

RECOGNITION OF ADAT FOREST AND PLANTATION CONCESSIONS IN INDONESIA

PENGAKUAN HUTAN ADAT DAN KONSESI PERKEBUNAN DI INDONESIA

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ABSTRACT

Legal recognition of adat forests has long been established through Decision of the Constitutional Court No. 35/PUU-X/2012 correcting terminology of adat forests in the Forestry Law. However, the recognition has been still not running as expected to date. This article will explore about what are legal implications of recognition of adat forests associated with plantation concessionaires. The study found a number of unfair articles in the Plantation Act, even though they had been corrected by two Decisions of the Constitutional Court. The injustice appeared in regulation to plantation concessionaires who can be entitled to land for plantation business. On the one hand, such regulation showed injustice, especially with orientation of partiality. On the other hand, it would potentially generate a conflict between plantation business and community. A number of cases occurred between communities and plantation enterprises are potentially taking small community away from justice.

Keywords: Legal Recognition, Adat Forest, Plantation Concessions.

ABSTRAK

Pengakuan hukum atas hutan adat sudah lama diteguhkan, melalui Putusan Mahkamah Konstitusi Nomor 35/PUU-X/2012, yang mengoreksi terminologi hutan adat dalam Undang-Undang Kehutanan. Akan tetapi hingga sekarang pengakuan tersebut masih belum berjalan sebagaimana yang diharapkan. Artikel ini ingin menelusuri bagaimana implikasi hukum atas pengakuan hutan adat terhadap pemegang konsesi perkebunan. Penelitian ini menemukan bahwa dalam Undang-Undang Perkebunan, terdapat sejumlah pasal yang tidak berkeadilan, walau sudah diperbaiki dengan dua Putusan Mahkamah Konsitusi. Ketidakadilan tampak pada pengaturan pelaku usaha perkebunan yang dapat diberi hak atas tanah untuk usaha perkebunan. Pengaturan demikian memperlihatkan ketidakadilan di satu pihak, terutama dengan orientasi keberpihakan. Di pihak lain, berpotensi memunculkan konflik usaha perkebunan dengan masyarakat. sejumlah kasus terjadi antara masyarakat dan usaha perkebunan, yang berpotensi menjauhkan masyarakat kecil dari keadilan.

Kata Kunci: Pengakuan Hukum, Hutan Adat, Konsesi Perkebunan.

INTRODUCTION

Purpose of the establishment of Indonesian state is basically confirmed in the fourth paragraph of the Preamble of the 1945 Constitution, namely "to protect the whole nation of Indonesia and the entire Indonesian territories and to promote general welfare, educate the life of the nation and participate in implementing the world order based on independence and social justice." This purpose became a basis of formulation of Article 33 Paragraph (3) of the 1945 Constitution mandating the state in utilizing lands, water and natural resources of Indonesian territories as much as possible to create prosperity of the people.

Forestry sector is one source of the people's prosperity regulated by Law No. 41 of 1999 on Forestry (UUK). Goal of forestry management is to maximize a just and sustainable welfare of people (Article 3). With this goal, the state through the right of state power puts *adat* forest into the concept of state forest. Finally, this fusion is found to collide with the interests of the people's prosperity.

This article is trying to get a picture of legal implications of recognition of *adat* forests associated with plantation concession holders. One thing should be asserted that the recognition of *adat* forest is based on decision of the Constitutional Court No. 35/PUU-X/2012 correcting terminology of *adat* forest in the Forestry Law. Decision of the Constitutional Court corrected a number of articles in the Forestry Law, namely Article 1 number 6, Article 4 paragraph (3), Article 5 paragraphs (1), (2), and (3).

Articles of the Forestry Law mentioned above determine spaces and arenas specifically. Affirmation of *adat* forests as state forest within territory of *adat* law people is defined in Article 1 number 6. Subsequently, Article 4 paragraph (3) asserts that forest ownership by the state is still paying attention to the rights of *adat* law peoples as long as they are still exist, recognized and not conflicting with the national interest. The Article 5 paragraph (1) classifies forests based on their status, namely state forest and forest rights. State forests may contain *adat* forest as defined in

Article 5 paragraph (2). The Government determines status of forests and *adat* forests insofar as the relevant *adat* law community, in fact, still exists and the existence is recognized (Article 5 paragraph (3)).

