THE CONCESSION FOR FOREST RESOURCES EXPLORATION ON THE ANCESTRAL LAND UNDER HUMAN RIGHTS PERSPECTIVE

Iwan Erar Joesoef
Universitas Pembangunan Nasional Veteran Jakarta
iwan.erar@upnvj.ac.id

Abstract: This paper investigates the granting of the concession for the exploration of natural resources on the ancestral forest. The research covers the regulation concerning the concession for exploration of the forest resources in Indonesia. This research uses document study as non-survey data collection such as regulations, the data of ancestral land conflict cited from related journals, and the court decision. This paper's contribution is to give the legal analysis of the Constitution Supreme Court decision that is to redefine the term of ancestral forest as not to be controlled by the state. The result on the granting of the concession for exploration of the forest resources was against the Indonesian constitution and human rights of Pancasila. It has led to the arise of many legal conflicts between the holder of concession and the Indigenous Law Community from which Government should be allowed to be good governance. Government should comply to the principles of Good Governance in all their decisions including the granting of the concession, of which is based on written and unwritten law.

Keywords: Concession, ancestral forest, indigenous, law community

1. Introduction

The interaction of Customary Law Community (CLC) and Customary Land has a holistic relationship which means self-existence, social cohesion, cultural roots and economic assets. Besides, it also means religio magis, which means that land is a gift from God that must be guarded and cared for as well as possible (Sukirno, 2018). However, in practice, the Government which underlies its policies based on Law No. 5 of 1960 concerning Basic Agrarian Principles (BAP) does not pay attention to the existence of Customary Law and Customary Land. This can be measured by the number of disputes related to Customary Land. The issue of releasing Ulayat Land by CLC to Legal Entities accommodated by Regulation of the State Minister for Agrarian Affairs / Head of the National Land Agency No. 5 of 1999 concerning Guidelines for Solving Problems of Customary Rights of Indigenous Peoples (Joesoef, 2018), resulted in conflicts between CLC and large companies and even multinational companies.

The right to control the state (RCS) is generally delegated to large-scale companies and state-owned enterprises (SOE) without consultation and the consent of the local population or the CLC. The transfer of rights to land in the form of concession permits to large companies and state-owned companies resulted in the accumulation of capital and wealth of concessionaires over natural resources. They become more dominant while CLC is marginalized or marginalized. This is because the CLC does not necessarily share the benefits enjoyed by these large companies and SOE. They get priority with concession permits for profitable natural resource management, while CLC is only involved in the absorption of labor by the concession holder (Nugroho, 2015, p.169).

In fact, forestry natural resources are only enjoyed and controlled by a group of people, because out of 579 forest concessions in Indonesia, only 25 high-class businessmen are dominated. Meanwhile, CLC that still depends on forest natural resources who have been working in the timber sector from generation to generation are forced to no longer be able to do wood business anymore. Big businessmen and state-owned companies have monopolized the forestry business, which has obtained legalization and permits from the forestry laws and regulations and has frozen the rights of CLC to participate in managing the forest. CLC based on forestry regulations cannot participate in the management of forest natural resources on the grounds that they still have traditional characteristics which are considered to hinder

development such as forest encroachment, poachers, swidden cultivators that are considered negative (Nugroho, 2015, p.170-171).

Several cases of Indigenous Land disputes can be seen from government policies such as the Forestry Ministry's Forestry Agreement policy which has designated 133.7 million hectares of Indonesia's mainland as forest areas. The claim to be State forest is to make it easier for the Government to get fresh funds from granting concession permits related to forest use. The utilization of this forest is mostly used for oil palm plantations and mining. As a result of this policy, there have been many cases of disputes between CLC and business entities that own capital, including state-owned enterprises. Based on data from national commission for Human Rights, the Indigenous Peoples Alliance of the Archipelago (AMAN) and Sawit Watch, there were around 500-800 cases (Sukirno, 2018) as cited from Kompas Daily on 14th January 2012.

