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Declarative System in Preventing the Criminalisation of Indigenous People for Adat Rights Conflicts in Indonesia

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Article	Abstract
<p>Keywords: Adat Rights; Criminalisation; Indigenous People; Indigenous People Draft Bill.</p> <p>Article History Received: Jul 30, 2021; Reviewed: Jan 18, 2022; Accepted: Jul 16, 2022; Published: Jul 31, 2022.</p> <p>DOI: 10.28946/slrev.Vol6.Iss2.1359.pp254-267</p>	<p>The existence of indigenous peoples as entities was born before the independence of the Republic of Indonesia. However, it is still disturbed by criminalisation by law enforcement officials for legal actions of indigenous peoples on their Adat lands whose Adat rights were transferred to other parties. Various regulations related to indigenous peoples already exist, and the Bill on Indigenous Peoples is not satisfying in preventing cases of criminalisation against indigenous peoples. It is because there is no adjustment in several crucial aspects, such as the nature of the recognition of indigenous people, protection of Adat lands and the application of criminal sanctions to achieve legal harmonisation in preventing the criminalisation of indigenous peoples. Synchronisation has not yet been realised between the substance of the legal rules related to indigenous peoples at the national level and the draft Bill on Indigenous Peoples with regional technical regulations at the sectoral level. This research uses statute and conceptual approaches to analyse legal norms, legal concepts, and legal principles related to indigenous people in Indonesia. As a result, it is believed that the protection of indigenous people's existence should be provided through a declarative system, not a constitutive system. It is also necessary to eliminate criminal sanctions against indigenous peoples in some related legal products according to the characteristics of indigenous peoples to stop the criminalisation of indigenous peoples and expand legal assistance for indigenous peoples in the context of implementing the law.</p>

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INTRODUCTION

The law protects all levels of society, not only modern society but also indigenous peoples who still exist in Indonesia. The legal protections for indigenous peoples have been accommodated through laws and Adat law that apply according to their ancestral territory. The Indonesian government has attempted to respond and adapt important principles of Adat law into the national legal order. However, the complexity of the socio-cultural diversity of Indonesian so-

ciety caused the existence of Adat law to be unrecognised by national law in practice.¹ However, there are still conflicts of norms between Adat law and national law,² for example, the expanding boundaries of the territory owned by the central and regional governments in contact with territorial boundaries. Indigenous peoples, control of natural resources, and government intervention in indigenous peoples' lives can potentially violate Adat's rights belonging to indigenous peoples.

Human legal ties to the land are very thick in the context of Adat land.³ Land tenure conflicts often occur between the Adat rights of indigenous peoples and the rights of local and central governments.⁴ In reality, indigenous peoples' position is weaker than those of businesses, corporations, and local and central governments who are also interested in these Adat lands for the benefit of large-scale industries, plantations, mining, and settlements. Moreover, if the members of the Adat community who control Adat rights do not hold physical evidence of ownership certificates, this will further weaken their position. On the other hand, even indigenous peoples who already have *SKTA* (Certificate of Adat Land) do not automatically have a solid basis for their rights to defend their position when there is a struggle for Adat land rights.⁵ From the business point of view, some companies intend to violate the law from the start. Many companies in a neoliberal era still comply with the law in transferring land rights. However, the local government obscures the original condition and status of the land before it is transferred to the company.⁶ These various conditions add to the complexity of the issue of the legal protection of Adat lands.

In the beginning, Adat land conflicts were triggered by the marginalisation of indigenous peoples, even though the status of the original natives was a privilege.⁷ Indigenous land conflicts have occurred in various regions in Indonesia, such as Central Kalimantan, East Kalimantan, East Java, Bali, Sulawesi, and others. Several cases of violations on indigenous peoples that even continued to criminalise those who fought for their rights had occurred in Kinipan Village, Paser, Central Kalimantan, and East Kalimantan. They had been charged with theft, confiscation, and acts of violence as a weight for criminal sanctions. The arrest and detention of indigenous peoples are still categorised as a purely criminal case, namely the theft article. The actions taken by indigenous peoples are not intentional and stem from misunderstandings. In Sulawesi, more than 80 communities from South Sulawesi are struggling

¹ Adriaan Bedner and Yance Arizona, 'Adat in Indonesian Land Law: A Promise for the Future or a Dead End', *The Asia Pacific Journal of Anthropology*, 20.5 (2019), 416–34.