A number of provisions were then corrected by the Constitutional Court based on the fact found in middle of society that several *adat* forests had different position than state forest.

On that basis, Decision of the Constitutional Court corrected a number of articles. The most important thing is confirmation that *adat* forest is forests within territory of *adat* law community (Article 1 point 6). The so-called *adat* forest is separated and differentiated from state forests. It is affirmed that state forest does not include *adat* forest (Article 5 paragraph (1)). Article 4 paragraph (3) also mentions that forest control by the state shall still respect the rights of *adat* people as long as they alive and in accordance with development of society and principle of the Unitary State of the Republic of Indonesia, as governed by law. Establishment of forest status was also corrected in Article 5 paragraph (3). In addition to the correction, the Decision of the Constitutional Court also removed Article 5 paragraph (2).

Based on the affirmation of the Constitutional Court Decision above, existence of *adat* forest must be recognized as being separate from state forest. Also, this assertion can be interpreted that anyone who does not recognize the Constitutional Court's Decision is basically similar to against the law.

Further examination of this recognition itself is intriguing, because of three things, namely: First, the government has grant many plantation concession licenses, not only in zones of state forests, but areas of *adat* forests that should be controlled by *adat* law community. When these concession licenses were granted, many *adat* law communities became victims of criminalization and expulsion in efforts of handing over the forests to concessionaires.

Second, concessions were granted for state forest according to old Forestry Law and it potentially provoked more conflicts after *adat* forest was separated from state forest based on

decision of the Constitutional Court. The most obvious potential conflict is, the government must obey the decision of the Constitutional Court to enforce the law by recognizing *adat* forests in the one hand and, the government should also keep the rule of law for the concessions in order to maintain legal certainty for concessionaires.

Third, the same object is regulated in three sectors mentioned above (forestry, plantation, agrarian), i.e. land. For example, an object that should be regulated by agrarian was, in fact, also regulated by the Forestry Law.

Another important issue is an extraordinary overlap of legislations. In relation to control of natural resources, including forest resources, the conflicting and overlapping legislations have been found in plantation sector as well as other sectors. In fact, forestry sector was also in conflict with sectors of energy and mineral resources, water resources, marine and fisheries, and land. Furthermore, the conflicts between these sectors also impacted *adat* law peoples.

One of the most essential things of an *adat* law community is the existence of *adat* law regulating, among the others, how to manage harmonious relationships. With the existence of *adat* law, *adat* law people are kept away from greed in exploiting nature at will to meet their economic needs. An inward attitude is involved, with future orientation to their grandchildren.¹

This commitment has made issues related to *adat* law peoples to discuss and to debate endlessly to date. Not only about concept and position of *adat* law people, but also how legislation and policy should address their existences.

The debate is also not simple one. Currently, Indonesia has 124.4 million hectares of forests.² According to statistical data of the Ministry of Environment and Forestry in 2014, Indonesian land area was about 187.918 million hectares. Forested area was 96,490 million hectares and non-

¹ Compare, Rebecca Anne Riggs, Jeffrey Sayer, Chris Margules, Agni Klintuni Boedhihartono, Dauglas Langston, Hari Susanto, *Forest Tenure and Conflict in Indonesia: Contested Rights in Rempek Village, Lombok*, Land Use Policy, Vol. 57, 2016, pp. 241-249.

² Kompas, "Setiap Tahun, Hutan Indonesia Hilang 684.000 Hektar", August 30, 2016.

forested area was 91.427 million hectares. In addition, use and utilization licenses for mining production operations (97 units) covered 52,890 hectares, for mining and non-mining exploitation in 2011 (110 units). In 2014, function of production forest areas of 495,008 hectares was converted to agriculture/plantation areas. In 2014, units of forest management were 60 units covering area of 10,191,333 hectares.³

Of the total area, 31,864 villages were found around the forests. Based on data of the Central Bureau of Statistics, there were approximately 8.64 million householders who depend on forest resources. Of these numbers, 425 thousands peoples (2,270 villages) were living in the vicinity of conservation areas. There were 37.8 million forests with business license status including plantation forests and community forests. Based on Decision of the Constitutional Court No. 35/2012, Aliansi Masyarakat Adat Nusantara (AMAN) had mapped 7.5 million hectares of *adat* forest areas.