In some countries, the granting of concessions on customary land or customary forests on the basis of development is common. As in Cambodia, the Government has granted land concessions for development (economic land concession). This provision is given in the policy of legitimizing land for development (legitimize land exclusions in the name of national economic development). This policy seizes the Indigenous Law Community as it has deprived indigenous law community (Hak et al., 2018). In Cameroon, the grounds that exploitation of natural resources for development has resulted in deprivation of CLC land rights. Conflicts occur because of a gap between the concept made between the Government and companies over natural resources, the incompatibility between regulation and implementation, which is detrimental to CLC (Tetinwe, 2017). Conflicts also occur in Cameroon over large scale land acquisitions by foreign investors (Ndi & Batterbury, 2017)

In the socialist country of Laos (Kenney-Lazar, 2016), the government has given up land of around 1 million hectares or about 5% of the country's territory to natural resource investors. The surrender threatened the CLC in accessing customary land or customary forest resulting in conflict. The conflict resulted in the interruption of investor projects. Research shows that the taking of extra-economic power is regulated relationally on socio-political relations between countries, capital and society (contingencies are shaped by social and political relations among and internal to state, capital, and community actors) (Kenney-Lazar, 2016).

So, from the experience of several countries, it can be concluded that there is no best practice for the use of customary land that applies to all countries. Appropriate practices are only by means of an approach to land, community resources, ownership recognition, and a detailed understanding of the national government administration, policies, laws, political economy development, as well as the diversity of land and ownership practices that exist in each country.

Global experience shows that there is no one best practice that applies to all national contexts. On the contrary, it is clear that tailoring a national approach to community land and resource tenure recognition requires a detailed understanding of the national government administration, policy, and legal context; political economy of development; and the diversity of land for which ownership practices (customary or otherwise) prevail in one country.

In Indonesia, there are many disputes related to the exploration of customary forests with various background problems. First, it is related to land use policies, particularly government policies, land grabbing, and forest encroachment and area conservation (Rustiadi et al., 2018). Second, it is related to the reclaim of CLC on green land from the Government and the private sector, due to forest degradation and deforestation which resulted in increased emissions (reducing emission problems) that occurred in Central Kalimantan (Astuti & McGregor, 2017). Third, it is related to the marginalization of CLC over access and control over customary forests, which has resulted in conflicts with large-scale forest plantation companies in Sumatra (Dhiaulhaq & McCarthy, 2020). Fourth, it is related to Government policies that are unfair to CLC in Jambi Province for private participation in the development of oil palm plantations. CLC is marginalized and faces legal uncertainty over their lands (Nilakrisna et al., 2016).

The contribution of this paper is to provide a review of legal considerations on the decision of the Constitutional Court No. 35 / PUU-X / 2012. The study of the Constitutional Court decision refers to the philosophical principles of Pancasila and the Constitution of the Republic of Indonesia. The number of land conflicts is related to the takeover of customary land or customary forest to become state land based on RCS, finally the Constitutional Court

in its decision No. 35 / PUU-X / 2012 decided that RCS was not positioned above as the parent of other rights, but rather shared the area of control with these individual and collective rights, as confirmed in the decision of the Constitutional Court on the Case Review of the Forestry Law that the State's authority is limited insofar as the content and authority of customary rights and the state only has authority indirectly over customary forests (Tody Sasmita & Haryo Budiawan, 2014, p.71).

Previous research related to the Constitutional Court decision No. 35 / PUU-X / 2012 is a research on the understanding and definition of ancestral land concession by CLC. In this research, it stated that the implementation of the Regulation of the Minister of ATR / Ka BPN No. 18 of 2019 does not recognize communal rights but customary rights and these rights are not the object of land registration under the BAP (Rumiartha et al., 2019). The second study relates to the legal consequences of recognizing customary forests on plantation concession holders after the Constitutional Court ruling. The research found that it is related to unfair plantation laws that regulate those who are granted land rights by plantation entrepreneurs, and this has resulted in conflicts with local communities (Warassih & Sulaiman, 2017).

Based on the decision of the Constitutional Court, the question is raised whether the granting of concession permits by the Government to companies and SOE on Customary Land must first obtain approval by the Customary Law Community. Referring to the theory put forward by Lon L. Fuller, written law that is not based on filtered customary law will not have a strong social basis and becomes an ineffective law and results in a decline in legal authority (Soekanto, 2016, p.378). Therefore, the Government in granting concession permits to companies and BUMN must first consult and obtain approval from the CLC.

This paper will discuss with the outline starting from (1) Introduction, (2) Tinjaun Pustaka, by discussing: (a) concessions, (b) rights to control the state, (c) customary law communities, (d) customary land, (e) natural resources, (3) Methods, (4) Results, (5) Discuss, by discussing: (a) the position of customary land in national land law and positive law, (b) granting of concessions by the Government on customary land, (6) Conclusion.

