Perebutan Penguasaan Hutan," *Jurnal Transformasi Sosial*, no. 33/XVI (2014): 3.

government. This condition normatively allows for overlap between the claims of customary rights of indigenous peoples and the state's forestry permit policy.³

This situation is concretely illustrated in Samosir Regency, North Sumatra where the Batak Toba customary law community has inhabited and managed forest areas for generations, but most of the forest areas were designated as production forest areas and concession permits were granted to PT Toba Pulp Lestari without formal recognition of the existence of customary forests of the local community.⁴ Without a Regional Regulation acknowledging their existence, the traditional activities of the Batak Toba customary law community could potentially qualify as a violation of Article 50 paragraph (3) of the Forestry Law, a serious structural inequality between the formal law of the state and the reality of traditional control of indigenous peoples.⁵

The Constitutional Court Decision No. 35/PUU-X/2012 is a significant legal milestone because it separates customary forests from the category of state forests and places customary law communities as the holders of rights to their forest areas. However, because the requirement for recognition through Regional Regulations remains valid, the absence of the regional regulation in Samosir Regency causes the juridical benefits of this decision to not be fully felt.⁶ This issue is at the intersection between forestry law, environmental law, and human rights that require a comprehensive normative juridical study, so the author is interested in researching it under the title "Legal Protection of the Rights of the Batak Toba Customary Law Community over Customary Forests in Samosir Regency in the Perspective of Environmental Law and Human Rights."

Methods

This research is a normative legal research that is descriptive and analytical, conducted through a legislative approach, a conceptual approach, and a case approach. The source of legal material was obtained through a literature study which includes primary legal materials in the form of the Constitution of the Republic of Indonesia in 1945, Law Number 41 of 1999 concerning Forestry, Law Number 32 of 2009 concerning Environmental Protection and Management, Law Number 39 of 1999 concerning Human Rights, Constitutional Court Decision Number 35/PUU-X/2012, and Regulation of the Minister of Environment and Forestry Number P.21/Menlhk/Setjen/KUM.1/4/2019 on Customary Forests and Rights Forests. Secondary legal materials include books, scientific journals, and related research results, while tertiary legal materials are in the form of legal dictionaries. The technique of collecting legal materials is carried out through literature studies and analyzed qualitatively by interpreting norms based on their context to answer the legal problems that are studied comprehensively.⁷

Results and Discussion

Legal Regulation for the Protection of the Rights of the Batak Toba Customary Law on Customary Forests in Samosir Regency

The legal arrangement for the protection of the rights of the Batak Toba customary law community over customary forests in Samosir Regency is spread across various layers of legal instruments that are hierarchically complementary to each other. At the constitutional level, Article 18B paragraph (2) of the 1945 Constitution affirms that the state recognizes and respects the unity of customary law communities and their traditional rights. However, this provision contains a critical limiting requirement, namely that the recognition must be further regulated in the law, while until now Indonesia does not have a special

³ Undang-Undang Nomor 41 Tahun 1999 tentang Kehutanan, Pasal 67 ayat (2).

⁴ Sandra Moniaga, *Hak-hak Masyarakat Adat dan Masalah serta Kelestarian Lingkungan Hidup di Indonesia* (Jakarta: HuMa, 2005), 15.

⁵ Undang-Undang Nomor 41 Tahun 1999 tentang Kehutanan, Pasal 50 ayat (3).

⁶ Putusan Mahkamah Konstitusi Nomor 35/PUU-X/2012, hlm. 178-180.