Focus of the present article is on legal implications of *adat* forest recognition related to the rights of plantation concessionaires.

METHODOLOGY OF RESEARCH

The research is based on conceptualization of law not as legislation. The law is seen through inductive study. Therefore, such concept of law does not see the law as an object affected by various political, economic, and sociocultural influences. Various findings were analyzed qualitatively in accordance with the purpose of this article writing.

³ Center of Statistical Data and Information of Ministry of Environment and Forestry 2014, Ministry of Environment and Forestry, Jakarta, 2015

DISCUSSION

1) What is *Adat* Community?

Adat community is an autonomous unit of community, that is, they regulate their life systems (law, politics, etc.) by themselves. They were born from a community, they are growing together and guarded by the community itself. The existence of *adat* peoples in Indonesia has been declared by scholars who have been devoting their studies on *adat* law.⁴

Every *adat* community has an *ulayat* right. Maria Sumardjono stated *ulayat* rights related to *adat* community as having indicators of existence as follow: (1) The presence of MHA (an *adat* law community) meeting certain characteristics as subject of *ulayat* rights; (2) The existence of land/territory with specific boundaries as *lebensraum* (living space) which is the object of *ulayat* right; (3) The existence of authority of the MHA in carrying out actions related to land, other natural resources, and legal acts.⁵

Position of MHA (*adat* law community) is regulated in many laws and regulations in the state law. Based on the division of sectors and table above, then the laws mentioned above refer to *adat* peoples in various ways. In other words, there are a variety of terms used by various laws and regulations to identify *adat* people. In addition to the term MHA itself, various other terms can be found namely: (1) *adat* society; (2) traditional people; (3) traditional community; (4) *adat* community; (5) *adat* village; (6) isolated community.

The various terms can be seen especially in various laws included in the six sectors above. This variation cannot be considered simple in academic world. It may be a mirror of how the state

⁴ Ade Saptomo, *Hukum dan Kearifan Lokal Revitalisasi Hukum Adat Nusantara*, Grasindo, Jakarta, 2010, p. 13. Compare, Jacko A van Ast, Anindya Widaryati, Mansee Bal, *The 'Adat' institution and the Management of Grand Forest 'Herman Yohannes' in Indonesian Timor: The Role of Design Principles for Sustainable Management of Common Pool Resources*, Conservation and Society, Vol. 12, No. 3, 2014, pp. 294-305. Compare, Sulaiman Tripa (Ed.), *Mukim di Aceh, Belajar dari Masa lalu untuk Membangun Masa Depan*, Diandra Pustaka Indonesia, Yogyakarta, 2015.

⁵ Ade Saptomo, p. 15. See also, Maria SW Sumardjono, "UUPA dan Ulayat", Paper, BPN, Jakarta, 1998.

has not definitely set MHA position, in order to control them easily in accordance with orientation of state power.⁶

In addition to the terms, recognition mechanism is also a problem in itself. A basis for viewing this mechanism is a constitution of the amendment result, namely Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia stating: "The State recognizes and respects units of *adat* law communities as long as they are alive and in accordance with development of society and Principle of the Unitary State of the Republic of Indonesia, as governed by law."⁷

Based on the article above, four conditions can be inventoried, as follows: (1) as long as they are alive; (2) in accordance with development of society; (3) principle of the Unitary State of the Republic of Indonesia; (4) shall be governed by law.⁸

These four conditions, already indicated, are based on Decision of the Constitutional Court No. 10/PUU-I/2003: First, still alive contains elements: (a) there are people whose members have an in-group filling; (B) there is an *adat* governance order; (C) *adat* properties and/or objects are identified; (D) a set of *adat* law norms is found.

