

Protection of the Rights of Indigenous Peoples
Study of Communal Land In The Management of Oil Palm Plantation in Indonesia

By :

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I. Preliminary

A. Background

One century of palm journey² has demonstrated its role as a contributor to foreign exchange. Riau Provincial Secretariat, noted oil palm plantations in Riau province in 2010 and 2011 has contributed Rp16, 65 trillion from CPO exports of palm oil and its derivatives.³ Palm oil industry contributed to the enhancement of the national economy, employment, improved quality of life of local communities. In addition, palm oil is also a negative impact on society and the environment. Often the respect and protection of the rights of indigenous peoples especially communal land neglected oil palm plantations (PPKS).

Palm plantation is a product of forest modernization by the state. Agricultural societies transformed into urban industrial society. Social rules, customs, habits that have been collected and characterized the life of a village or hamlet is replaced by the rhythm of the factory and the city.⁴ The difference in modern and traditional paradigms cause conflict (gaps) between the corporation with indigenous peoples (traditional), and

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² M. Badrun, *Milestones Change Through PIR Program*, Directorate General of Plantations Ministry of Agriculture of the Republic of Indonesia, Jakarta, 2010, p 3.

³ <http://birokeuangan.riau.go.id/k4/gallery/arsip-berita/37-demo4/102-ekspor-cpo-sawit-riau-capai-rp-1665-triliun.html>, accessed on May 4, 2012.

⁴ Francis Fukuyama, *The Great Disruption: Human Nature and the reconstitution of Social Order*, translated by Masri Maris, *Great Disruption of Human Nature and the New Social Administration*, U.S. Embassy, in cooperation with the Freedom Institute and PT. Gramedia Pustaka Utama, 2005, p 9-10.

in Indonesia almost occurred in all provinces contained PPKS.⁵ Indonesian Forum for Environment (Walhi) West Kalimantan recorded since 2008 until 2011 happened about 280 cases of conflict between communities and investors expanding oil palm plantations in the province.⁶

Customary land tenure by PPKS is one of the causes of conflict. The existence of communal land need to be considered by PPKS, because it concerns human rights.⁷ Universal Declaration of Human Rights (UDHR) has put the responsibility of protection and respect for indigenous peoples and their rights to the state and everyone.

Study of protection of communal land in the plantation by PPKS is very relevant, in order to provide a basic overview on the emergence of conflicts and how the law provides protection. This paper will analyze from a legal perspective,, because the law intended to provide protection and respect for human rights.

B. Problem Formulation

Departed from the background of the issues above, the problem is formulated as follows :

1. Why there is a clash between oil palm plantations and related indigenous communal land?
2. How does the legal protection of communal land of indigenous peoples in natural resource management by palm oil company?

⁵ Martua T Sirait., *Indigenous Peoples and Oil Palm Plantation Expansion in West Kalimantan, Indonesia*, Cordaid, Amsterdam, 2009, p 7; discovered 512 points of conflict between PPKS and local communities are scattered in seventeen provinces.

⁶<http://jogja.tribunnews.com/2011/12/10/terjadi-280-pelanggaran-ham-di-perkebunan-sawit-kalimantan...>, accessed on December 17, 2011.

⁷ Republika, Thursday, December 15, 2011, p., 11; community of Mesuji, Lampung and PT Silva Inhutani and villagers Sodong River, South Sumatra and PT Sumber Alam Wangi (SWA). In Riau, Teluk Kuantan community (Koto village Cengar) and PT. Tri Bhakti Sarimas Riau Sengingi Kuantan district, and Sinama PTPN V and community of Sinama Nenek.

II. Discussion

A. Basics of conflict between PPKS and Indigenous communities

1. Conflict of Modern And Traditional Cultures.

Conflicts between oil palm companies (PPKS) and indigenous peoples, particularly related to communal land actually clash of cultures in the management of forest resources. PPKS as perpetrators of modern forest management while local traditional managers. Historically, the ancient people of the world are all traditional societies relies life of the natural resources. Development of the nation state shifting traditional to modern.

State change the traditional order of indigenous peoples that already exist since time immemorial,⁸ in accordance with the interests of the state. oil Palm plantations is a modern area, as deliberately constructed, programmed, organized and regulated by the government, to fit the growth goals of development. Europe before the Romans ruled,. America before the European ruled,⁹ countries in Africa and Asia before it was colonized, the people living in traditional cultures, preserve life and the life of the natural wealth (subsistence cultures).