⁷ Salim HS dan Erlies Septiana Nurbani, *Penerapan Teori Hukum Pada Penelitian Tesis dan Disertasi*, Raja Grafindo Persada, Jakarta, 2013, hlm. 7

law that comprehensively regulates the recognition and protection of customary law communities. Article 28H paragraph (1) of the 1945 Constitution strengthens the protection dimension by guaranteeing the right of every citizen to a good and healthy environment, which for the Toba Batak customary law community cannot be separated from their rights to their customary forests. Meanwhile, Article 33 paragraph (3) of the 1945 Constitution, which affirms the state's control over natural resources, must be interpreted inclusively so that it includes the prosperity of customary law communities, not solely for the benefit of the large-scale forestry industry.⁸

At the sectoral law level, Law Number 41 of 1999 on Forestry has actually provided a number of normative protection instruments. Article 4 paragraph (3) requires the control of forests by the state to continue to pay attention to the rights of customary law communities, and Article 67 paragraph (1) recognizes the rights of customary law communities to collect forest products and manage forests based on customary law. However, Article 67 paragraph (2) is the most crucial and most problematic norm because it places the formal recognition of customary law communities in the Regional Regulation instrument. Without the Regional Regulation, all rights guaranteed by Article 67 paragraph (1) cannot be operationalized judicially, and customary law communities are even vulnerable to criminalization based on the prohibition of Article 50 paragraph (3) letters a and b for their traditional activities in forest areas that have not been formally recognized.⁹

Law Number 39 of 1999 concerning Human Rights provides an additional dimension of protection through Article 6 which requires the state to protect the cultural identity of customary law communities, including the right to customary land, and Article 3 paragraph (3) which prohibits all forms of discrimination against any community group, including customary law communities. Meanwhile, Law Number 32 of 2009 concerning Environmental Protection and Management strengthens protection through Article 65 paragraph (1) which guarantees the right to a good and healthy environment, the participatory principle in Article 2 letter i which requires community involvement in environmental management decision-making, and Article 26 which requires the involvement of affected communities in the EIA process as an instrument of preventive legal protection.¹⁰

The most fundamental legal milestone is the Constitutional Court Decision Number 35/PUU-X/2012 which states that the phrase "customary forests are state forests" is contrary to the 1945 Constitution so that customary forests are no longer categorized as state forests but forests that are within the territory of customary law communities. This decision changes the position of customary law communities from mere managers to real rights holders over their customary forest areas. However, the Constitutional Court Decision 35/2012 does not remove the requirements of Regional Regulations in Article 67 paragraph (2) of the Forestry Law, so that the determination of customary forest areas in concrete terms remains dependent on the regional legal instruments. Regulation of the Minister of Environment and Forestry Number P.21/2019 emphasizes this condition by stipulating that the application for the determination of customary forests must be accompanied by a Regional Regulation or other regional legal product as an administrative requirement that cannot be excluded.¹¹

Thus, there is a serious normative gap between progressive legal guarantees at the constitutional and national levels and the conditions of legal uncertainty experienced by the Batak Toba customary law community in Samosir Regency, which all of which stem from the same structural obstacle, namely the lack of the formation of a Regional Regulation on the recognition of customary law communities in Samosir Regency.

⁸ Pasal 18B ayat (2), Pasal 28H ayat (1), dan Pasal 33 ayat (3) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945

⁹ Undang-Undang Nomor 41 Tahun 1999 tentang Kehutanan, Pasal 4 ayat (3), Pasal 67 ayat (1) dan ayat (2), serta Pasal 50 ayat (3) huruf a dan huruf b.

¹⁰ Undang-Undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia, Pasal 3 ayat (3) dan Pasal 6 jo. Undang-Undang Nomor 32 Tahun 2009 tentang Perlindungan dan Pengelolaan Lingkungan Hidup, Pasal 2 huruf i, Pasal 26, dan Pasal 65 ayat (1).

¹¹ Putusan Mahkamah Konstitusi Nomor 35/PUU-X/2012, Amar Putusan jo. Peraturan Menteri Lingkungan Hidup dan Kehutanan Nomor P.21/Menlhk/Setjen/KUM.1/4/2019, Pasal 5

Forms of Preventive and Repressive Legal Protection of the Rights of the Toba Batak Customary Law Community over Customary Forests to Pt Toba Pulp Lestari in Samosir Regency

1. Forms of Preventive Legal Protection

Referring to Hadjon's conception, preventive legal protection is the protection provided before the occurrence of a violation. There are three preventive legal protection instruments that should work to protect the rights of the Batak Toba customary law community, but all three do not function effectively.