Secondly, "in accordance with the development of society" contains elements: (a) their existence has been recognized under applicable law as a reflection of development of values considered ideal in today's society, both general and sectoral laws; (b) substances of traditional

⁶ Rikardo Simarmata, *Pengakuan Hukum terhadap MHA di Indonesia*, UNDP, Bangkok, 2006, p. 6, dan 309. See also, Sulaiman Tripa & Taqwaddin Husen, *Arah Pengaturan Tata Batas Mukim di Kabupaten Aceh Barat*, Jurnal Transformasi Administrasi, Vol. 5 No. 1, 2015, pp. 924-938. Sulaiman Tripa, *Mukim di Hadapan Hukum Negara*, Digest Epistema, Vol. 6, 2016, p. 6. Compare, Iin Ichwandi, Takeo Shinohara, *Indigenous Practices for Use of and Managing Tropical Natural Resources: A Case Study on Baduy Community in Banten*, Indonesia, Tropics, Vol. 16, No. 2, 2007, pp. 87-102.

⁷ Second amendment, established on August 18, 2000

⁸ The term, regulated "in" and regulated "with", has difference, namely: word "with" signals other specified Act, whereas "in" indicates an Act concerned contains the regulation. See also, I. Nyoman Nurjaya, *Adat Community Land Rights as Defined Within the State Agrarian Law of Indonesia: Is it a Genuine or Pseudo-Legal Recognition?* US-China Law Rev. 2011, 8, 380. Compare. Agni Klintuni Boedhihartono, *Can Community Forests Be Compatible With Biodiversity Conservation in Indonesia?* Land, 6(1), 2017. Taqwaddin Husin, Teuku Alvisyahrin, *Peran Hukum Adat dalam Penanggulangan Bencana Gempa Bumi dan Tsunami Aceh*, Kanun Jurnal Ilmu Hukum, Vol. 16, No. 3, 2014.

rights are recognized and respected by members of the relevant community and of wider society, and they are not against human rights.

Third, "in accordance with Principle of the Unitary State of the Republic of Indonesia" contains elements: (a) their existence does not threaten the sovereignty and integrity of the Republic of Indonesia; (b) substances of the *adat* law norms are appropriate and not in contrary to the laws and regulations.

Fourth, "regulated by the Law" contains elements: regulations based on the Law are available.

Each of these conditions has its own complexity. With the long silencing of *adat* peoples, then such strict conditions were set can obviously pose unique problems. It is difficult for *adat* peoples to be fully recognized if the state law is the only basis.

In the Forestry Law itself, recognition of *adat* law peoples is determined by Article 67, which states:

(1) *Adat* law community shall, in fact, still exist and their existence is recognized to be entitled

to:

- a. collect forest products to fulfill daily needs of the relevant *adat* community;
- b. carry out activities of forest management under *adat* law and they are not contrary to the state law; and
- c. gain empowerment in order to improve their welfare.

(2) Assertion of the existence and inexistence of *adat* law community as referred to in paragraph (1) shall be stipulated by Regional Regulation.

(3) Further provisions as referred to in paragraph (1) and paragraph (2) shall be regulated by Government Regulation.

In Explanation of Article 67 Paragraph (1), it is stated that *adat* law community is recognized, if in fact fulfills the following elements: (a) the community is still found in a form of *paguyuban* (*rechtsgemeenschap*); (b) an institution is available in the form of *adat* ruling figures; (c) *adat*

jurisdiction is clear defined; (d) *adat* law institutions and instruments, especially *adat* court are still adhered; and (e) they are still gathering forest products from their surrounding environment to meet daily living needs.

Furthermore, Explanation of Article 67 Paragraph (2) mentions that Regional Regulation shall be prepared taking into account results of research by experts on *adat* law, aspirations of local community, and leaders of *adat* peoples in the region concerned as well as relevant agencies or parties.

Affirmation of *adat* law community has been not strictly regulated in Law No. 39/2014 on Plantations. Article 13 only determined that *adat* law community is established in accordance with the laws and regulations. Accordingly, the Forestry Law may also be referred to as a basis in this regard.