2. Literature Review

2.1 Concession

A concession is an agreement between the private sector and the Government to do part of the work of the government, or the private party is given the authority under certain conditions. It can also be interpreted as a license to do a certain job with a certain extent, by not allowing other parties to participate. The work carried out is related to the public interest carried out by the company which is impossible for the Government to do (W.F. Prins, Adisapoetra, 1987, p.74-77). Concession is also said to be a designation that allows concessionaires to get dispensations, permits, licenses and also a kind of government authority that allows them to for example construct roads, flyovers and so on. The requirements for granting concessions must be carried out by the Government with due care and careful calculation (Efendi, 2004, p.47).

In Latin American countries such as Colombia, Panama, Venezuela and Mexico, placing a concession as a Public Contract is regulated by law (Serina, 1999, p.373). These laws apply the doctrine of "economic equilibrium" and they include provisions relating to extraordinary or unforeseen events that materially affect the contract. They can make contract changes to the initial position, enter into agreements to re-establish the balance of the contract, including the contract value, payment methods and additional costs such as funding fees and bank interest (Berger, 2003).

Concessions can also be a means of creating a competition from a monopolistic market in the infrastructure industry such as electricity, gas, telecommunications, rail networks. It can take the form of "Management Contracts with Incentive Payment", "Leases", "Pure Concessions", BOT's, and Rehabilitate-Operate-Transfers (ROT's). These concessions do not need to be given to private companies if the Government can give them to BUMN (Kerf, Gray, Irwin, & Levesque, 1999, p.1-6). Therefore, the concession is a government policy tool or "as a tool of government policy" (Craig, 2008, p.126).

2.2 The right to control the state (RCS)

The RCS is absolute. Without such control, fair and equitable welfare will not be achieved. However, the right to control land by the state is impossible to achieve if the state through the government does not create legal certainty as the basis and guidelines for its control. Lack of understanding of the meaning, substance of the purposes and objectives of RCS over land is not impossible to easily misuse and misinterpret since the state is an independent organ of power regardless of the purpose and its formation. If this is the case, the state will keep society away from the ideal of its formation, namely a just and prosperous society which should be spelled out in every regulation, policy and attitude of action (Erwiningsih, 2009, p.6-7).

Article 33 paragraph (3) of the 1945 Constitution, the earth, water and space, including the natural resources contained therein, are at the highest level controlled by the State as an organization of power for all the people. The RCS authorizes the State to: (1) regulate and administer the designation, use, supply and maintenance of earth, water and space, (2) determine and regulate legal relations between people with earth, water and space, (3) determine and regulate legal relations between people and legal acts concerning the earth, water and space. State authority derived from the RCS is used for the greatest welfare of the people as referred to in Article 1 paragraph 2 BAP.

National Agrarian Law in accordance with Presidential Decree of July 5, 1959 and Article 33 of the 1945 Constitution, obliged the State to regulate land ownership and lead its use, so that all land throughout Indonesia was for the greatest prosperity of the people, both individually and mutually. Article 33 of the 1945 Constitution: (2) Production branches which are important for the state and which control the livelihoods of the public shall be controlled by the state, (3) The land and water and natural resources contained therein shall be controlled by the state and used for the greatest prosperity of the people, (4) The national economy shall be carried out based on economic democracy with the principles of togetherness, fair efficiency, sustainability, environmental insight, independence, and by maintaining a balance between progress and national economic unity.

2.3 Customary law community (CLC)

There are 3 types of territorial legal alliances, namely: (a) village partnership, (b) regional partnership, (c) village partnership. However, only territorial-based alliances are rarely found, for example: genealogical alliances in Gayo (South Aceh, first, they were hereditary ties or "clans" and then began to recognize territorial ties), "dusun" territorial alliances (South Sumatra), "villages" (Madura). There are also those based on two factors (genealogical and territorial), but 2 conditions must be met: (1) must be included in one genealogy unit, and (2) must reside in the respective fellowship area. Meanwhile, there are 5 types of alliances that are only genealogical in nature, for example, in one village there is only one "clan", or several different "clans", and the combination of these "clans" is joined in one territory. Van Vollenhoven summed up the existing legal alliance structure in Indonesia as (Wignjodipoero, 2014, p.78-85):

a) Group I: Legal alliances in the form of genealogical entities;
b) Group II: Legal alliances in the form of territorial units in which there are genealogical units;
c) Group III: Legal alliances in the form of territorial units without genealogical unity in them, but with or not with smaller territorial units;
d) Group IV: Legal alliances in the form of territorial entities in which there are associations or legal entities that are deliberately established by the citizens.

