Focus Journal Law Review Vol. 6 No. 1 Mei 2026
E-ISSN : 2829-7415

# Study of Constitutional Court Decision No. 35/PUU-X/2012 and Analysis of Customary Forest Management Regulations in Indonesia and Malaysia

I Made Arya Utama [1]

Abstract

That in the Constitutional Court Decision No. 35/PUU-X/2012 stipulates that customary forests are forests located in customary areas, no longer state forests, through the Constitutional Court Decision No. 35/PUU-X/2012, the Constitutional Court stipulates that customary forests are forests located in the areas of customary law communities and changes their status so that they are no longer state forests. The urgency of this research aims to examine the Constitutional Court Decision No. 35/PUU-X/2012 and Analysis of Customary Forest Management Regulations in Indonesia and Malaysia. The research method used in this research is the normative legal research method. The results of the research show that the Constitutional Court accepted and adjudicated the request for material review of Law Number 41 of 1999 concerning Forestry. The considerations given by the Constitutional Court in the Decision of the Constitutional Court of the Republic of Indonesia Number 35/PUU-X/2012 broadly state that Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) have provided recognition and protection for the existence of customary forests in unity with the customary rights territory of a customary law community. This is a consequence of the recognition of customary law as living law that has been in place for a long time, and continues to the present day. Therefore, placing customary forests as part of state forests is a disregard for the rights of customary law communities. Furthermore, the management of customary forests in Indonesia and Malaysia has fundamental differences. Indonesia recognizes customary forests within state forest areas as "rights forests", while Malaysia applies a system in which the management of customary land and forests is more integrated with state agrarian law, especially in the regions of Sabah and Sarawak.

Keywords: Constitutional Court, Decision, Customary Forests, Indonesia, Malaysia

[1] Professor Lecturer, Udayana University, email : arya_utama@unud.ac.id

## 1. Introduction.

The hereditary inherited rights of customary forest management can be proven with anthropological evidence as well as religious customary heritage in customary forest areas, as stated by Kirsch, a researcher, that anthropological evidence is used to show that local place names are toponyms in their language, which establishes historical ties to the land that are not recognized by the state (Kirsch, 2016), one of the complexities for anthropologists is ensuring that their written statements can be understood by the legal system, communities seeking recognition of their rights, and reliance on anthropological historical documentation. and collecting physical evidence is a common thing in indigenous people's land claims (Kirsch, 2018), including in this case customary forest management rights related to the Study of Constitutional Court Decision No. 35/PUU-X/2012 and Analysis of Customary Forest Management Regulations in Indonesia and Malaysia.

Providing legal protection for customary forest management to communities is based on the 1945 Constitution of the Republic of Indonesia, which is the constitutional right of indigenous communities. The provisions of Article 18B paragraph 2 of the 1945 Constitution of the Republic of Indonesia formulate "The State recognizes and respects the units of customary law communities and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law." Furthermore, Article 28I paragraph 5 of the 1945 Constitution of the Republic of Indonesia formulates that "to uphold and protect human rights in accordance with the principles of democratic government based on law, the implementation of human rights is guaranteed, regulated and stipulated in laws and regulations".

The legislation in question is the provisions of Article 6 paragraph 1 of Law Number 39 of 1999 concerning Human Rights which states that in the context of upholding human rights, the differences and needs of indigenous peoples must be considered and protected by the law, society and the government. Article 6 paragraph 2 of Law Number 39 of 1999 concerning Human Rights states that the cultural identity of indigenous peoples, including rights to customary land, is protected in accordance with current developments.

Humans have rights to something in two ways, namely: a) on the basis of its essence, and b) on its use. The first is the rights that humans have outside their authority. Humans have this right on the basis of “divine command”. The second is a right that is owned on the basis of reason and will, in the sense that humans have the right to something because they are able to use it.

Natural rights to objects owned by humans are based on: a). Its rational nature, because humans use their minds to utilize everything for their survival, b). Its social nature, because in this case, humans are "encouraged" to utilize everything for the benefit of their family (Thomas Aquinas, 2006).