- a. The forestry licensing mechanism that should require verification of customary territories before concession permits are issued as required by Article 4 paragraph (3) jo. Article 67 paragraph (1) of the Forestry Law. However, in practice, the licensing mechanism does not systematically integrate the verification stage, so that due to the absence of a Regional Regulation of recognition, the Batak Toba customary forest area is not mapped in the forestry administration system and is considered as a state forest area that is freely allocated to concession permit holders.¹²
- b. The AMDAL mechanism based on Article 26 of the PPLH Law requires the involvement of affected communities in the preparation process. However, the effectiveness of this instrument depends on the extent to which the involvement is carried out meaningfully, not just an administrative formality. For customary law communities that do not have formal recognition, their involvement in the AMDAL process is increasingly vulnerable to being ignored because their existence has not been officially recognized by the local government.¹³
- c. The principle of Free Prior and Informed Consent or FPIC is recognized in Article 32 of UNDRIP of 2007 and is substantially absorbed in the obligation of community involvement in Article 26 of the PPLH Law. The absence of an adequate FPIC mechanism in the process of granting HTI concession permits to PT Toba Pulp Lestari reflects the failure of preventive legal protection in the dimension of consultation and consent of the affected communities.¹⁴

2. Forms of Repressive Legal Protection

Repressive legal protection is protection provided after a violation of rights with the aim of restoring rights that have been violated.¹⁵ The rights of the Batak Toba customary law community to customary forests in Samosir Regency, there are four normative instruments of repressive legal protection, including:

- a. The mechanism for resolving forestry disputes outside the courts as stipulated in Article 74 paragraph (1) and Article 75 paragraph (2) of Law Number 41 of 1999 concerning Forestry. This mechanism is relatively more accessible than the litigation route, but its effectiveness depends heavily on the equality of bargaining positions of the parties. Without formal recognition through Regional Regulations, the Batak Toba customary law community is in a very weak bargaining position because their rights claim does not have a strong formal legal basis on which to negotiate.¹⁶
- b. The mechanism for environmental civil representative lawsuits is based on Article 71 of the Forestry Law and Article 91 of Law Number 32 of 2009 concerning Environmental Protection and Management. This mechanism faces three normative challenges at once, namely the difficulty of proving causality between PT Toba Pulp Lestari's activities and the losses suffered, the vulnerability of indigenous peoples' legal standing as plaintiffs that can be questioned due to the absence of a Regional Regulation of recognition, and the limited scope of recovery which only

¹² Undang-Undang Nomor 41 Tahun 1999 tentang Kehutanan, Pasal 4 ayat (3) jo. Pasal 67 ayat (1).

¹³ Undang-Undang Nomor 32 Tahun 2009 tentang Perlindungan dan Pengelolaan Lingkungan Hidup, Pasal 26.

¹⁴ United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) Tahun 2007, Pasal 32 jo. Undang-Undang Nomor 32 Tahun 2009, Pasal 26.

¹⁵ Philipus M. Hadjon, *Perlindungan Hukum bagi Rakyat di Indonesia* (Surabaya: Bina Ilmu, 1987), hlm. 5.

¹⁶ Undang-Undang Nomor 41 Tahun 1999 tentang Kehutanan, Pasal 74 ayat (1) dan Pasal 75 ayat (2).

includes compensation for losses that have occurred without being able to recover rights to customary forest areas that have been administratively transferred.¹⁷

- c. The mechanism of the State Administrative lawsuit is based on Law Number 5 of 1986 as amended by Law Number 51 of 2009. Normatively, the decision to grant concession permits issued without paying attention to the obligations of Article 4 paragraph (3) of the Forestry Law can be sued as a TUN Decision that is contrary to laws and regulations. However, the main obstacle is the 90-day grace period for filing a lawsuit as stipulated in Article 55 of the PTUN Law, which in practice is very difficult to meet by customary law communities who do not have adequate access to information on the administrative process of forestry licensing.¹⁸
- d. The complaint mechanism to Komnas HAM is based on Article 89 paragraph (3) of Law Number 39 of 1999 concerning Human Rights. This mechanism is normatively limited because Komnas HAM does not have the authority to cancel concession permits that have been issued and its recommendations are not legally binding, so its effectiveness depends entirely on the government's political will to follow up.¹⁹