Today's ethnologic science has been able to determine a clear picture of the "indigenous" notion of the solid and regular unity of the society, which is symbolized by the human form with two parts, namely the great realm (cosmos) and the human realm. Then there are 4 structures of the people in the customary law community, namely: (1) legal societies within the community and their special forms, (2) the kings' environment, (3) traders as outsiders of society, and (4) the “gubernemen” arrangement (Ter Haar, 2017, p.6-22).

2.4 Ancestral (Adat) land

The BAP in Article 3, which provides the basis for the recognition of customary rights by stating two requirements, namely the requirements regarding its existence / existence and its implementation, does not provide further explanation of the criteria determining the existence of customary rights. However, by adhering to a conception that is based on customary law, it would be fair if the criteria for determining the existence of customary rights are based on three elements that must be met simultaneously, namely: (1) the subject of customary rights, namely the CLC which fulfills certain characteristics, (2) objects of customary rights, namely territorial land which is their "lebensraum", and (3) the existence of certain authority from the MHA to manage their territorial lands, including determining the relationship with respect to the supply, allocation and utilization as well as preservation of their territorial lands (Soemardjono, 2009, p.64-65).

Van Vollenhoven stated that customary land or Ulayat land cannot be traded. He explained this in his legal theory "beschikkingrecht", which is the highest law regarding land in Dutch civil law and constitutional law, which covers all islands in Indonesia. In his theory, Van Vollenhoven gives 6 distinctive features of Indonesian land law and customary architecture (Soesanggobeng, 2012, p.166-168):

a) The legal community with its leaders and members can freely use and exploit all the forest lands that are not yet controlled by someone in the legal community to open it, establish settlements or villages, hunt, collect forest products, herd and graze;
b) Foreigners can only do things like number 1 above, after obtaining permission from the legal community, because each violation is declared a customary violation (offense) called "maling utan".
c) Every foreigner, but sometimes even members of the legal community, are required to pay income ("recognitie"), to be able to collect and enjoy the products of land in the environment of the customary law community;
d) Customary law communities are responsible for every violation of the law that occurs in the territory of the legal community, the perpetrators cannot be held accountable because they are not known;
e) Customary law communities still have the right to control and supervise agricultural lands within their legal community;
f) Customary law community land may not be sold and released to other parties permanently. This sixth trait was emphasized by Van Vollenhoven as the most important.

2.5 Natural resources

Representative Council (MPR) Decree No. IX / MPR / 2001 states that agrarian reform and natural resource management must be implemented in accordance with the principles of recognizing, respecting and protecting the rights of CLC and national cultural diversity on natural resources. Natural Resources has a dual role, namely as a model for economic growth (resource-based economy) and at the same time as a life support system. Maintaining a good and healthy living environment is a basic right for all human beings, as Principle 1 of the Stockholm Declaration, 1972: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and wellbeing, and he bears solemn responsibility to protect and improve the environment for present and future generation".

This principle has been adopted in the 1997 Environmental Law and the 1999 Human Rights Law. The provisions of this law are very basic environmental law principles, and are also considered part of the basic rights or human rights to the environment, and a good and healthy life (Bambang Daru Nugroho, 2015: p.51).

3. Methods

The research method used in this research is normative juridical research method. The normative juridical research method, also known as library law research, is legal research conducted by examining library materials or secondary data (Soekanto, Soerjono, 2013, p.13). This secondary data includes primary, secondary and tertiary legal materials. To get research results that can be scientifically justified, the authors use a document study which is a non-survey data collection technique (Bailey, 1982, p.301-329).

The research begins by first examining and analysing Ulayat Land based on Law Number 5 of 1960 concerning Basic Agrarian Principles. Furthermore, the analysis is carried out on the Regulation of the Minister of Agrarian Affairs Number 5 of 1999 concerning Guidelines for Solving Problems of Customary Rights of Customary Law Community. Then, this research continued by analysing the legal protection against CLC. In analysing the problem, the writer uses a statutory approach. According to Peter Mahmud Marzuki, the statutory approach is an approach using legislation and regulations. Products that are beschikking / decree, namely decisions issued by administrative officials that are concrete and specific, for example presidential decrees, ministerial decrees, regent decrees, and decisions of a certain body cannot be used in a statutory approach (Marzuki, 2010, p.137).

4. Results

Customary Land legally, in positive law, CLC National land is recognized as long as it still exists and is in line with National interests and does not conflict with the prevailing laws and regulations. However, sociologically, seeing the conflict related to Customary Land by CLC, it can be said that sociologically the existence of CLC still exists as a legal subject for Customary Land. The existence of customary land was strengthened by the Constitutional Court decision No. 35 / PUU-X / 2012 in 2012 has decided that the existence of customary forests is no longer included as part of state forests.

