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The Enforcement of Criminal Law in the Utilization and Management of Forest Area Having Impact Toward Global Warming

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Abstract: The rampant corruption is in the utilization and its influence on global warming. It is expected in the future, in addition to the availability of maps of forest area easily accessible with some clear regional boundaries, there are also institutional and human resource capacity strengthening in the areas permitting the process to prevent corruption in the management of forest areas in Indonesia resulted in the destruction of natural resources, especially forests. Various activities in that sector become a critical point of the occurrence of corruption cases. In addition to the inadequacy of the forest area maps, unclear set of area boundaries, and the violations of licensing criteria, the cases of illegal logging become the factors that cause damages to the forest land in Indonesia. The purpose of this paper is to find out the relationship between corruption in the permitting conversion of forest land field of the ministry. The method used in this study was descriptive analytical research describing and analyzing the available facts in accordance with the issue that became the object of the research study.

Keywords: Criminal Law Enforcement; Forest Areas; Global Warming.

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INTRODUCTION

In the era of globalization, every country, especially developing countries, should be able to promote the development in order to pursue or equate the development with the developed and established countries in order to sustain the national stabil-

ity. The development is directed specifically to establish public welfare justice and prosperity in every country including Indonesia. One way to do this is to consider all aspects including environmental aspects.

Environmental aspects should not ignore the conservation and protection of natural resources as the collective rights to be enjoyed and must be well maintained in order to continue to profit in the daily life. With so many benefits that can be taken from the forests, the forests become a prime target for people to take the wealth of resources in it. This factor is the main reason for the rapid exploitation. Whereas the existence of forests is not

only seen from the economic side but also from the social and cultural side where the forests serve as places to live for various kinds of living creatures such as humans, animals, and plants as well as from the health point of view where it functions as the lungs of the world.

The forest exploitation can be carried out both legally and illegally. In the legal management, forests can establish an order that benefits all parties, is useful in the application of labor; is beneficial for all individuals as well as the concerns over the damage which can be minimized. What matters now is that forest management conducted illegally has made a bad impact on all parties, in terms of economy, health, societies, cultures, and others.¹

As a sovereign state with abundant forest resources, Indonesia already has a concept of forest governance inseparable from the ideology of the forest tenure as stipulated in Article 33 paragraph (3) of the 1945 Constitution stating that "earth and water and natural resources contained in it are controlled by the state and utilized for the welfare of the people".

Besides as a political constitution, the 1945 Constitution also serves as an economic constitution. One of the characteristics that is important as an economic constitution is that the 1945 Constitution contains "the idea of the welfare state".² In order to derive optimal benefits from

the forests and forest areas for public welfare, then, in principle, all forests and forest areas can be utilized with due regard to the nature, the characteristics and vulnerability, and it is not justified to change the main function.

The use of forest and forest areas must be adapted to the main function that is the function of conservation, protection and production. The suitability of these three functions is very dynamic and the most important is that the utilization should remain synergy. To maintain the quality of the environment, the conversion of productive natural forests into other interests other than the field of forestry must be avoided, in order to avoid the damage to the forests, although normatively, the conversion or change in the forest area in question is not prohibited by law.

The forest management in Indonesia does not yet reflect the adherence to the principles of good forest governance. As a result, it raises significant forest degradation and deforestation. Analysis of the National Development Planning Agency in 2010 related to the fundamental problems in Indonesia's forestry sector showed that poor governance, spatial arrangements which were not in synchronization between the central and the local, unclear tenurial right as well as weak capacity in forest management (including law enforcement) became fundamental issues of the forest management in Indonesia leading to the destruction of the forest resources.

For decades, numerous problems in the natural resources policies harm the interests of the country to welfare its

¹Handri Burhan, *Analisa Hukum UU Nomor 41 Tahun 1999 Tentang Kehutanan*, Postedon 3 April 2011, Accessedon 12 March 2017.