² Katharina Holzinger and others, 'The Constitutionalization of Indigenous Group Rights, Traditional Political Institutions and Adat Law', *Comparative Political Studies*, 52.2 (2018), 1775–1809.

³ Agung Basuki Prasetyo, "Penyelesaian Sengketa Perjanjian Sewa Menyewa Tanah Adat." *Diponegoro Private Law Review* 7, no. 1 (2020): 641-649.

⁴ Maria Fernanda, 'Tenure Reforms in Indigenous Lands: Decentralized Forest Management or Illegalism', *Current Opinion in Environmental Sustainability*, 32 (2018), 60–67.

⁵ Ferry Setiawan, "Surat Keterangan Tanah Adat (SKTA) oleh Damang Kepala Adat Terkait Pembuatan Sertipikat Tanah di Provinsi Kalimantan Tengah." *Jurisdictie* 8, no. 1 (2017); 71-90. <https://doi.org/10.18860/j.v7i3.4331>.

⁶ Kristin Ciupa, 'The Promise of Rights: International Indigenous Rights in the Neoliberal Era', in *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge, 2017), p. 140.

⁷ Iokine Rodriguez and Mirna Liz Inturias, 'Conflict Transformation in Indigenous Peoples' Territories: Doing Environmental Justice with a Decolonial Turn', *Development Studies Research*, 5.1 (2018), 90–105.

to acquire government recognition of their Adat lands.⁸ Enrekang (Bugis tribe) is one location in South Sulawesi where indigenous issues arise⁹, also Sinjai District when Bahtiar bin Sabang case happened in 2016.¹⁰ In Sumatra, land conflicts involve communities and large-scale forest plantation companies.¹¹

Indigenous peoples in Indonesia are vulnerable to discrimination and violations of the law.¹² Through its law enforcement officers, the state should provide legal protection for indigenous peoples and guarantee their security as part of citizens without the need to take repressive legal actions that better defend the interests of businesspeople. The utilisation of Adat land is dominated by business people and the government in the name of national interests, for example, to accelerate the country's development. Therefore, unwitting confiscation of Adat rights can be carried out with the participation of the government, even though the government should help indigenous peoples instead of being more inclined to side with corporations.

Legal regulations related to indigenous peoples have existed, such as; Law Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA), Law Number 39 of 1999 concerning Human Rights, Law Number 41 of 1999 concerning Forestry, and Law Number 26 of 2007 concerning Spatial Planning, Law No. Number 32 of 2009 concerning Environmental Protection and Management, Law Number 18 of 2013 concerning Prevention and Eradication of Forest Destruction, Law Number 6 of 2014 concerning Villages, Law Number 23 of 2014 concerning Regional Government, Law Number 39 of 2014 concerning Plantations and various regulations the implementers have not been able to protect indigenous peoples against criminalisation for several reasons. Therefore, the drafting and ratifying of the Indigenous Peoples Draft Bill become urgent to defend indigenous peoples who are increasingly threatened by the development of the business world, expansion of residential areas, and territorial seizures. Domestic and foreign investment activities are displacing them, and the worst threat is criminalisation.

Thus far, there is still a gap between national legal products and the practice of controlling land rights, which are urgently regulated in legal instruments. Furthermore, the indigenous peoples find it difficult to defend their rights when dealing with authorities or parties with higher positions, higher legal knowledge, and more substantial economic capabilities. Therefore, it is necessary to make improvements to the substance of the Indigenous Peoples Draft Bill to achieve harmonisation and protect the position of indigenous peoples when disputes and criminalisation occur. Based on this description, this study will discuss and

⁸ Willem van der Muur, "Forest Conflicts and the Informal Nature of Realising Indigenous Land Rights in Indonesia." *Citizenship Studies* 22, no. 2 (2018): 160–174. <https://doi.org/10.1080/13621025.2018.1445495>.

⁹ Timo Duile, 'Indigenous Peoples, the State, and the Economy in Indonesia: National Debate and Local Process of Recogni-Tion', *Austrian Journal of South-East Asian Studies*, 13.1, 155–60.