5. Discussion

5.1 Position of customary land in National Land Law and Positive Law

Referring to the positive national land law, it is stated in Article 3 of the BAP that the implementation of customary land from the CLC as long as in reality it still exists must be in accordance with the interests of the National and the State and must not conflict with laws and regulations of a higher level. This means that customary land is private land even though it is communal in nature so that it is not included as individual land that can be registered as Article 16 of the BAP such as property rights, business use rights, building use rights or usage rights. In the context of State Land, Customary Land is not free land where the Government has its freedom according to its authority in the RCS.

The position of Customary Land as the titled land which is not a free of the State Land can be seen from the Constitutional Court's decision regarding the conflicts between the CLC and the Government as well as companies related to the use of these Customary Lands. The Indonesian Constitutional Court then issued its decision, namely in the Constitutional Court Decision No. 35 / PUU-X / 2012 which decided that the existence of customary forests is no longer included as part of state forests. This can be seen from the judicial review of Article 1 paragraph 6 of Law Number 41 Year 1999 concerning Forestry, where the Constitutional Court ruled that the word "state" in Article 1 point 6 of the Forestry Law is contrary to the 1945 Constitution. The word "state" in that Article does not have binding legal force. Article 1 point 6 of the Forestry Law is changed to "Customary forest is the forest that is within the territory of a customary law community".

The Constitutional Court in decision No. 35, based on Alenia IV of the Preamble of the 1945 Constitution, states that there are two important things in the formation of a state with a choice of a welfare state. First, regarding the goals of the state, namely protection of the nation and territory, general welfare, intelligence of the nation's life, and participation in realizing

world order based on independence, eternal peace and social justice. Second, regarding the foundation of the state, Pancasila, namely Almighty Godhead, just and civilized humanity, Indonesian Unity and Democracy led by wisdom in deliberation / representation, and by realizing a social justice for all Indonesian people (Todi Sasmita, Haryo Budiawan, 2014, p.29-39).

The meaning of RCS should be placed on a philosophical dimension that not only provides equal opportunities for every individual to control land, but also ensures that individuals who are in a disadvantaged position and receive different treatment from individuals with better social and economic positions. Cultivators, landless poor people, and indigenous peoples are some examples of communities that need special attention and treatment that guarantees their rights to land, so that they can have an equal position with large companies (Todi Sasmita, Haryo Budiawan, 2014, p.33). In the principle of "the state controls", in the relationship between the state and society, the position of the people cannot be subordinated to the state, because the state actually receives power from the community to regulate the allocation, supply and use of land, as well as legal relations and legal actions concerned. with the ground (Todi Sasmita, Haryo Budiawan, 2014, p.33).

The existence of customary land is also recognized in the 1945 Constitution. Second Amendment Article 18 B paragraph (2) and Article 28 I paragraph (3), Law Number 39 Year 1999 concerning Human Rights, Law Number 48 Year 2009 Concerning Judicial Power, as well as Law Number 32 Year 2004 concerning Regional Government. This means that the Government must pay attention to and protect CLC including Customary Land in all aspects and regulations related to Customary Land.

Customary Law, including Customary Land, thus occupies an important function in the framework and process of forming national laws directed at legal unification. The position of customary law is strengthened by scientific meetings in the field of law such as in the 3rd National Law Seminar in 1974 where it was concluded that the development of national law must pay attention to customary law as the law that lives in society. As well as in the many Customary Law Seminar it was emphasized that Customary Law is one of the important sources for obtaining materials for the development of national law and leading to legal unification through the making of laws and regulations. Of course, it still pays attention to the growth and development of habits and activities in the development of national law (Nugroho, 2015, p.73).

Thus, customary land includes other land rights such as ownership rights, business use rights, building use rights or usage rights. This means that customary land is not free state land, the only difference is that customary land is communal as based on Van Vollenhoven's theory which is the highest law since the Dutch colonial era and cannot be permanently transferred to another party (Soesanggobeng, 2012, p.166-168). Meanwhile, other land rights as mentioned in Article 16 BAP are individual and can be transferred based on the provisions of the BAP and can be registered. Based on this legal construction, the Government cannot immediately take legal action, legal action or legal stipulation on Customary Land without prior approval from the CLC, especially the approval of the customary chief of the CLC. This is based on the legal construction that CLC and the customary head are the legal subjects of Customary Land who have public and civil authority.