2) Interpretation of The Plantation Act

The issue of Law no. 18/2004 on Plantations on August 11, 2004 stated in its consideration that one of important objectives of state law related to plantations is "to make just welfare and prosperity of people into reality, plantation needs to be guaranteed for its sustainability and its function and role shall be enhanced".

In the Plantation Act No. 18/2004, some problematic articles were found, namely Article 21 and Article 47. Then, they had been corrected through Decision of the Constitutional Court No. 55/PUU-VIII/2010.

Considering these conditions, a new act was established, namely Law no. 39/2014 on Plantations (Plantation Act). In its considerations, the new Plantation Act mentioned that, in addition to welfare and prosperity of people, attention is paid to plantations considered to play important role in national economy in order to realize just welfare and prosperity of the people. Unfortunately, content of this Plantation act does not reflect a justice. This condition can be seen in

terms of land use. Article 11 paragraph (1) determines that plantation businessmen may be entitled to land for plantation business in accordance with the laws and regulations. However, they are determined in Article 12 that:

- (1) in a case that land needed for plantation business is land of *ulayat* rights of *adat* law community, the plantation businessman shall consult with the *adat* law community holding the *ulayat* right in order to obtain an agreement on the land handover and remuneration;
- (2) *musyawarah* or agreement with the *adat* law community holding the *ulayat* right as referred to in paragraph (1) shall be conducted in accordance with the provisions of legislation.

Ironically, Article 17 is set otherwise.

- (1) authorized official shall be prohibited from issuing a plantation business permit for land controlled by *ulayat* rights of *adat* law community.
- (2) Provisions of the prohibition as referred to in paragraph (1) shall be exempted in event that an agreement has been reached between the *adat* law community and the plantation businessman concerning handover of the land and remuneration as referred to in Article 12 paragraph (1).

Great interests for investors are hidden In Article 12 and Article 17 above. Article 12 implicitly demonstrates that *adat* law community shall relinquish their rights by receiving remuneration, although Article 12 paragraph (1) says it in the words "the plantation businessman shall consult with the *adat* law community holding *ulayat* right to obtain an agreement concerning the land handover and the rewards".

The language used in the Plantation Act reveals a language of power that is seemingly incontrovertible. The language conceals the fact that there is a position inequality, especially for *adat* law community in defending the rights. There is no reason for *adat* law community to be able

to strengthen their position to defend their rights. Such language also shows the highly elitist position of the Act which is inconsistent with the philosophical consideration, namely "bringing just welfare and prosperity of people into reality."

Interestingly, this hidden pressure is as if answered by regulation of Article 103 stating that the officer issuing business license on *ulayat* land of *adat* law community can be threatened with imprisonment for a maximum of five years and a maximum fine of Rp. 5 billion. With the exception of Article 12 paragraph (2), so position of Article 103 is indirectly useless.

Associated with the types of permit or license, three types of permits are: cultivation of plantation crops; business of harvest processing; and business of plantation services (a minister for inter-provinces, governors for cross-regencies/municipalities, and regent) [Article 48]. However, requirements and procedures, land area, and granting of business licenses are determined by Governmental Regulation.

Regarding the permit, no governmental regulation has been found to control it to date. Previously, procedures and land area were regulated by Regulation of the Minister of Agriculture no. 98 of 2013, but the Ministerial Regulation was based on preceding plantation act. Along with the release of a new plantation act, this matter must also be followed up immediately.

Other matter relating to plantation company, as specified in Article 40, a plantation company can be transferred to foreign investors with approval of the minister.

In addition to the articles mentioned above, impartiality is also evident in a number of articles:

- (1) Article 27 paragraph (3) mentioned, the activity of searching and gathering of genetic resources can be done by individual or legal entity based on the minister's permit.
- (2) Article 29, local governments in accordance with their authority, or plantation businessman can perform plant breeding to find superior varieties.