²Jimly Asshiddiqie, *UUD 1945: Konstitusi Negara Kesejahteraan dan Realitas Masa Depan*, Pidato pengukuhan Jabatan Guru Besar Tetap Madya pada FHUI, 13 June 1998, p1.

people, meanwhile, the corruption hidden inside it exploits the issue. Besides, today issues also concern the lack of determination of forest area boundary, namely;

- a. The uncertainty of the status of forest areas
- b. The "policy dispute" between the determination of the province space with sectoral ministers
- c. The role of the community in the limited management
- d. Disputes over land to forest areas
- e. The forest area is determined only by appointment, hence it is included as authoritarian actions.
- f. The loss of forest area into a wasteland (no actual garden planting in the land acquisition of forest area)
- g. *PNBP* leasing is not leased

Efforts to improve forest governance has become an urgent necessity and should be a serious concern of the government since this is the fundamental issue in the context of forest management in Indonesia. Moreover, today Indonesian government has a commitment with the international community to reduce GHG emissions, both conducted independently with the target of 26% and 41% with an international support until 2020. Without good governance support, the programs and initiatives that will be performed for the fulfillment of those commitments are unlikely to succeed and would only result in a corruption.

According to Kompas, the forestry corruption by practices of mining industry, plantations and forests was estimated to reach Rp 273 trillions. Wilmar Tumpak Hutabarat, representing the Coalition of Forests Anti-Mafia, said

that corruption in the natural resources sector gets increasingly horrific. "Efforts to fight against these crimes committed by law enforcement and government and their staffs are still considered not optimal. In fact, the mafia of natural resources are still rampant".³

Prevention efforts are conducted as one of the ways in settling of various cases of corruption in the forestry sector. In addition to the availability of maps of forest areas easily accessible with some clear regional boundaries, it is expected that there is an institutional and human resource capacity strengthening in the area permitting process to prevent corruption in the field of forestry. The weak role and capacity of government in monitoring function creates loopholes and incentives for forestry elements actors to exploit forest resources destructively.⁴

This condition occurs since in the decentralization era, the largest authority possessed by the local government, including the authority to grant permits of utilization of forest resources and lands. The forest and land management implemented by the government in local regions are still far from the principles of good governance. The forest and land management is almost always non-transparent; closing the access and space for the public to participate, with minimum accountability and lack of commitment to coordinate to execute an activity. These weaknesses affect the thrives of abuse of authority by the holders of power at the local level and the occurrence of corruption practices in the land clearing

³www.kompas.com Thursday (13/6/2013),

⁴FWI: Potret Keadaan Hutan Indonesia Period of 2000 – 2009, 2011

process, the business licensing to private sectors and conversion of natural forests that are not in accordance with the applicable rules.

The corruption which has been widespread is not only inflicted losses on the state, but also a violation of the social and economic rights of the public, hence a corruption needs to be categorized as a crime that should be eradicated in an extraordinary way, tackling corruption in the preservation perspective of social rights and economy for public welfare. Then is there any influence on a global warming?

DISCUSSION

The forest area is a specific area designated and / or stipulated by the government to maintain its presence as the permanent forest.⁵ The existence of the forest areas is the result of the inauguration of the forest area, covering the steps ranging from the appointment of the forest area, the establishment of the forest boundaries, the mapping of the forest, and the establishment of the forest area. The levels contain the consequences of the law, so, according to the law, a forest area will exist after an area is designated, at least, by the Minister of Forestry as a forest area including its boundaries even

though the limitations are still on the map.

In general, the notions of forest area in the various regulations in Indonesia have some weakness or ambiguity. The weakness or the ambiguity lies in the definition of conservation areas that is unclear and the differences among the definitions in various regulations. The terms of conservation, preservation and protection are not easily distinguishable by public or sometimes are not considered important. The Law No. 5 of 1990 on Conservation of Natural Resources and the Ecosystems does not mention the term of conservation area, but uses the term of *KSA/Kawasan Suaka Alam* (Natural Reserve Area) and *KPA/Kawasan Pelestarian Alam* (Nature Conservation Area).