¹⁰ Miranda Wattimena, 'Discrimination Against Indigenous Peoples from Legal Texts to Policing Practice', *Indigenous Policy Journal (Dialoguing)*, 29.3 (2018).

¹¹ Ahmad Dhiaulhaq and John F. McCarthy, 'Indigenous Rights and Agrarian Justice Framings in Forest Land Conflicts in Indonesia', *The Asia Pacific Journal of Anthropology*, 21.1 (2020), 34–54.

¹² M. Yakub Aiyub Kadir, "Defining People and Indigenous People in International Human Rights Law and Its Application in Indonesia." *International Journal on Minority and Group Rights* 26, no. 3 (2019): 373, 408. <https://doi.org/10.1163/15718115-02602006>.

examine how the legal protection of indigenous peoples against the threat of criminalisation of indigenous peoples over Adat lands is associated with the principle of recognising the existence of indigenous peoples in Indonesia.

RESEARCH METHODS

The statute approach and conceptual approach in this normative legal research provide an analysis of legal norms, legal concepts, and legal principles contained in the rules concerning indigenous peoples and their *ulayat* rights, according to the hierarchy theory of regulations. The statute approach analyses the suitability and synchronisation of central and regional legal rules. The conceptual approach is applied to analyse the principle of recognising indigenous peoples' existence in Indonesia and the concept of criminalising indigenous and non-indigenous peoples.

This study uses data consisting of primary and secondary data. Primary data obtained from regulations consisting of; 1) The 1945 Constitution of the Republic of Indonesia Article Article 18B paragraph 2, Article 28 I paragraph 3 and Article 33, 2) Law Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA), 3) Law Number 39 of 1999 concerning Human Rights, 3) Law Number 41 of 1999 concerning Forestry, 4) Law Number 26 of 2007 concerning Spatial Planning, 5) Law Number 32 of 2009 concerning Environmental Protection and Management, 6) Law Number 18 of 2013 concerning Prevention and Eradication of Forest Destruction, 7) Law Number 6 of 2014 concerning Villages, 8) Law Number 23 of 2014 concerning Regional Government, 9) Law Number 39 of 2014 concerning Plantations, 10) Bill on Indigenous Peoples. Law books, journals, jurisprudence, and articles related to the criminalisation of indigenous people were the source of secondary data. The collected data was then studied to find the relevance to this research's topics, then reviewed and implemented to analyse the theory, ideas, and concepts related to this research.

ANALYSIS AND DISCUSSIONS

The Relationship between the Procedure for Recognising the Existence of Indigenous Peoples and the Opportunity of Criminalisation of Indigenous Peoples

A crucial collective right for indigenous peoples is maintaining their cultural and linguistic identity and obtaining protection of rights to land and natural resources based on local institutions in the land law system.¹³ These rights are the basis for the struggle of indigenous peoples to defend their rights amid the times. The connection between humans and their ancestral land is very close because it contains personal and public interests.¹⁴

This public interest is referred to in Article 18 of UUPA and Law Number 20 of 1961 concerning Revocation of Rights to Land and Objects on It and Presidential Regulation Number 36 of 2005 concerning Land Procurement for the Implementation of Development in the Public Interest. In general, it has been formulated that the general interest of the majority of indigenous peoples must pay attention to the implementation, use, and purpose. The

¹³ Anang Husni, "Hak – Hak Kolektif Dalam Sistem Hukum Pertanahan (Suatu Analisis Mengenai Fungsi Hukum Dalam Konflik Pertanahan." *Masalah-Masalah Hukum* 40, no. 4 (2011): 419-426. <https://doi.org/10.14710/mmh.40.4.2011.419-426>.

¹⁴ Amelia Rachman, "Implementasi Asas Keselarasan Dalam Pengadaan Tanah Bagi Pembangunan untuk Kepentingan Umum." *Sagacious* 6, no. 1 (2019): 45-62.

implementer can be government or private, its use must be for the common interest, and the aim is not to seek profit.