Customary law according to Lon L. Fuller is based on the process of interaction in society and then functions as a pattern to organize and facilitate the interaction process so that customary law is referred to as "a system of stabilized interactional expectancies". However, Fuller considers that the doctrine of "opinion necessitates" is a repetitive action because this doctrine does not apply when Customary Law is still in the process of being formed. So Fuller uses another approach from The American Law Institute's Restatements of Contracts. What determines the process of forming customary law is the ultimate goal of an act or event, namely to create a peace which is marked by harmony between order and tranquility in society. In legal development, the benefits of customary law are (Soekanto, 2016, p.374-377):[4]

[4]According to Soerjono Soekanto, it is necessary to identify customary laws that support development, which are neutral or contrary to development. It is also necessary to identify the Customary Law which is designed because it is ordered by the customary ruler or the customary head which is not necessarily felt to be fair, the Customary Law which is adhered to because the collectivity wants it even though it is not necessarily fair, and the Adat Law which is adopted because it is considered fair by individual community members.

a) There is a tendency in customary law to formulate regular behaviour regarding roles or functions;
b) In customary law, behaviour with all its consequences is formulated thoroughly, especially for deviant behaviour with negative sanctions;
c) Usually in customary law, the pattern of dispute resolution that may occur is formulated, where this is sometimes raised in a symbolic form, namely by holding certain ceremonies.

Thus, based on this theory, written law that is not based on customary law that has been filtered and does not have a strong social basis, is easily shaken and ineffective and reduces the authority of the law and law enforcement.

5.2 Granting concessions by the Government on customary land

The granting of concessions by the Government to large companies managing natural resources and also SOE is the authority of the Government which is a power based on law. Based on this authority, the Government can take legal actions, both public legal actions and civil legal actions, including signing decrees to make public licenses (Safri Nugraha, 2005, p.38-39). Such authority must be based on law, namely law so that there is no legal action that exceeds the limit or arbitrariness. Therefore, the nature of the authority is always bound by a certain period, subjected to the specified territorial boundaries and material and its implementation is bound to written law and unwritten law (in this case the General Principles of Good Governance) (Safri Nugraha, 2005, 38-39).[5]

The General Principles of Good Governance, which serve as a guideline for the Government in exercising its authority, including the authority for granting concessions, are regulated in Law No. 30 of 2014 concerning Government Administration. This means that the authority to grant concessions by the Government must be based on written and unwritten law (general principles of good governance) (Safri Nugraha, 2005, p.38-39).[6] For example, the Minister of Forestry gets authority based on a Presidential Decree and carries out governmental duties in the forestry sector based on the Forestry Law. Thus, the Minister of Forestry cannot simply make a policy or policy without coordinating with the relevant ministers. In the case of granting concessions to companies and SOE managing natural resources on Customary Land, it must coordinate with the Minister of Agrarian Affairs and Spatial Planning.

Although the Government in granting concessions has done so based on written law, namely the Forestry law, it does not pay attention to unwritten law, namely the general principles of good governance. This can be explained as follows:

a) The existence of CLC and Customary Land is still a legal polemic in the positive law of national land, where in article 3 of the UUPA, it is stated that CLC is recognized as long as it still exists and must be in accordance with the national interest and not against the prevailing positive law.
b) Constitutional Court Decision No. 35 / PUU-X / 2012 in 2012 has decided that the existence of customary forests is no longer included as part of state forests. This means that on the Customary Land, there is an CLC and a customary leader who is a legal subject authorized in public law and civil law.
c) The government in granting concessions to companies and SOE managing natural resources does not carry out consultations and without the approval of the CLC and the customary leader as the legal subjects of Customary Land.

[5] According to Safri Nugraha, the authority of the Government is obtained based on the product of law (attribution) or based on delegation (authority derived from attribution authority) and mandate authority which is the assignment of an official who has the authority for attribution or delegation. This authority in public action has extraordinary powers, namely "prealable" authority, namely first the authority to make decisions taken without prior approval from any party, and secondly "ex officio" authority, namely the authority to make decisions taken because of their position so that cannot be opposed by anyone with a criminal sanction. The exercise of this authority is bound by three legal principles, namely: (1) juridicity principle, (2) legality principle, and (3) discretionary principle. This is to prevent the occurrence of "abuse of power" (excess of authority), "detournement de power (abuse of authority) and" ultra vires "(abuse of authority).