The division of forest areas by the function with specific criteria and considerations is stipulated in the Government Regulation No. 34 of 2002 regarding Forest Management and Forest Management Planning, Forest Utilization and Use of Forest Areas set out in Article 5 paragraph (2), as follows: a). Conservation Forest Area consists of a nature reserve zone (nature reserves and Wildlife), Nature Conservation Areas (National Parks, Forest Parks, and Nature Park), and the Hunting Park, b). Protected forest, and c). Production forest.

From the definitions and explanations of the forest area, there are elements which include: a). a particular region, b). the existence or nonexistence of forest, c). set by the government (the minister) as the forest area, and d). based on the needs and interests of the community.

To determine the legal status of the

⁵ Law No: 41 of 1999 about Forestry stated that based on the functions, forest areas are categorized as preserved areas, namely: Protected Forest, Nature Reserves consists of: Nature Preserve and Wildlife Reserve: Nature Conservation Area consists of: National Park, Forest Park, Natural Park, Hunting Park. While those that categorized as Cultivation Area are Limited Production Forests, Permanent Production Forest and Production Forest that can be converted.

forest area, the inauguration of the forest is required. There are three phases in performing the inauguration of forests, namely, the designation phase, the inaugural phase, and the determination phase. The determination phase of a forest area is a very important moment in the determination of a legal status of a forest area. The legal status of forest area is issued by a decree of the Minister of Forestry. The decree contains the legal status of the forest area, whether as protected forests areas, production forests, preserved forests, or recreational forests. In addition, it also contains the coverage, boundaries, and location of the forest area.

There are two characteristics of forest areas, namely, (1) the designation of the Ministry of Forestry as outlined in the Decree of the Minister of Forestry, and (2) there has been an establishment of the forest boundaries. There are two logical consequences of the establishment of the Ministry of Forestry. First, requiring the Government c.q. Minister of Forestry to manage and protect the forest area so that the area can function properly. Second, requiring the public to participate in the forest protection.

The goal of setting the establishment of forest areas and the change of status and function of forest areas are: a). to maintain and secure the existence and needs of forest areas as a driver of the local regional and national economy as well as to support the local, regional, national, and global life; b). to realize the legal certainty on forests, as well as the optimization of land use / forest in the

framework of national, sectoral, and regional development.⁶

Based on the purpose of the setting of the determination of forest areas, changes in the status and function of the forest areas that have been described create some implications since when the forest area is mentioned, then the phrase "limit" is an inherent component of the building, and concerning the jurisdiction of provisions of the legislation in the field of forestry. Applicability of the jurisdiction of provisions of the forestry sector is determined by the legal limits of the forest area that is the limit that can be maintained by law against the claims of certain parties. One cause of the most crucial forest area problems lies precisely on the issue of forest boundaries.

The complexity that occurs in the management of forest areas is the possibility that can be taken into consideration in determining policy options, which rules out an element of a criminal offense. This condition must be difficult for forestry officials and law enforcement officials to completely resolve crimes and violations in forest management, on the one hand, the activities of occupying forest area have criminal dimension,⁷

The forest inaugural activity is a very important activity in the field of forestry. This activity is the basis for determining the legal status of the forest, whether the forest becomes a protected forest, production forest, conserved forest, or preserved

⁶Pasal 3 Keputusan Menteri Kehutanan Nomor: 70/Kpts-II/2001 jo. Nomor: Sk. 48/ Menhut-II/2004 Tentang Perubahan Keputusan Menteri Kehutanan Nomor 70/Kpts-II/2001 Tentang Penetapan Kawasan Hutan, Perubahan Status Dan Fungsi Kawasan Hutan.

⁷Article 50 Law Number: 41 year 1999.

forest. The inauguration of forest is an activity that relates to the boundary marking of an area that has been designated as a forest area in order to obtain a legal certainty regarding the status and the forest boundaries. An order for forest inauguration is provided in Article 14 of Law No. 41 of 1999 on Forestry, stating: "Based on the forest inventory, the government held the inauguration of forest areas; forest areas inaugural activities are undertaken to provide legal certainty on forests." Article 15 Law No. 41 of 1999 states that the inauguration of the forest area held by the minister to provide legal certainty regarding the status, function, location, boundaries, and land area of forests.