- (3) Article 30 paragraph (1), varieties of the plant breeding or an introduction from foreign countries must first be released by the Central Government or launched by owners of varieties prior to distribution.
- (4) Article 42, activity of plantation cultivation and/or crops processing businesses can only be conducted by the plantation company if it has obtained the right to land and/or plantation business permit.
- (5) Article 55 affirms that: "Every person is prohibited to illegally: (a) work, use occupy and/or control plantation land; (d) work, use, occupy and/or control community's land or *ulayat* right land of *adat* law community for plantation business; (c) run logging in plantation areas; or (d) harvest and/or gather crops." Criminal penalty for Article 55 is a maximum imprisonment of four years and a maximum fine of Rp 4 billion (Article 107).

Judicial review had been appealed for articles above to the Constitutional Court by the Oil Palm Farmers Union (SPKS), Sawit Watch Organization (PSW), Alliance of Indonesian Farmers (API), Indonesian Farmers Union (SPI). In the Constitutional Court Decision No. 138/PUU-XIII/2015 dated October 28, 2015, a number of contradicting points are found:

- (1) Article 27 paragraph (3) is contradictory to the constitution as long as it is not interpreted as "exempted for individual small farmers." Actually, Article 27 Paragraph (3) is the same as the sound of Article 9 Paragraph (3) of Law No. 12/1992 on Crop Cultivation System which has been declared as unconstitutional with the Constitutional Court Decision No. 99/PUU-X/ 2012.
- (2) Article 29 insofar as the phrase "may" is unconstitutional as long as it is not interpreted "including individual smallholders."
- (3) A number of articles were revoked, namely Article 30 paragraph (1), Article 42, Article 55, and Article 107.

Especially for Article 12 paragraph (1), actually it had also been tested to the Constitutional Court with the case No. 122/PUU-XIII/2015, but it was rejected by the judge assembly. In fact, this article is also directly related to the existence of *adat* law community related to inequalities of their position in dealing with plantation business.

3) Legal implications

After three years of the Decision of the Constitutional Court No. 35/PUU-X/2012 (recognition of *adat* forests), a few policies have been established regarding the recognition of *adat* forests. Study by The Epistema Institute (2016) mentioned legal products about *adat* law community were totaling 538 which were produced by decrees of regents and regional regulations. Context of these regional legal products associated with persistence of *adat* law communities were not reaching recognition of *adat* forests yet. In relation to nomenclature of *adat* villages up to December 2016, only 133 *adat* villages have been established with local legal products and the *adat* villages have not obtained registrations and village codes from the Ministry of Home Affairs yet.

In relation to *adat* forests, at the end of 2016 the President implemented the "2016 Adat Forest Recognition" on December 30, 2016 at the State Palace and granted recognition to 13,122.3 hectares of *adat* forest to nine *adat* community groups.

Groups of *adat* communities receiving *adat* forest recognition were as follows: (1) *adat* forest of Ammatoa Kajang (Bulukumba, South Sulawesi) covering 313.99 hectares; (2) *adat* forest of Marga Sarampas (Merangin, Jambi) covering 130 hectares; (3) *adat* forest of Wana Posangke (Morowali Utara, Central Sulawesi) covering 6,212 hectares; (4) *adat* forest of Kintah Lebak (Lebak, Banten) covering 486 hectares; (5) *adat* forest of Bukit Sembahyang and Padun Gelanggang (Kerinci, Jambi) covering an area of 39.04 hectares; (6) *adat* forest of Bukit Tinggal (Kerinci, Jambi) covering 41.27 hectares; (7) *adat* forest of Tigo Luhah Pementi yang Berenam (Kerinci, Jambi) covering an area of 276 hectares; (8) *adat* forest of Tigo Luhah Kemantan

(Kerinci, Jambi) covering an area of 452 hectares; (9) *adat* forest of Tombak Haminjon (Humbang Hasudutan, North Sumatra) covering an area of 5,172 hectares.

Based on this recognition, it is important to clarify the new term used, namely "*kelompok masyarakat adat* (group of adat peoples)." In academic terminology, the term *kelompok masyarakat adat* is unknown, *masyarakat adat* (*adat* community) is the familiar term. The phrase of *kelompok masyarakat adat* is important to clarify, so as not to elicit another legal interpretation.