Modernization of forest resource management is done by the pattern of destruction or depreciation (deforestation) native forest to forest cultivation

⁸ Soetandyo Wignjosebroto, Promoting the Realization of Independent Judiciary With Impartial Professional Judge, *Judicial Commission Bulletin Vol I No.. December 3, 2006*, p. 16th and see also Soetandyo Wignjosebroto, Ethical Issues in the Law: How Its effectiveness To Enforce Provisions of Legislation, <http://soetandyo.wordpress.com>, accessed on 30 November 2011, p. 2; pre modern standards of behavior as a habit, or a practical procedure (folkways) are complied with and implemented together by humans collectively as a habit or a practical procedure..

⁹ Hasanu Simon, Foreword, the book Owen J. Lynch. Kirk Talbott, Balancing Acts: Community-Based Forest Management and National Law in Asia and the Pacific, translated by Nina Dwi Sasanti, *Balance Action: Community Based Forest Management System and State Law in Asia and the Pacific*, Publisher ELSAM, Jakarta, 2001, p xxi.

(agriculture and plantations). History of forest destruction has occurred since thousands of years ago.¹⁰

Modern forest management gets legitimacy from the world of science, forestry schools and universities established in Europe. Its alumni applying modern science in the area of origin and colonies, including Indonesia.¹¹ Holland brought modern farming in the colony (Indonesia) since several centuries ago.¹²

Oil palm cultivation has been carried out by the Dutch since 1869 in the area of Muara Enim, Musi Hulu in 1890 and in Belitung in 1890, but not developed, because the Dutch dubious the economic value.¹³ In 1911, Belgians Adrian Hallett establish oil palm plantations in the river Liput (Aceh) and Island Radja (Asahan), the Dutch East Indies government support, and the result of oil palm grown up to now.¹⁴

Forest modernization does not depart from the philosophy of prosperity for the people. Plantation target is economic growth (capitalization, increased revenue and foreign exchange). Indigenous peoples do not serve the interested parties (stakeholders), deprived of their rights in the name of development.¹⁵ Very logical, if the history of the plantation in the world presented PPKS conflict with society.

¹⁰ *Ibid.*, p., Xxi; around 6000 to 2000 years ago, the forest has been destroyed when the Babylonians wanted to become a great and powerful nation. Roman has destroyed forests of Western and Central Europe since 200 - 1000 years ago.

¹¹ Nancy Lee Peluso, *Rich Forest, Poor People: Resource Control and Resistance in Java*, The Regent of the University of California, 1992 translated by Landung Simatupang, Konphalindo, Jakarta, 2006. p., 10

¹² Iyung Pohan, *The Complete Guide Palm Oil: Agribusiness Management from Upstream to Downstream, Governmental Spreader*, 2008, p. 43; Since the year 1600 before the VOC, smallholders to become a source of exploitation trade commodities for the European market, and then forwarded by the VOC with the system of forced submission until the early of the 19th century, though the role of VOC has been changed to the Dutch Government since 1800.

¹³ *ibid*, p 32.

¹⁴ *ibid*, p 33.

¹⁵ Nancy Lee Peluso, *Op. Cit.*, 11; taking forests for the benefit of the plantation or development projects, robbed and dumped land tenure system that was already there and set the rules of the new law for land use and resources. Often, the takeover given the justification in the claim that the change is for the common interest for the benefit maximization.

Different cultures gave birth to a different paradigm, companies and governments alike to see the forest resources as a source of capital, it needs to be exploited, for the sake of economic growth and capitalization.¹⁶ For indigenous peoples, forest resources not only for economic, but contained social, cultural and spiritual. How important natural resource for them, it can be said the land is *raison d'etre* not only for the social, cultural, spiritual, economic and political, but also for their existence.¹⁷

The laws of the state support the modernization of the forest and tend to favor of the market. Agrarische Wet (AW 1870) is a product of Dutch law that governs forest modernization. Erfacht rights (ruler of land with an area of 350 ha (1,500 shoulder) for 75 years) are protected and facilitate investors.¹⁸ AW motivated by the insistence of the owners of large private capital through liberal faction in parliament.¹⁹