With regard to the change in the designation, function and use of forests, Article 31 paragraph (1) of Government Regulation No. 15 of 2010 on the Implementation of Spatial Planning states that the change in the designation, function, and use of the forest areas uses the provisions of the legislation in the field of forestry applied. Paragraph (2) states that the change in designation, function, and use of forest areas referred to paragraph (1) is integrated in the changing of spatial plan. Paragraph (3) states that the change in the designation, function, and use of forest areas referred to paragraph (1) may be carried out before the specified change of spatial plan referred to paragraph (2).

Based on the provisions above, it is clear that changes in the designation, function and use of forest lands cannot be separated from the spatial aspect. Therefore, the setting of policy of forest exploitation and or utilization including changing of the designation, function and use of forests should be implemented very care-

fully in order not to cause a conflict with the predefined layout.

The changes of designation of forest areas are partially carried out by exchanging the forest area and releasing the forest area. The change of status/designation of forest areas is a process of changing the forest areas to non-forest areas.

Regarding the principle of the protection required under the environmental legislation, the development in the field of the environment, especially on issues related to forestry, it is necessary to also consider the development of forestry laws. Structuring the forestry law both in terms of the management and the formulation of the principles of the criminal provisions needs to be harmonized with regard to the development and global trends and the protection of environment.

The process of conversion of forest land cannot be done without the permission and assessment from spatial related agencies. Because if the conversion of the forest areas ignores the above matters, penal implications will apply. Besides, the measures will affect the environment and expand the global warming effect resulted from the reduction of the forest land.

The issue of changing the designation, function, and use of the forest areas brings about a controversy after the allegations of abuse of authority by some people in the decision-making process. The regulatory policies that create loopholes often cause further exploitation by some parties for their personal benefit, by

doing corruption, collusion and nepotism.⁸

The choice of using penal or criminal prosecution in forest management has become a necessity because the problems of forests and forestry are not all purely related to the administration laws but they have entered into the realm of criminal law which is regulated in the positive law, whether it is the very conservative positive law in the Criminal Code or those regulated in the Law on the forestry itself. It is not easy to use criminal law in the forestry sector because the element of proof is very dependent on the administrative procedures of governance of the forest management itself. The criminal law in positive law in the forestry law was "borrowing" of criminal law as a means of enforcing the administrative law itself, of course, to act against anyone who commits an offense in the field of the administrative law itself.⁹

The criminal law enforcement in the forestry sector is highly dependent on how the administration of legal norms related to the forest management. For example, now there are still different inter-

pretations of the legal administration of forests, forest lands, and the most common is the confusion of norms/not harmonious norm/conflict occurred in the field due to bad management of provisions of the legislation in the field of spatial planning, local government and law of forestry itself.¹⁰

The failure of criminal enforcement in the forestry sector actually results from the poor forest governance that does not provide a legal certainty. The main problem in the management of forest areas is due to the provisions of the status of the forest areas, the boundaries of the forest area which have not been set definitively; thus, it does not ensure the legal certainty, particularly about the truth of forest boundaries. It thus would be a problem and a barrier in the implementation of the criminal law enforcement of forestry.

Indonesia recognizes two manifestations of criminal law. First, the criminal law that is collected by way of codification in one book. It is known as the Criminal Code (*KUHP*).¹¹ This is called the general criminal laws or (*commune Strafrecht*). Second, the criminal laws which are scattered in a variety of specific legislations. The latter usually (as a rule of sanctions) contain the threat of criminal penalties for violations of certain pro-

⁸Data of Ministry of Forestry (2007), stated the change of function of protected forest in Indonesia was estimated to reach 10 million ha. The number showed that the cases of the change of function of conservation forests in Bintan, Kepulauan Riau and Tanjung Si Api-api in South Sumatra, were only a small number of the cases of the preserved forests that changed their function. The data of the change of the function of the forests showed that there had been changes in the designation of protected and conservation forest to be area of plantation, mining, open space, and agriculture land.