In addition, it is also important to clarify the extent to which the *adat* community is managing their *adat* forests, and what is difference with traditional rights. In the decision above, there was no concretely explained about what are traditional rights these group of *adat* peoples have.

As a barometer, there were a number of common rules and regulations regarding how the existence of MHA: First, Joint Ministerial Regulation of Minister of Home Affairs, Minister of Forestry, Minister of Public Works, Head of BPN: 79/2014, PB.3/Menhut-11/2014, 17/PRT/M/2014 on How to Solve Land Issues in Forest Area, dated October 17, 2014.

Second, Regulation of the Minister of Home Affairs No. 52/2014 on Guidelines for Recognition and Protection of MHA.

Third, Ministerial Regulation of Agrarian and Spatial Plans/Head of BPN No. 9/2015 on Procedures of Establishment of Communal Rights for Lands of *Adat* Communities and Peoples in Specified Area [annulling Ministerial Regulation of Agrarian No. 5/1999 on Settlement Procedure of *Ulayat* Rights of MHA]. The Ministerial Regulation was improved with Ministerial Regulation of Agrarian and Spatial Plans/Head of BPN No. 10/2016 on Procedures for Establishment of Communal Rights of Lands of Adat Law Communities and Peoples in Specified Area (21 March 2016).

Such position of state law will open up opportunities for injustice. Policy issued should be always oriented for the interests of *adat* peoples in a just manner. With the impartial state law, position of plantation business will be incessantly faced with the people. The reality of face-to-face

conflict has been going on for a long time. The condition had already occurred in colonial period in which the Dutch East Indies granted land concessions to plantation business with *erfpacht* rights. This right cannot be free from conflict with *ulayat* right that was dominantly encountered during that time. This right was also used to expel people from their lands. Areas of lands were manipulated. It is similar to granting forest concessions in the independence era. When the concessive land was measured, it broke lands and houses of the people.

This inherited conflict is tangible further to the realm of independence, when the people have to deal with the power of the state. In such a position of conflict, the people are required to prove everything, including in relation to the existence of MHA (*adat* law communities).

In many cases, the communities become a defeated party. There have been a number of very important cases that should be paid attention. These cases were not solely the ones occurred after decisions of the Constitutional Court, but they can be seen related to the decision. These cases were: First, verdict of the District Court of Manggala, Tulang Bawang (Lampung) to four farmers who had been in conflict with a company. In this case, position of *adat* law was ignored and the law enforcement only seen the state law. The case was annexation of 1,577 hectares land by a plantation business, and the conflict had been going on since 1991.

Second, in a case of plantation, farmers of Ngadirenggo Village, Blitar (East Java) were imprisoned. The farmers claimed to work on a land belonging to their ancestors. While, BPN issued HGU (land use permit) no. 13 for sengon plantation to PT. Dewi Sri up to 2036. The plantation company sued the farmers who cultivated the land and police arrested 2 farmers and 42 farmers were charged for misdemeanor .

Third, communities faced with Decision of the Central Java Governor no. 660.1/17 of 2012 on Environmental Permit of Mining Activities of PT. Cement Indonesia (Persero) Tbk, related to a construction plan of cement factory. Then, it raised conflict with the communities. People residing in Rembang, Pati, and *adat* community of Sedhulur Sikep refused the construction of cement

industry in the location because it will threaten environmental, social, economic, and cultural life of the communities.

Fourth, the case of Manisih and Sri Suratmi in District Court of Batang. They were charged with Article 363 of the Criminal Code for stealing randu fruit in a plantation area. In fact, they only gathered wastes of harvest (*gresek/ngasak*) which was turned out to be categorized as a criminal act case no. xx /Pid.B/2009/PN.Btg). In meantime, *gresek/ngasak* was a habit of the village, namely to take something that is usually not used again by the owner.