Sociologically, the ideals of the Indonesian State as stated in the fourth paragraph of the Preamble to the 1945 Constitution of the Republic of Indonesia cannot be achieved if what is experienced by customary law communities is not protected, then customary law communities will experience discrimination, poverty, be exploited and become victims of development, ignoring these things will be an experience of suffering for indigenous law communities, including the Indonesian people in general. The existence of indigenous peoples as rights holders is only half-heartedly acknowledged with certain burdensome requirements. Thus, it is important to encourage recognition of customary law communities as legal subjects (legal standing), aiming to ensure customary law communities as rights holders protected by law (Pareke, J.T. and Arisandi, F., 2020).

Referring to the 1945 Constitution of the Republic of Indonesia as the Constitution and Law Number 39 of 1999 concerning Human Rights, the implementing regulations under it relating to customary forest management must comply and comply with the above regulations or higher regulations, including accommodating the contents of the Constitutional Court Decision regarding customary forest management.

The essence of Regional Regulations which accommodate the interests of the community in the region in order to achieve the greatest happiness for the community, must be respected by government administrators at the center as a matter for regional government administrators in seeking happiness and prosperity for the community in the region. With this recognition, regions have the right to establish Regional Regulations to accommodate special regional conditions and regulate the life of the community in their region in interactions between individuals. The central government can no longer intervene in the formation of Regional Regulations, even if the material content of Regional Regulations formed by government administrators in the regions is in conflict with higher regulations, unless the content of the material is contrary to the constitution, laws and the objectives of forming the Regional Regulations themselves (Victor Juzuf Sedubun, 2015), so that the mandate of the above regulations, namely the Law or Constitutional Court Decision

regarding customary forest management, can be maximally implemented in the regions with the formation of regional regulations.

That in the Constitutional Court Decision No. 35/PUU-X/2012 stipulates that customary forests are forests located in customary areas, no longer state forests, through the Constitutional Court Decision No. 35/PUU-X/2012, the Constitutional Court stipulates that customary forests are forests located in the areas of customary law communities and changes their status so that they are no longer state forests. The urgency of this research aims to examine the Constitutional Court Decision No. 35/PUU-X/2012 and Analysis of Customary Forest Management Regulations in Indonesia and Malaysia.

**2. Problem Formulation & Methode Research.**

The formulation of the problem in this research is to study and analyze the Constitutional Court Decision No. 35/PUU-X/2012 and Analysis of Customary Forest Management Regulations in Indonesia and Malaysia.

The problem-solving approach in this study utilizes a legal and comparative approach (Marzuki, P.M., 2005) through a legislative approach, a literature review, and a comparative legal approach to obtain research results related to Constitutional Court Decision No. 35/PUU-X/2012 and Analysis of Customary Forest Management Regulations in Indonesia and Malaysia.

The approach method in this research uses a normative juridical approach. This research uses a descriptive-analytical approach, which describes the norms studied and is linked to theories, as well as the opinions of legal experts. The data sources in this study come from library research, which is carried out based on books, literature related to the problem to be studied. The type of data collected is secondary data obtained from the literature consisting of primary legal materials, secondary legal materials, and tertiary legal materials. Data processing begins after all required data is fully fulfilled. The collected data is sorted based on its relevance and usefulness in this research. After the data is grouped according to its purpose and use, it is then processed and described accurately. The data analysis method used in this research is descriptive qualitative analysis, namely analyzing data by objectively describing symptoms or phenomena and facts obtained in the field to answer the research problem (Suteki and Galang Taufani, 2020). In this case, this approach is used to review this research.

## 3. Analysis and Discussion.

### The Constitutional Court Decision No. 35/PUU-X/2012.

The lack of protection and recognition of the rights of indigenous peoples, especially rights to land and natural resources, is usually accompanied by a lack of political will to address the problems faced by indigenous peoples, and the general fact that the majority of indigenous peoples live in areas where the last unexploited natural resources are located (Hale, CR., 2005). Indigenous organizations win important battles over cultural rights only to find themselves trapped in laborious, technical, administrative, and highly unfair negotiations to obtain the resources and political power necessary to realize those rights (IWGIA, 2017).