⁹Sadino, Mengelola Hutan dengan Pendekatan Hukum Pidana: Suatu Kajian Yuridis Normatif (Studi Kasus Propinsi Kalimantan Tengah), Biro Konsultasi Hukum dan Kebijakan Kehutanan, 2011, p3.

¹⁰Sadino, Problematika Penegakan Hukum Pidana pada Pengelolaan Hutan di Indonesia, Biro Konsultasi Hukum dan Kebijakan Kehutanan, Jakarta. 2010.

¹¹Sudarto said as a criminal law "in the real sense", that is the law which aim is to set the right to give penal is in the hand of the state, a guarantee of law and order. See : Sudarto, *Kapita Selekta Hukum Pidana dalam Bab Kedudukan Undang-undang Pidana Khusus dalam Sistem Hukum Pidana*, Alumni Bandung, 1986, p59.

visions of the legislation concerned. The second type is often referred to as special criminal laws. Included in the special criminal laws are:¹²

- a. Laws that are not codified; eg Law on Corruption Eradication, Money Laundering Act.
- b. Rules of administrative law which include criminal sanctions; for example, Forestry Law, Banking Law.
- c. The law contains special criminal (*iussingulare, iusspeciale*) which contains offenses for certain groups of people or in relation to a particular act. For example, *Wetboek van Militair Strafrecht Voor* Indonesia which was then amended and supplemented by Law No. 39 of 1947 and known as the "Army Criminal Code".

In the context of criminal law, there are three measures that become the parameter of a law to be qualified as *lexspecialis systematic*. First, the material criminal provisions in the legislation deviate from the existing general provisions. Second, the law stipulates formal criminal law which also deviates from the provisions of criminal procedure in general. Third, the *adresat* or the subject of law in the legislation is specific.¹³

Dynamic doctrine of teaching and principles of the *Specialist Lex* is highly related to the basic teachings of *Concorsus* and *Deelneming* that when they are confused in the understanding it

will then be an indicator of the ability of the law enforcer to comprehend the basics of the criminal law.¹⁴

Article 14 of Law No. 20 of 2001 on Amendments to the Law No. 31 of 1999 on the Eradication of Corruption that explicitly states the provision that:

"every person who violates the provisions of the legislation which expressly states that the violation of the provisions of the law as corruption prevailing regulations stipulated in this law".

The corruption can also be used to prosecute other crimes related to financial losses of the state and the national economy such as forest crime, tax crime, the crime of capital markets, and other criminal acts.

To avoid confusion in the understanding of the principle of *Systematische Specialiteit* (specificity systematic) as the doctrine of academic which is not necessarily understood by the public, particularly in the relationship between the administrative penal law and the Criminal Law (Corruption), the Legislator of Act (especially Muladi then as Minister of Justice of the Republic of Indonesia) provided an explicit understanding through Article 14 of Law No. 31 of 1999.

Data on destruction of forests in Indonesia are still confusing. This results from the differences in perception and interest in disclosing the data of the forest destruction. The rate of deforestation in Indonesia, according to World Bank, is estimated between 700,000 to 1.2 million ha per year. Meanwhile, according to the FAO, the rate of deforestation in

¹²Note 11, p63-65.

¹³Eddy O. S. Hairiej, Presented in limited discussion of banking activity, Santika Hotel, Yogyakarta, October 30, 2008.

¹⁴Indriyanto Seno Adji, *Korupsi dan Penegakan Hukum*, Diadit Media, Jakarta, p171-172.