Based on the description above, the legal protection system available to the Toba Batak customary law community has failed in both forms of efforts. In preventive efforts, failures occurred because the licensing mechanism did not require verification of customary territories, the EIA did not provide meaningful space for indigenous participation that had not been formally recognized, and the FPIC principle was not effectively implemented. In repressive efforts, failure occurred because all available legal channels contained normative obstacles that made them ineffective in restoring the rights of the Batak Toba customary law community in a concrete manner.²⁰

Based on the perspective of Hadjon's theory, this condition illustrates the systemic failure of legal protection which stems from the same root problem, namely the absence of Regional Regulations recognizing customary law communities in Samosir Regency. The absence of these regional legal instruments simultaneously paralyzes preventive legal protection mechanisms and weakens indigenous peoples' access to normatively available repressive legal protection instruments.

Based on the perspective of Rawls's theory of justice, this condition reflects a structural injustice that is contrary to the principle of difference, because the Toba Batak customary law community as the most vulnerable group bears the greatest burden of existing legal uncertainty while the economic benefits of forest management in their traditional territories are enjoyed by others.²¹

Legal Efforts to Protect the Rights of the Batak Toba Customary Law Community over Customary Forests in Samosir Regency Based on the Principles of Environmental Law and Human Rights

The most basic and urgent legal effort is to encourage the acceleration of the formation of Regional Regulations for the recognition of the Batak Toba customary law community in Samosir Regency. This is not just a policy choice but a legal obligation that comes directly from Article 67 paragraph (2) of the Forestry Law jo. Article 18B paragraph (2) of the 1945 Constitution which is constitutional. Procedurally, the formation of the Regional Regulation must refer to Law Number 12 of 2011 concerning the Establishment of Laws and Regulations by fulfilling the obligation of community participation as stipulated in Article 96 of the law, which is a tangible manifestation of the principle of *free prior and informed consent* recognized in UNDRIP in 2007. Concrete efforts that can be taken are the submission of an official petition to the Regional House of Representatives of Samosir Regency to include the Draft Regional Regulation on the Recognition and Protection of Indigenous Peoples in the Regional Legislation

¹⁷ Undang-Undang Nomor 41 Tahun 1999 tentang Kehutanan, Pasal 71 jo. Undang-Undang Nomor 32 Tahun 2009, Pasal 91.

¹⁸ Undang-Undang Nomor 5 Tahun 1986 tentang Peradilan Tata Usaha Negara, Pasal 55.

¹⁹ Undang-Undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia, Pasal 89 ayat (3)

²⁰ Philipus M. Hadjon, *Perlindungan Hukum bagi Rakyat di Indonesia* (Surabaya: Bina Ilmu, 1987), hlm. 3-5.

²¹ John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), hlm. 302.

Program accompanied by representative organizations such as the Alliance of Indigenous Peoples of the Archipelago.²²

During the process of forming Regional Regulations, the Batak Toba customary law community can take an alternative route through the Social Forestry mechanism based on the Regulation of the Minister of Environment and Forestry Number P.9/Menlhk/Setjen/Kum.1/3/2021. The Customary Forest Scheme within the framework of Social Forestry provides a path of recognition and legal access to customary forest areas even though Regional Regulations have not yet been formed, with reference to the Regulation of the Minister of Environment and Forestry Number P.21/Menlhk/Setjen/KUM.1/4/2019 concerning Customary Forests and Rights Forests. The precedent of the success of the Pandumaan-Sipituhuta indigenous people in Humbang Hasudutan Regency who succeeded in obtaining the determination of the Tombak Haminjon Customary Forest covering an area of 5,172 hectares through a long struggle since 2009 can be used as a relevant normative reference for the Batak Toba customary law community in Samosir Regency.²³