There are critical gaps in documentation and recognition of communal law today (Zulkifli, et al., 2025), framing documentation as a form of defensive protection. This approach requires proactive participation and intellectual support from the community and government to make full use of available facilities and ensure a comprehensive and effective documentation process (Dinda Keumala Setiyono, et al., 2024), including in this case documentary evidence in the form of recognition of customary forest management rights.

From the perspective of recognizing customary forest management rights, it is important in terms of addressing challenges that require normative reform, better documentation, and active community involvement in the intellectual field to enable sustainable development (Nadia Astriani, 2024), as well as the sustainability of the protection of customary forest management rights by indigenous communities in customary forest areas.

Indonesia is a country based on law (Rumiartha, INPB 2022), the implementation of state activities must be based on law (Rumiartha, INPB, et al. 2022), this is related to the implementation of customary forest management which must be based on law without reducing or ignoring the rights of customary law communities.

That in the Constitutional Court Decision No. 35/PUU-X/2012 it was determined that customary forests are forests located in customary areas, no longer state forests, through the Constitutional Court Decision No. 35/PUU-X/2012, the Constitutional Court determined that customary forests are forests located in the areas of customary law communities and changed their status so that they are no longer state forests. The Constitutional Court accepted and adjudicated the petition for material review of Law Number 41 of 1999 concerning Forestry. The considerations given by the Constitutional Court in the Decision of the Constitutional Court of the

Republic of Indonesia Number 35/PUU-X/2012 broadly stated that Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) have provided recognition and protection for the existence of customary forests in unity with the customary rights area of a customary law community. This is a consequence of the recognition of customary law as living law which has been in place for a long time, and continues until now. Therefore, classifying customary forests as part of state forests constitutes a disregard for the rights of indigenous peoples. Furthermore, the management of customary forests in Indonesia and Malaysia differs fundamentally. Indonesia recognizes customary forests within state forest areas as "private forests," while Malaysia implements a system where customary land and forest management are more integrated with state agrarian law, particularly in the Sabah and Sarawak regions.

The Constitutional Court Decision No. 35/PUU-X/2012 means that customary forests are forests within the territories of indigenous peoples, and not state forests as stipulated in Article 1 number 6, Article 4 paragraph (3), Article 5 paragraph (1), Article 5 paragraph (2), Article 5 paragraph (3), and the Explanation to Article 5 paragraph (1) of Law No. 41 of 1999, which contradicts the 1945 Constitution of the Republic of Indonesia and is not legally binding. In the Constitutional Court Decision, the panel of judges also considered the need for regional regulations to designate customary forests as a form of respect for forests owned by indigenous peoples.

Therefore, according to the researchers' study, the importance of establishing a massive regional regulation regarding customary forests is crucial. The absence of regional regulations on customary forests results in less than optimal protection and respect for customary community ownership of customary forests, and the lack of protection for customary communities in the event of conflicts related to the use of natural resources within their customary forests by entrepreneurs or investors.

The essence of Regional Regulations, which accommodate the interests of local communities in order to achieve the greatest possible happiness for the community, must be respected by central government administrators as the responsibility of regional government administrators in striving for the happiness and well-being of their communities. With this recognition, regions have the right to establish Regional Regulations to accommodate specific regional conditions and regulate the communal life of their communities and their interactions with each other. The central government can no longer intervene in the formation of Regional

Regulations, even if the material content of the Regional Regulations formed by the regional government administrators is in conflict with higher regulations, unless the mutant material is in conflict with the constitution, laws and the purpose of forming the Regional Regulation itself (Victor Juzuf Sedubun, 2015), so that the mandate of the regulations above it, namely the Law or the Constitutional Court Decision regarding the management of customary forests, can be implemented optimally in the regions by forming regional regulations.