[6] Safri Nugraha mentioned that there are 13 principles to consider: (1) the principle of legal certainty, (2) the principle of balance (principle of proportionality), (3) the principle of equality in decision making (principle of equality), (4) the principle of carefulness (principle of carefulness), (5) the basis of motivation for every decision of the state administration (principle of motivation), (6) the basis of do not mix authority (principle of non-mixed of competence), (7) the basis of the game worthy (principle of fairplay), (8) principle of justice or fairness (principle of reasonableness), (9) principle of responding to the expectation (principle of meeting expextation), (10) principle of undoing the consequences (principle of undoing the consequences) of an anulleded decision), (11) principle of protection over personal view of life (principle of protection the personal way of life), (12) principle of wisdom (principle of wisdom), and (13) principle of maintenance of public interest (principle of public service).

d) The government in granting the concession does not coordinate with the relevant ministries, namely the Ministry of Agrarian Affairs and Spatial Planning which understands the legal and regulatory aspects of both written and unwritten on Customary Land.

6. Conclusion

The case under Constitutional Court Decision No. 35 / PUU-X / 2012 in 2012, which has decided that the existence of customary forests is no longer included as part of state forests, shows that Government do not comply with the General Principles of Good Governance. In this circumstance, the Government must be based on written and unwritten law (general principles of Good Governance). Referring to the theory of Lon L. Fuller, the granting of concessions to companies and SOE managing natural resources in the forestry environment does not have a strong social basis and is ineffective. This means that the Government's policy has a legal flaw that can be taken against those who are loss and damaged. Meanwhile, the Government itself as a government apparatus can be held accountable legally.

The benefit for the Government in this research is that the government needs to deepen the legal aspects that live in society in addition to the existing positive laws. In fact, the Government gives concessions to companies and SOE managing natural resources without the consent of the subject of the CLC, so that it can be seen from the many cases related to the use of natural resources on customary land. Then, the Government in granting the Concession did not coordinate with the Ministry of Agrarian Affairs and Spatial Planning who knew the Customary Land regulations both in writing and not in writing.

The government as a regulator should comply with the general principles of Good Governance, which legalised that the Government action is in the form of granting concessions to companies and SOE managing natural resources without having legal flaws and legally holding them accountable. The author still sees that this research is far from perfect, but this writing can be used as a starting material for further research.

References

Astuti, R., & McGregor, A. (2017). Indigenous land claims or green grabs? Inclusions and exclusions within forest carbon politics in Indonesia. *The Journal of Peasant Studies, 44*(2), 445–466.

Bailey, K. D. (1982). *Methods of Social Research* (2nd ed.). The Free Press.

Berger, K. P. (2003). Renegotiation and Adaption of International Investment Contracts: The Role of Contract Drafters and Arbitrators. *Vand. J. Transnat'l L., 36*, 1347.

Craig, P. (2008). *Administrative Law* (6th ed.). Sweet & Maxwell.

Dhiaulhaq, A., & McCarthy, J. F. (2020). Indigenous Rights and Agrarian Justice Framings in Forest Land Conflicts in Indonesia. *The Asia Pacific Journal of Anthropology*, *21*(1), 34-54.

Efendi, L. (2004). *Pokok-Pokok Hukum Administrasi*. Bayumedia Publishing.

Erwiningsih, W. (2009). *Hak Menguasai Negara*. Total Media and UII.

Hak, S., McAndrew, J., & Neef, A. (2018). Impact of Government Policies and Corporate Land Grabs on Indigenous People's Access to Common Lands and Livelihood Resilience in Northeast Cambodia. *Land*, *7*(4), 122.

Joesoef, I. E. (2018). Gagasan Perwakilan Masyarakat Hukum Adat dalam Dewan Perwakilan Daerah: Keseimbangan antara Kepentingan Individualitas dan Kolektivitas dalam Pelaksanaan Demokrasi. *Jurnal Seminar Nasional Hukum, Universitas Negeri Semarang, Unnes Law*, *4*(03).

Kenney-Lazar, M. R. (2016). *Resisting with the state: The authoritarian governance of land in Laos*. Clark University Worcester, MA.

Marzuki, P. M. (2010). *Penelitian Hukum*. Kencana.

Michel Kerf, R. David Gray, Timothy Irwin, Celine Levesque, R. R. T. (1999). *Concessions for Infrastructure: A Guide to Their Design and Award* (No. 399).