Modernization of the forest at the time of independence was also applied in Indonesia. Law No. 5 of 1960 on Agrarian Principles (UUPA) a way for the government to take control of natural resources. The ownership is set to the requirements, for those who do not meet the requirements will be controlled by the state and could turn into Right of Cultivation.²⁰ UUPA gave formal requirements

¹⁶ Indra Surya, and Ivan Yustiavandan, *Implementation of Good Corporate Social Responsibility: Putting aside the Special Rights For Business Continuity*, Predana Media Group, mold-2, Jakarta, 2006, p. 106; Monsk say when the company just the pursuit of life, clearance, and profits without limitation, the company has become the object of which is very dangerous for society.

¹⁷ Rafael Edi Basko, *The Rights of Indigenous Peoples*, *Dignitas Journal of Human Rights*, Vol. V No.. II Year 2008, p 67.

¹⁸ Iyung Pohan, *Op. Cit.*, p 43.

¹⁹ Subadi, *The Land Tenure and Use of Forest Areas*, Prestasi Pustaka, Jakarta, 2010, p. 64-65; Budi Harsono said the purpose of the issued of AW is none other than to open up the possibility for private investors, to use freely and exploitative of lands in the colony the Dutch East Indies. In times of political culture system has been implemented by the government monopoly, and private capital will not be taking part in the exploitation, unless it has it's own eigendom right.

²⁰ Soesilowati Maria Margaretha, *Land Registration for the First Time for Right of Cultivation (HGU) in Environmental PT. Perkebunan Nusantara IX (Limited) Region Pekalongan*, Thesis Program Notary College of Diponegoro, Semarang, 2007, p. 21, such as land rights eigendom Agrarisch rights, Indigenous property rights, royal rights, operating rights of the former partikulier land and other rights

over land rights, including customary land. Often people lose when dealing with PPKS, because people are not able to prove the reason of ownership (formal proof) over their communal lands.

UUPA provides the opportunity for corporations to exploit forest resources by up to 35 years and can be extended.²¹ The growth of oil palm plantations to 9 million hectares is the result of the UUPA. The Spirit modernization continue to fill government's policy, especially during the reign of the new order. The state becomes the sole authority to take control of forest resources, individual behavior and wisdom of indigenous peoples (communal land) against the will of the state disciplined.²²

Legal perspective, the rules made by the state is to be based on the values that develops in society. The essence of the law for the public interest, not the interests of the government or a handful of people. The legal system has a function to distribute and maintain the allocation of the correct values in society.²³ This means that the legal system is largely determined by the will and interests of the community and was considered correct. Understanding the truth, is what is commonly referred to as justice.²⁴

Weak protection of communal land, shows that the law is not able to accommodate the values available in the community. Borrowing the term van Peursen state law has cultural validity as a 'passport culture' within the

²¹ See Article 21 of Basic Agrarian Law.

²² See Law No. 5 Year 1967 on Basic Provisions of Forestry (UUKKPK) and its derivatives which are further policy pro modernisasi forestry. For example, Government Regulation No. 21 of 1970 on Forest Concessions (PPHPH), Article 6 (1) states that the rights of indigenous people and members to take the forest, its implementation needs to be disciplined, so it does not interfere with the implementation of the concession. Paragraph (3) states in a forest area that is being done in the context of forest management, the implementation of the right of the people to collect forest produce is frozen.

²³ *Ibid.*, p 19.

²⁴ *Ibid.*, p 19.

community.²⁵ Government including PPKS should not turn a blind eye from reality, a form of communal land community wisdom on natural resources. Bernard L. Tanya, said indigenous people is not 'empty vessels'. They have what is called *volks-gemeenschappen*, which consists of values, norms, territory, leadership, and conflict management as a system of order that has been functionally tested in their 'situation system'.²⁶ The law must be able to bring together people and what they deserve, in terms of ethical no more and no less.²⁷

Palm oil industry can be good, if for-profit business interests balanced with respect for and protection of indigenous communal land. Implementation of commitment to environmental awareness and community (social responsibility / CSR) can overcome PPKS conflicts with indigenous peoples. One form of CSR is to establish oil palm plantations on land communal land based on the agreement of both parties.