The legal basis for the existence of indigenous peoples in obtaining their rights is based on the 1945 Constitution Article 18B paragraph 2 and Article 28 I paragraph concerning human rights, including their rights to ancestral lands. Ulayat rights are rights to a plot of territory, area, clan, and Nagari and take advantage of it. Land containing Adat rights includes 3 (three) main parts, namely the environment as the centre of the alliance, the residents' business environment, and the supply land environment. Parties who may take advantage of Adat land rights are the indigenous peoples concerned or parties outside of it but with the approval from the indigenous peoples who own Adat rights. The outside parties may use Adat land as long as there is permission from the Adat ruler with a mechanism of paying tribute.¹⁵ The use and transfer of Adat land rights are also temporary because Adat rights cannot be alienated or transferred forever.¹⁶ Likewise, the indigenous peoples' internal parties may only take benefits limited to the needs of somah/brayat/his own family. Indigenous communities are responsible for all criminal acts against the law in their territory.

Cross-sectoral ministries still regulate the legal protection of Adat rights. It is related to many other legal products, for example, the Minister of Religion Regulation Number 5 of 1999 concerning Guidelines for the Settlement of Adat Rights of Indigenous Peoples, which was revoked before being implemented, Law Number 32 of 2009 on Environmental Protection and Management, and Law Number 41 of 1999 on Forestry. However, all of them are insufficient to protect indigenous peoples' rights because the criminal sanctions have not succeeded in providing a punitive effect commensurate with the impact experienced by the financial and psychological losses of indigenous peoples and land abuse. There are other related regulations, namely Law Number 39 of 1999 concerning Human Rights, Law Number 26 of 2007 concerning Spatial Planning, Village Law Number 6 of 2014, Law Number 23 of 2014 concerning Regional Government, and Law Number 39 of 2014 concerning Plantations.

Instead of protecting them, the existence of these laws has become the master's weapon for indigenous peoples who are against corporations. Several times similar cases have occurred, such as the case criminalisation of the indigenous people of Silat Hulu Village,¹⁷ Sedulur Sikep,¹⁸ and indigenous peoples in Laman Kinipan. Criminal provisions in forestry, plantations, and the environment are excluded from people who have lived there for the whole time. It is also reinforced by the Decision of the Constitutional Court Number 95/PUU-XII/2014. However, the substance of this rule in its implementation is still confused with criminal acts in illegal logging and mining and plantation activities without permits.¹⁹

¹⁵ Husen Alting, "Penguasaan Tanah Masyarakat Hukum Adat (Suatu Kajian Terhadap Masyarakat Hukum Adat Ternate)." *Dinamika Hukum* 11, no. 1 (2011): 87-98.

¹⁶ Iman Sudiyat, *Hukum Adat, Sketsa Asas* (Yogyakarta: Liberty, 2012).

¹⁷ Sefa Martinesya, "Tanggung Jawab Pemerintah Terhadap Pemenuhan Hak Masyarakat Adat." *Nurani Hukum* 3, no. 1 (2020): 69, <https://doi.org/10.51825/nhk.v3i1.8466>.

¹⁸ Muhammad Azil Maskur, "Internalisasi Nilai-Nilai Masyarakat Adat Dalam Pembaharuan Hukum Pidana Nasional," *Masalah-Masalah Hukum* 47, no. 1 (2018): 22-31, <https://doi.org/10.14710/mmh.47.1.2018>.

¹⁹ Imran Siswadi, "Implikasi Putusan Mahkamah Konstitusi Nomor 95 / PUU-XII / 2014 Terhadap Tindak Pidana Kehutanan." *Mandalanursa* 5, no. 2 (2021): 257-69. <https://doi.org/10.36312/jisip.v5i2.1957>.

In general, crimes committed by indigenous peoples include entering Adat lands whose Adat rights have been transferred, destruction, use of plantation land without permission, persecution, and land tenure without consent. Indigenous peoples can also be accused of interfering with people's freedoms, unpleasant acts, and threats. Articles in Law Number 18 of 2013 concerning Prevention and Eradication of Forest Destruction include Article 82 paragraph (1) letter c, Article 12 letter c, Article 94 paragraph 1 letter a and b, Article 78 Law Number 41 of 1999 concerning Forestry, and several articles in the Criminal Code such as Article 406, still applied to indigenous peoples. The interests of indigenous peoples to meet their average needs cannot be equated with mining and plantations without permits. They do not cause state losses and do not damage the environment, especially when viewed from the scale of losses that are not massive. Therefore, the law should target eradicating corporate crimes against forests organised and have an enormous impact on reducing forest damage instead of criminalising local farmers and indigenous peoples.