Indonesia reached 1.315 million ha per year or the forest area reduced by one percent every year. Various environmental-concerned NGOs revealed that the deforestation accounts 1,600,000 - 2,000,000 ha per year and Greenpeace even revealed higher data. They stated that the destruction of forests in Indonesia reached 3.8 million ha per year. While a forestry expert revealed the rate of deforestation in Indonesia was 1,080,000 ha per year.¹⁵

Evaluation of the state losses on natural resources in the three sectors, namely forestry, plantation, and mining, showed a very fantastic number. Notes on August 2011 by Forestry Ministry stated that the potential state losses due to forest concession licenses in seven provinces in Indonesia was predicted to cost the state nearly IDR 273 trillions. Hutabarat explained that the state losses incurred due to the opening of 727 plantation units and 1,722 mining units with problem rated. He added that Central Kalimantan Province was the largest loss of IDR 158 trillions, larger than the other provinces such as East Kalimantan whose value was expected to reach IDR 31.5 trillions, West Kalimantan was IDR 47.5 trillions, and South Kalimantan reaching IDR 9.6 trillions. The latest data is the result of Supreme Audit Agency (*BPK*) stating that there were 15 findings committed by 22 companies in four provinces, namely Central Kalimantan, Riau, North Maluku and West Papua, where mining and exploitation to exploit the forest area without permission and no forest land use permit.

¹⁵<http://www.irwantoshut.net>, accessed on 12 February 2017

The total value of the loss in the country in such deviations was around IDR 100 billions.¹⁶

Indonesia is known to have a fairly extensive tropical forests with incredibly high biodiversity and even the world's second highest after Brazilia. Based on the data of the Ministry of Forestry in 2015, the forest area in Indonesia reached 120.34 million hectares, consisting of conservation forest area of 20.55 million hectares, protected forest of 33.52 million hectares, and 66.33 million hectares of production forests.

From the existing data, Indonesia forest areas reach 162 million hectares. The largest forest land is in Papua (32.36 million hectares), followed by the forests of Kalimantan (28.23 million hectares), Sumatra (14.65 million hectares), Sulawesi (8.87 million hectares), Maluku and North Maluku (4.02 million hectares), Java (3.09 million hectares), and Bali and Nusa Tenggara (2.7 million hectares).¹⁷

The destruction of forests will result in a rise in temperature. Carbon emissions until the 2000s that increased to about 6.5 billion tons in just half a century leads to the increase in global average temperature of 0.13 degrees Celsius per decade. Another consequence of climate change is the melting of ice in the polar that shrinks Arctic sea ice into 2.7 percent per decade, the rising of sea level of 0.5 millimeters per year, and storms that often occur.

¹⁶Note 15.

¹⁷Note 15.

Developed countries, particularly the United States, has accounted for 24 percents of global emissions, followed by China 14 percents, Russia 6 percents, and Japan, the giant industrial country, and India account for 5 percents. Although 75 percent of carbon emissions is caused by fossil fuel use, deforestation mainly is caused by excessive logging, forest fires and forest land change. The functionaries still consider the the world's aggravating carbon emissions.

Developed countries as the largest producers of carbon emissions are obliged to provide compensation for the efforts to save the forests in developing countries with a pattern mechanism of clean development mechanism (CDM).

Indonesia itself as the fifth-largest country of potentially doing 10 percent of the world supply of carbon credits is estimated to have the potential of CDM in the energy sector amounted to 25 million tonnes of CO₂ at a price of 1.83 US dollars per ton. As for afforestation and reforestation activities covering an area of 32.5 million hectares, Indonesia will be able to absorb 5.5 gigatons of CO₂ and at least half of it is eligible to be a CDM project. It is said that Indonesia has the potential to absorb the funds of at least 500 million dollars from the CDM project activity.¹⁸

CONCLUSION

1. In the policy, both central and local governments have to really consider

¹⁸ <http://www.greenpeace.org/seasia/id/Global/seasia/report/2010/4/hutan-tropis-indonesia-krisi-iklim.pdf>.

how much value to be gained by the change in designation, function and use of forest land, because if not, it will bring about greater environmental disaster. Another important aspect is the law enforcement against the violations of laws and regulations, abuse of authority and or acts that violate legal principles of environmental functions.

2. Changes over the function of forest area that ignore the procedure in practice, implicated in crime especially in the field of corruption by abusing power to facilitate and issue the permit for the change of function. The process also has implications for the world's climate change because the forests as the lungs of the world reduce.

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