The Batak Toba customary law community can also use environmental law and human rights instruments simultaneously. Based on Article 26 of the PPLH Law, affected communities have the right to be meaningfully involved in the EIA process if PT Toba Pulp Lestari submits an application for an extension or extension of the concession permit and can submit objections that are the basis for the EIA Assessment Commission to reject or require changes to the EIA document. In addition, complaints to Komnas HAM based on Article 89 paragraph (3) of the Human Rights Law can be taken to exert moral and political pressure on local governments, as well as the use of the Universal Periodic Review mechanism at the UN Human Rights Council to encourage the fulfillment of Indonesia's obligations in protecting the rights of indigenous peoples at the international level. If all non-litigation efforts do not yield adequate results, the litigation route through an environmental civil lawsuit based on Article 71 of the Forestry Law jo. Article 91 of the PPLH Law or a lawsuit by the State Administration against a licensing decision that is contrary to Article 4 paragraph (3) of the Forestry Law can be taken as an effort to restore rights judicially.²⁴

Based on the perspective of Hadjon's legal protection theory, the entire legal effort can be mapped into two categories. The establishment of Regional Regulations, involvement in the EIA process, and the Social Forestry mechanism are preventive efforts as they aim to build a foundation of protection before further violations occur. Meanwhile, environmental civil lawsuits, TUN lawsuits, complaints to Komnas HAM, and the UPR mechanism are repressive efforts aimed at restoring rights that have been violated. What needs to be emphasized normatively is that preventive efforts in the form of accelerating the formation of Regional Regulations must be a top priority because all repressive efforts will be much more effective if supported by the formal recognition of customary law communities through the regional legal instruments.²⁵

From the perspective of Rawls's theory of justice, this whole legal effort is a manifestation of the principle of difference, which requires that the basic structure of society should be governed in such a way as to provide the greatest benefit to the most disadvantaged groups. The Toba Batak customary law community as the most vulnerable group in relations with the state and corporations has the right to proportionate and effective legal protection, not just normative recognition that cannot be operationalized because it depends on local legal instruments that have not been formed. Thus, the

²² Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan, Pasal 96 jo. UNDRIP Tahun 2007, Pasal 32.

²³ Ray Amantharo Saragih et al., "Analisis Hukum Penguasaan dan Pengelolaan Hutan Adat oleh Masyarakat Adat: Studi Hutan Adat Tombak Haminjon Desa Pandumaan dan Desa Sipituhuta Kabupaten Humbang Hasudutan," *Locus Journal of Academic Literature Review* 2, no. 3 (2023): 255–257.

²⁴ Undang-Undang Nomor 32 Tahun 2009 tentang Perlindungan dan Pengelolaan Lingkungan Hidup, Pasal 26 dan Pasal 91 jo. Undang-Undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia, Pasal 89 ayat (3) jo. Undang-Undang Nomor 41 Tahun 1999 tentang Kehutanan, Pasal 71.

²⁵ Philipus M. Hadjon, *Perlindungan Hukum bagi Rakyat di Indonesia* (Surabaya: Bina Ilmu, 1987), hlm. 2-5.

fulfillment of the state's obligation to provide meaningful legal protection for the Batak Toba customary law community over customary forests in Samosir Regency is not only a juridical demand but also a demand for justice that cannot be postponed any longer.²⁶

Conclusion

The legal arrangement for the protection of the rights of the Batak Toba customary law community over customary forests in Samosir Regency has a progressive normative foundation starting from Article 18B paragraph (2) of the 1945 Constitution, Law Number 41 of 1999 concerning Forestry, Law Number 39 of 1999 concerning Human Rights, Law Number 32 of 2009 concerning Environmental Protection and Management, to the Constitutional Court Decision Number 35/PUU-X/2012, but all of these normative guarantees cannot be effectively operationalized because they depend on Regional Regulations that have not yet been formed, so that preventive and repressive legal protection of the rights of the Batak Toba customary law community in the context of the existence of PT Toba Pulp Lestari has experienced systemic failures in both dimensions, and the legal remedies that can be taken must be simultaneous through the acceleration of the formation of regulations. The region as the main foundation is strengthened by the use of the Social Forestry scheme, the use of environmental and human rights law instruments, and litigation channels as a judicial recovery effort.

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²⁶ John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), hlm. 302-303.

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