Non-Governmental Organisations (NGOs) representing the voices of indigenous peoples filed a judicial review of Law Number 39 of 2014 and Law Number 41 of 1999. The Constitutional Court then cancelled article 27 paragraphs 3, article 29, 30 paragraphs 1, article 42, 55 and 107 in Law Number 39 of 2014 through the Constitutional Court Decision No. 138/PUU-XII/2015, also cancelling Article 1 point 6 in Law Number 41 of 1999 through the Constitutional Court Decision No. 35/PUU-X/2012. Adat forest changed to the territory of indigenous people. Meanwhile, the previous definition classified the Adat forest as the state forest.²⁰ Adat forests do not belong to the government like state forests. However, cancelling these articles does not necessarily result in the immediate cessation of criminalisation efforts against indigenous peoples. It is still difficult for indigenous peoples to claim rights to their Adat territories.²¹

Indigenous peoples are victims of criminalisation in forest areas and the context of plantation and mining areas. However, the mistake of law enforcement officers in taking the criminalisation step has stopped the struggle of indigenous peoples. The root of the conflict lies in the appropriation of Adat territories by corporations beyond the boundaries without material and immaterial appropriate returns and the inclusion of Adat lands into state forests.

Legal regulations such as Regulation of the Minister of ATR/Head of BPN Number 18 of 2019 concerning Procedures for Administration of Adat Land of Adat Law Community Units and Regulation of the Minister of Home Affairs Number 52 of 2014 concerning Guidelines for Recognition and Protection of Indigenous Peoples requires indigenous peoples to be registered to have an official indigenous peoples acknowledgement letter from the Minister of Home Affairs and an Adat Land Certificate (or SKTA). A group of people in an Adat village area may not carelessly claim to be indigenous peoples or indigenous communities. Still, it must first recognise and regulate their rights by the state as registered indigenous peoples after obtaining an official acknowledgement letter from an official at the Ministerial level, namely the Minister of Home Affairs.

²⁰ Christin Samangun, Dady Narwawan, and Hans Orocomna, 'Implikasi Hak Pengusahaan Hutan Terhadap Hak Masyarakat Hukum Adat', *Journal Patriot*, 12.1 (2019), 25–40.

²¹ Sartika Intaning Pradhani, 'Traditional Rights of Indigenous People in Indonesia: Legal Recognition and Court Interpretation', *Jambe Law Journal*, 1.2 (2019), 177–205 <<https://doi.org/10.22437/jlj.1.2.177-205>>.

Thus, it becomes an administrative problem for them. This constitutive principle will be further applied in the Indigenous Peoples Bill, namely the stages of identification, verification, validation, and determination²² Specific protection is only given after the determination has been issued. The Indigenous Peoples Bill in the future should ensure the state's role to protect indigenous peoples so that they are protected from corporations with more economic power, education, and power regardless of whether or not there is legal recognition of them. The role of the government that must reaffirm here is only as a manager, not an owner, so it is appropriate that "state forest" and "Adat forest" have an equally important position.

In Article 46 of the Indigenous Peoples Bill, a ban is imposed on anyone who hinders legitimised Adat law communities from managing their natural resources according to local wisdom, with a penalty of 5 years imprisonment or a maximum fine of 5 billion rupiahs. The meaning of legitimacy is that indigenous peoples and Adat lands can only be recognised after the official recognition of the relevant indigenous peoples is issued, and maps of Adat areas become part of the requirements for protecting Adat land rights. Thus, it can see that the Indigenous Peoples Bill still carries the constitutive concept.