**Analysis of Customary Forest Management Regulations in Indonesia and Malaysia.**

Customary forest management in Indonesia and Malaysia has fundamental differences. Indonesia recognizes customary forests within state forest areas as "private forests", while Malaysia implements a system where customary land and forest management is more integrated with state agrarian law, especially in the Sabah and Sarawak regions.

In terms of legal basis and recognition in Indonesia, it is regulated in Law no. 41 of 1999 concerning Forestry and Constitutional Court Decision No. 35 of 2012 which excluded customary forests from the classification of state forests. Customary forests are recognized after a Regional Regulation or Regional Head Decree is issued. So according to research studies, it is important to form massive regional regulations related to the formation of regional regulations regarding customary forests. The absence of regional regulations regarding customary forests has an impact on the lack of maximum protection and respect for customary law communities' ownership of customary forests, and the absence of protection for customary law communities when conflicts occur regarding the use of natural resources in customary forests of customary law communities by entrepreneurs or investors. The legal basis and recognition in Malaysia in this case is that there is no single federal law for the entire country. Forest management falls under the jurisdiction of each state. In Sabah and Sarawak, customary rights are recognized through inherited customary law or through Land Codes (such as the Sarawak Land Code).

In the context of ownership and control status related to customary forest management in Indonesia, namely that customary forests belong to the Customary Law Community, but the state still has the authority to regulate and manage (mastery of public functions) their use for the prosperity of the people and/or the well-being of the people. In Malaysia, in the context of ownership and control status related to customary forest management, in this case customary land and forests are generally recognized as communal property rights (Native Customary Rights -

NCR) or customary reserve land (Native Reserve). States grant use or property rights to indigenous communities to manage resources.

Regarding forest management and utilization schemes in Indonesia, management and utilization under the Social Forestry program (specifically Minister of Environment and Forestry Regulation No. 9 of 2021), communities can manage forests for timber and non-timber forest products, as well as environmental services, whereas in Malaysia in Sarawak and Sabah, customary forests are often subject to commercial concession agreements between state governments and private companies, where indigenous communities are entitled to compensation or management rights to certain areas for subsistence needs.

Challenges and conflict resolution related to forest management in Indonesia, in this case agrarian conflicts, often occur due to the many overlapping regulations that are not harmonious, apart from that, between customary forest boundaries and company concession permits, including plantation permits, the process of determining customary forests through long bureaucracy is still a major challenge. Meanwhile, in Malaysia, regarding challenges and conflict resolution in forest management, the main problem revolves around the conversion of customary land for large-scale oil palm plantations. Dispute resolution is carried out through the state's civil court system by proving the history of customary land occupation.

**4. Conclusion.**

The Constitutional Court in the Decision of the Constitutional Court of the Republic of Indonesia Number 35/PUU-X/2012 broadly state that Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) have provided recognition and protection for the existence of customary forests in unity with the customary rights territory of a customary law community. This is a consequence of the recognition of customary law as living law that has been in place for a long time, and continues to the present day. Therefore, placing customary forests as part of state forests is a disregard for the rights of customary law communities.

The Constitutional Court Decision No. 35/PUU-X/2012 means that customary forests are forests within the territories of indigenous peoples, and not state forests as stipulated in Article 1 number 6, Article 4 paragraph (3), Article 5 paragraph (1), Article 5 paragraph (2), Article 5 paragraph (3), and the Explanation to Article 5 paragraph (1) of Law No. 41 of 1999, which contradicts the 1945 Constitution of the Republic of Indonesia and is not legally binding. In the

Constitutional Court Decision, the panel of judges also considered the need for regional regulations to designate customary forests as a form of respect for forests owned by indigenous peoples.

Therefore, according to the researchers' study, the importance of establishing a massive regional regulation regarding customary forests is crucial. The absence of regional regulations on customary forests results in less than optimal protection and respect for customary community ownership of customary forests, and the lack of protection for customary communities in the event of conflicts related to the use of natural resources within their customary forests by entrepreneurs or investors.