B. Legal Protection of Communal Land

In general, the international community recognize and respect indigenous peoples. UK Parliament can be said as the motor debate about the destruction of the indigenous peoples and change their way of life. United States entered into an agreement (treaty) with the local community, and this is something that indicates an indirect recognition of the sovereignty of indigenous peoples.²⁸

Organization of the United Nations (UN) gave great attention to the existence of indigenous peoples. Since the 1970's with the help of the Inter-American Institute (Inter-American Institute), to conduct research and obtain

²⁵ Bernard L. Tanya, *Law in Social Space*, Genta Publishing, Yogyakarta, 2011, p 11.

²⁶ *Ibid.* p 11 – 12.

²⁷ Lawrence M Friedman, *The Legal System: A Social Science Perspective*, Russell Sage Foundation, New York, 1975, translated M. Khozin, *Legal System: Perspectives of Social Sciences*, Media Nusa Publishers, Bandung, 2009, p 19

²⁸ Edy Rafael Bosko, *Op. Cit.* p 40.

detailed information about the indigenous peoples.²⁹ In 1993, on the Indigenous People Year, United Nations stressed governments of UN member states to immediately implement the empowerment of local communities.³⁰

If inventoried, there are dozens of international documents on indigenous communities through international treaties, among others, the protection of human rights, the right to assemble, the right to land and territorial, religious freedom, intellectual property, indigenous rights, traditional spatial recognition, and so on.³¹ International agreement is a form of understanding by the people of the world that indigenous peoples and their rights are part of human rights must be protected and respected.

Substantively, international law requires the world community, especially the state to protect and respect the indigenous peoples and their rights. International provisions requiring states to make regulations respecting indigenous peoples, including special treatment measures (affirmative law) to ensure the enjoyment of the rights of indigenous peoples by indigenous peoples.³²

²⁹ *Ibid.* p 42.

³⁰ Abdul Halim Barkatullah et al, *Recognition and Respect for Indigenous Peoples And Their Traditional Rights in East Kalimantan*, University of Lambung Mangkurat collaboration with DPD RI, Banjarmasin, 2009

³¹ Husen Alting, *Dynamics of Law in Recognition and Protection of Indigenous Peoples' Rights Over land (Past, Present and Future)*, LaksBang Pressindo Khairun University and Research Institute, University of Khairun Ternate, Yogyakarta, 2011, p. 109; Agreement as follows:

- a. International Covenant an Civil and Political Rights, 1966 signed by 129 countries.
- b. Convention of Biodiversity (CBD) in 1992 which was signed by about 108 countries.
- c. Convention on All Forms of the Disctimination of 1979, signed by 138 countries.
- d. Convention on the Ellimination of All Forms of Racial Discrimination, 1966, signed by 116 countries.
- e. Convention on the Preventive and Punishment of the Crime of the Genocide, 1948, signed by 142 countries.
- f. Convention on the Rights of Child, signed by 168 countries.
- g. ILO 169, Indigenous and Tribal Peoples Convention (Convention on indigenous peoples) 1989, signed by seven countries.

³² Retno Kusniarti, *et al.*, *Synchronization Sectoral Law In order to meet the Rights of Indigenous Peoples*, Human Rights Research Center Faculty of Law of the University of Jambi in collaboration with the Regional Representative Council of the Republic of Indonesia, Jambi, 2011, p 27; Philip Alsto in the Bulletin of Human Rights declared the perspective of international law, the obligation to respect (to respect) requires states parties to refrain from any actions that may violate any rights of its citizens. The obligation to protect (to protect) legislation requires states to shape policies that protect the

Covenant ICESCR³³ confirms that countries take measures to ensure the right "... undertakes to steps ... to the maximum of its available resources, with a view Achieving progressively the full realization of the rights recognized in the present covenant ...".³⁴ State is bound to protect and fulfill the human rights of its citizens, and for that is lined with legal rules implemented strictly.³⁵

Respect and protection of indigenous peoples and their rights as mandated by international law has been committed by Indonesia. 1945 Constitution, Article 18B Paragraph (2) and Article 28 paragraph (3) recognize, respect units and traditional rights of local communities. Law No. 39 Year 1999 on Human Rights, Article 6, paragraph (1) are as follows: in the enforcement of human rights, diversity and needs of indigenous peoples must be considered and protected by law, society, and government fence with legal rules are implemented tight.