Fifth, a case of Minah who had picked three cocoa fruits in plantation business area. Article 362 was used in District Court of Purwokerto (Decision No. 247/Pid.B/2009/PN.PWT). This case was considered to meet element of theft, whereas according to testimony, Minah took the 3 cacaos for seeds, but she was caught by a foreman and she returned the cacaos and apologized. But a week later she was called by police.

Sixth, detention of 13 members of *adat* peoples of Seko (South Sulawesi) who refused construction of power plants. They were sued by PT Seko Sower Prima and they were accused of damaging the company's facilities in Betue Seko River, North Luwu. Activity of the company was rejected by *adat* people on the ground that it will disrupt lives of people, but they were arrested by police.

Seventh, another conflict was one experienced Nur Azis, Sutrisno and Mujiyono from Wetan Pageruyung, Kendal, with a plantation business. The land cultivated by the residents was an abandoned land and some talk had occurred previously, but later, the plantation business sued them on charge of land annexation. The three farmers were threatened with 8 years of imprisonment and a fine of 10 billion based on Article 94 paragraph (1) of Law no. 18/2013 on Prevention and Eradication of Forest Destruction.

Based on those cases, there are a number of things to work on, namely: First, it is hoped that new regulations will be born that are not only protecting but also empowering *adat* law community.

Adat law peoples are no longer faced with position of no choice, as provided for in Article 12 paragraph (1) of the Plantation Act. In this case, the state should see *adat* law community as one has existed before the independence of Indonesia and not consider them as emerging suddenly. Hence, the position of *adat* law communities should be empowered with the birth of fair laws. The fair laws should refer to empowerment of *adat* law communities. Based on the thought of Ronald Dworkin, that law should always be perceived as "moral reading."⁹

Second, an investigation should be conducted by an independent team to make inventory and to find concession plantation lands derived from lands of *adat* law communities. By having this data, potential conflict can be avoided and then resolved through fair ways.

Third, the existence of *adat* law communities has begun to recognize, although with very strict conditions, but their roles are not highlighted yet. In issuing policies related to position of *adat* law communities, it should be that they are fully involved. A policy related to the existence of *adat* law communities should not deny the spirit of the constitution and be derived through the acts, especially in relation to granting of a greater role to the *adat* law communities.

Fourth, conflicts that have occurred should be resolved through establishment of a special agency with task of resolving conflict of concession plantation lands related to lands of *adat* law communities through mediation. In this case, the mediating agency is chosen on the basis of mutual agreement. Resolution of this problem will be no longer to be assigned to formal institutions; they have not been able to draw conclusions so far because of pressure derived from power over them, including position of village institutions that have become formal institutions in Indonesia today. This mediation function is not only to solve the existing problems, but also to give birth persons who understand the hearts and feelings of *adat* law communities so far.

⁹ Ronald Dworkin, *Freedom's Law The Moral Reading of the American Constitution*, Oxford University Press, Oxford, 1996, p. 2-4.

Fifth, it is important to liquefy various legislation formulations that are conflicting to each other and to view them holistically. Considering what Charles Stamford expressed, the law should not always be regarded as rigid. The law is a fluid and flexible object that can be reconciled.¹⁰ It is attributed to the concept of deep ecology expressed by Arne Naess, something that will be regulated in the law must be able to target to the deepest point, inseparable from one thing to another.¹¹

CONCLUSION

Based on explanation in previous section, it can be concluded that the Plantation Act contained a number of unfair articles, even though they had been corrected by two Decisions of the Constitutional Court. Injustice appeared in regulating plantation businessmen who were entitled to land for plantation business. Such regulations showed injustice on the one hand, especially with orientation of partiality. On the other hand, the regulations can potentially generate conflicts between plantation business and community around it. A number of cases occurred between community and plantation enterprises are potentially taking small peoples away from justice.

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¹⁰ Charles Sampford, *The Disorder of Law: A Critique of Legal Theory*, Blackwell, New York, 1989, p. 223.

¹¹ A. Sonny Keraf, *Etika Lingkungan*, Kompas, Jakarta, 2010, p. 31-32. Cf. E. Ostrom, *Institutions and the Environment*, Blackwell Publishing, Oxford, 2008.

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