Furthermore, the management of customary forests in Indonesia and Malaysia has fundamental differences. Indonesia recognizes customary forests within state forest areas as "rights forests", while Malaysia applies a system in which the management of customary land and forests is more integrated with state agrarian law, especially in the regions of Sabah and Sarawak. In the context of ownership and control status related to customary forest management in Indonesia, namely that customary forests belong to the Customary Law Community, but the state still has the authority to regulate and manage (mastery of public functions) their use for the prosperity of the people and/or the well-being of the people. In Malaysia, in the context of ownership and control status related to customary forest management, in this case customary land and forests are generally recognized as communal property rights (Native Customary Rights - NCR) or customary reserve land (Native Reserve). States grant use or property rights to indigenous communities to manage resources.

Regarding forest management and utilization schemes in Indonesia, management and utilization under the Social Forestry program (specifically Minister of Environment and Forestry Regulation No. 9 of 2021), communities can manage forests for timber and non-timber forest products, as well as environmental services, whereas in Malaysia in Sarawak and Sabah, customary forests are often subject to commercial concession agreements between state governments and private companies, where indigenous communities are entitled to compensation or management rights to certain areas for subsistence needs.

**Reference**

Dinda Keumala Setiyono, Ahmad Sabirin, Nadia Nursantih, (2024), Has Indonesia Safeguarded Traditional Cultural Expressions?, Jambura Law Review, vol.6, no.2, 2024, pp.218.

Hale, C. R. (2005), *Neoliberal Multiculturalism: The Remaking of Cultural Rights and Racial Dominance in Central America*. Political and Legal Anthropology Review 28(1): 10–28

IWGIA, International Work Group for Indigenous Affairs, (2017), Land Grabbing, Investments and Indigenous Peoples' Rights to Land and Natural Resources.

Marzuki, P. M.,( 2005),Penelitian Hukum, edisi revisi, Prenadamedia, Jakarta, p. 13.

Nadia Astriani, Laina Rafianti, Betty Rubiati, Firman Hadi Suparna, and Julia Elviyana., (2024), Local Food Protection to Achieve Food Security, European Food and Feed Law Review, vol.19, no.6, pp.331.

Pareke, J.T. and Arisandi, F., 2020. "Pengakuan Masyarakat Hukum Adat dan Perlindungan Wilayah Adat di Kabupaten Rejang Lebong." Bina Hukum Lingkungan, 4(2), p. 220.

Rumiartha, I. N. P. B. (2022). Correlation Theory A.V. Dicey Perspective of the Rule of Law in Indonesia: Correlation Theory A.V. Dicey Perspective of the Rule of Law in Indonesia. *Focus Journal Law Review*, *2*(1). https://ojs.balidwipa.ac.id/index.php/fjl/article/view/19

Rumiartha, I. N. P. B., Astariyani, N. L. G., & Indradewi, A.A.S. (2022). Human Rights of Indigenous People in Indonesia: A Constitutional Approach. Journal of East Asia and International Law, 15(2), 395-402.http://journal.yiil.org/home/archives_v15n2_10

Suteki and Galang Taufani,. 2020, "Metode Penelitian Hukum (Filsafat, Teori, Dan Praktik)," ed. 3, Rajawali Pers, Depok, p.176.

Siems, M. M., & Mac Síthigh, D. (2021). "Mapping legal research". *Cambridge Law Journal*, 71 (3), p. 651–676

Thomas Aquinas, 2006, Summa Theologiae, I, IIae, Quaestio XC, dalam E. Sumaryono, Etika & Hukum, Relevansi Teori Hukum Kodrat Thomas Aquinas, Cetakan Ke-5, Kanisius, Yogyakarta, p. 260.

Victor Juzuf Sedubun, 2015, Pengawasan Peraturan Daerah yang Berciri Khas Daerah, Disertasi, Program Doktor Program Studi Ilmu Hukum Fakultas Hukum Universitas Airlangga, Surabaya, p. 71.

Zulkifli, Almusawir, Andi Tira, (2025), Communal Intellectual Property Rights and Creative Industry Development Through Integration Patterns, Unnisulla Jurnal Hukum, vol.41 no 3, pp.767-793.