Ndi, F. A., & Batterbury, S. (2017). Land grabbing and the axis of political conflicts: Insights

from Southwest Cameroon. *Africa Spectrum*, *52*(1), 33–63.
Nilakrisna, D., Taqwa, R., Sriati, S., Purnama, D. H., & Susanto, R. H. (2016). Social Conflicts Between Oil-Palm Plantation Company and Indigenous People in Jambi Province. *Journal of Tropical Life Science*, *6*(2), 95466.
Nugroho, B. D. (2015). *Hukum Adat, Hak Menguasai Negara atas Sumber Daya Alam Kehutanan dan Perlindungan terhadap Masyarakat Hukum Adat*. PT. Refika Aditama.
Rumiartha, I. N. P. B., Poesoko, H., & Rato, D. (2019). The nature of customary land concession in the customary law society. *International Journal of Social Sciences*, *2*(1), 49–55.
Rustiadi, E., Barus, B., Iman, L. S., Mulya, S. P., Pravitasari, A. E., & Antony, D. (2018). Land Use and Spatial Policy Conflicts in a Rich-Biodiversity Rain Forest Region: The Case of Jambi Province, Indonesia. In *Exploring Sustainable Land Use in Monsoon Asia* (pp. 277–296). Springer.
Safri Nugraha, et al. (2005). *Hukum Administrasi Negara*. Badan Penerbit FHUI.
Serina, Q. G. (1999). An Overview of the Legal Aspects of Concession Agreements in Latin America. *ILSA Journal of International and Comparative Law*.
Soekanto, Soerjono, S. M. (2013). *Penelitian Hukum Normatif*. PT. RajaGrafindo Persada.
Soekanto, S. (2016). *Hukum Adat Indonesia*. PT. RajaGrafindo Persada.
Soemardjono, Maria, S. . (2009). *Kebijakan Pertanahan, Antara Regulasi dan Implementasi*. Penerbit Buku Kompas.
Soesanggobeng, H. (2012). *Filosofis, Asas, Ajaran, Teori Hukum Pertanahan, dan Agraria*. STPN Press.
Sukirno. (2018). *Politik Hukum Pengakuan Hak Ulayat*. Prenadamedia.
Tech, T. (2016). *Community land and resource tenure recognition: Review of country experiences*.
Ter Haar Bzn, B. (2017). *Asas-Asas dan Susunan Hukum Adat* (K. N. Soebakti Pesponoto (ed.); 14th ed.. Balai Pustaka.
Tetinwe, N. A. (2017). Translating policies on the rights of indigenous communities into concrete practice to mitigate conflicts over natural resource exploitation in Central Africa: case study of the Baka people in Eastern Cameroon. *Studies in Sociology of Science*, *7*(6), 13–24.
Tody Sasmita, Haryo Budiawan, S. (2014). *Pemaknaan Hak Menguasai Negara Oleh Mahkamah Konstitusi (Kajian terhadap Putusan MK No. 35/PUU-X/2012, Putusan MK No. 50/PUU-X/2012, dan Putusan MK No. 3/PUU-VIII/2010)*.
W.F. Prins, Adisapoetra, R. K. (1987). *Pengantar Ilmu Hukum Administrasi Negara* (6th ed.). PT. Pradnya Paramita.
Warassih, E., & Sulaiman, S. (2017). Recognition of Adat Forest and Plantation Concessions in Indonesia. *Kanun Jurnal Ilmu Hukum*, *19*(2), 249–268.
Wignjodipoero, S. (2014). *Pengantar dan Asas-asas Hukum Adat* (17th ed.). PT. Toko Gunung Agung.

Regulations:

-Undang-undang Dasar Republik Indonesia Tahun 1945.
-Tap MPR Nomor IX/MPR/2001.
-Undang-undang No. 5 Tahun 1960 Tentang Peraturan Dasar Pokok-Pokok Agraria.
-Undang-undang No. 32 Tahun 2004 Tentang Pemerintahan Daerah.
-Undang-undang No. 41 Tahun 1999 Tentang Kehutanan.
-Undang-undang No. 39 Tahun 1999 Tentang Hak Asasi Manusia.
-Undang-undang No. 48 Tahun 2009 Tentang Kekuasaan Kehakiman.
- Undang-undang No. 30 Tahun 2014 Tentang Administrasi Pemerintahan.
-Peraturan Menteri Negara Agraria/ Kepala Badan Pertanahan Nasional No. 5 Tahun 1999 Tentang Pedoman Penyelesaian Masalah Hak Ulayat Masyarakat Hukum Adat
-Peraturan Menteri ATR/ Ka BPN No. 18 Tahun 2019

Court Decision:

-Putusan Mahkamah Konstitusi No. 35/PUU-X/2012 Tahun 2012.