There will never be a conflict or communal land not taken by PPKS, if PPKS implement all the provisions of the law, particularly Article 9, paragraph (2) of Law No. 18 Year 2004 on Plantation,³⁶ which is as follows:

- (1) In respect of the plantation, to businesses in accordance with their interests can be given rights to the land needed for the plantation business in the form of property, the right to cultivate, right to build, and / or use rights in accordance with legislation.
- (2) In the event that the necessary land is communal land rights of indigenous people are in fact still exist, precede entitlements as referred to in paragraph (1), the applicant shall conduct consultations with indigenous customary land rights holders and citizens who hold the rights to the land, in order to obtain agreement on the delivery of land and compensation.

existence of the local community. While the duty to ensure (to Ensure) implies an affirmative obligation (affirmative obligation) to take all necessary measures to ensure the enjoyment of the relevant rights of local communities.

³³International Covenant Economic, Social and Culture Rights (ECOSOC).

³⁴ See Article 2 (1) International Covenant on Economic, Social and Cultural Rights.

³⁵ Moh Mahfud MD, *Political and Legal Struggle In Indonesia*, Gama Media, Yogyakarta, 1999, p 158.

³⁶ Hereinafter called Plantation Act

The utilization of communal land by PPKS, can be caused, first PPKS not dutiful carrying out orders Plantation Act. Second, the government does not check the accuracy of the information related PPKS plantation business permit and concession. The phrase 'in terms of the required land is communal land rights of indigenous people are in fact still exist, precede entitlements' is a phrase that requires the company to conduct a search efforts on the existence of local communal land. If the results are found to communal land, the company is obliged to deliberation to reach agreement in advance with the local community related to the management of communal land.

PPKS conflicts with indigenous peoples due to communal land occupied by PPKS, indicating that PPKS not directly to community survey to find out the existence of communal land in the area being applied for the concession. Through the study of Environmental Impact Assessment (EIA),³⁷ information on communal land should be acquired. The acquisition of communal land by proving PPKS EIA is not implemented properly.

Substantively communal land has been protected by law enforcement just has not been implemented by PPKS. The values of capitalism are patterned modern forest management underlying noncompliance PPKS execute commands Plantation Act. Lawrence M. Friedman says, demands or social forces that drive the law, renewing and even violating the law. These forces are described as elements of attitudes and social values or cultural law.³⁸ Norma is good, not necessarily work well if it is not supported by the values of the input norms.

The government in its role as a law enforcement and legal products (regulatory) approaches M. Friedman called the structure and substance. Both

³⁷ See Article 25 paragraph (2) letter a Plantation Act

³⁸ *Ibid.* p 17.

components of the legal system's real, just a blueprint or design, not a machine at work, which gave the strength or life and reality is the outside world (external inputs).³⁹ PPKS and the government are parties who became structure to comply with the requirements set out in the Plantation Act.

III. Closing

A. Conclusion

1. Conflicts between oil palm plantation company and the indigenous peoples related communal land caused by differences in the paradigm of positive law and customary law. Law requires formal land ownership, and communal land before the Constitutional Court's decision placed as state forest, which means that any time the state can use the communal land for plantation, while the indigenous peoples based on the hereditary habit.
2. Substantively, communal land protection regulations need improvement, because claims of land ownership formalities not guarantee the right of indigenous peoples to acquire communal land. Economic aspects and interests of capitalization, is also a factor of weakness in the enforcement of the protection of communal land oil palm plantation development

³⁹ *Ibid.* p 17-19.

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II. Regulations

The 1945 Constitution

Act No. 5 of 1960 on the Basic Agrarian

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Act No. 18 Year 2004 on Plantation.

Government Regulation Number 21 of 1970 on the Rights of businessmen Forest (PPHPH)

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Republika, Thursday, December 15, 2011, p., 11; community of Mesuji, Lampung and PT Silva Inhutani and villagers Sodong River, South Sumatra and PT Sumber Alam Wangi (SWA). In Riau, Teluk Kuantan community (Koto village Cengar) and PT. Tri Bhakti

Sarimas Riau Sengingi Kuantan district, and Sinama PTPN V and community of Sinama Nenek.

IV. Internet

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