The principle that should be applied in protecting indigenous peoples is to protect first and then register. Protection is given automatically (declarative), not constitutive. The declarative principle prioritises recognising indigenous peoples' property rights, and registration is only for data collection or recording, not as a mechanism for submitting rights. For example, a similar principle can be compared with the means of legal protection through a declarative system on communal intellectual property rights in the context of IPR. A community of people owns the communal intellectual property,²³ including indigenous peoples, or a group of people from a specific area, such as indications of origin and geographical. It is also applied to genetic resources, traditional knowledge, and traditional cultural expressions.²⁴

Administrative order inspection should only examine territorial boundaries and control status for territorial legality without conflicting with other laws that also regulate land and environmental areas. However, the main priority in minimising conflicts over Adat rights over Adat lands is firm and clear tenure and area information. Protection is still provided without waiting for registration and recognition of indigenous peoples and Adat lands because the rights of indigenous peoples to Adat land are hereditary property rights, not based on commercial transactions. Therefore, the treatment must differ from the orderly administration regarding land ownership by modern societies that carry out transactions on land with property rights and derivatives of other land rights.

The Indigenous Peoples Bill in the future should also not be trapped in administrative processes that become obstacles for indigenous peoples in obtaining rights. Business interests and state revenues should continue to run smoothly, but indigenous peoples' interests are also maintained. Applying the declarative system will reduce disputes between indigenous peoples, the government, and corporations to suppress the criminalisation rate. The exemption from

²² Article 6 Indigenous Peoples Draft Bill.

²³ Anis Mashdurohatun, Adhi Budi Susilo, and Bambang Tri Bawono, 'Copyright Protection Towards the Society 5.0', *Journal of Southwest Jiaotong University*, 56.2 (2021), 394–404.

²⁴ Dwi Tiara Kurnilasari, Annalisa Yahanan, and Rohani Abdul Rahim, "Indonesia's Traditional Knowledge Documentation in Intellectual Property Rights' Perspective." *Sriwijaya Law Review* 2, no. 1 (2018): 110-130.

criminal sanctions for indigenous peoples in the Forestry, Plantation, and Environment Law could be applied more consistently.

Harmonisation of Legal Rules Related to Indigenous Peoples in Preventing the Criminalisation of Indigenous Peoples

Indigenous peoples are always born before the formation of a sovereign state. Indigenous peoples had lived on Indonesian soil long before Indonesia's independence. Therefore, it is only natural that legal protection through legal products formulated and ratified by the government does not abolish the existence of indigenous peoples as marginal people who are defeated by the economic interests of the state and the needs of people's modern life needs. Legal protection by the Indonesian government is still administrative and has not touched the main problem that causes the violation of indigenous peoples.

The confiscation of Adat rights has been carried out without realising it with the participation of the government, which should help indigenous peoples but is more in favour of corporations.²⁵ The instrument used is the decision of government officials in the form of a unilateral public legal action (one-sided) in the form of *beschikking* (decree or decision).²⁶ The meaning of control by the state is not in the owner's context, significantly if his presence limits the influence of Adat law community relations on his wealth.

Rights deprivation can initiate by issuing administrative permits that look fine at the beginning but turn out to be problematic in the future because they are issued without good faith in the context of implementing good corporate governance. The context of granting permits that impact Adat land rights includes permits and decisions issued by the Minister of Forestry, BPN to the Regent/Governor, through permits for expansion of plantation land, HGU permits, SIUP to include Adat areas into state forests in violation of rights. The phenomenon in which an indigenous community only takes a few sticks of forest products for their daily needs in an initially their ancestral land area should not happen again. The case of Adat land disputes with a broader and more severe scope, such as the case of the Laman Kinipan indigenous community.

The Dayak Tomun indigenous people are an example of indigenous peoples and Adat territories who obey the administration because they are already registered and have a map of their Adat territory²⁷, as well as the indigenous people of the Kinipan page.²⁸ However, this compliance still does not provide adequate legal protection because the indigenous peoples have not yet received formal written recognition. After all, unresolved legal conflicts over Adat forests hamper them. Thus, it appears here that administrative legality takes precedence over the value of justice and legal expediency.

²⁵ Daniel Edwin Indrajaya Gore and Ellyne Dwi Poespasari, 'Legal Protection for Indigenous People's Rights in Indonesian Law', *PalArch's Journal of Archeology of Egypt/Egyptology*, 17.4 (2020), 2516–26.

²⁶ Herman and Hendry Julian Noor, "Doktrin Tindakan Hukum Administrasi Negara Membuat Keputusan (*Beschikking*)," *Jurnal Komunikasi Hukum (JKH)* 3, no. 1 (2017): 82, <https://doi.org/10.23887/jkh.v3i1.9240>.

²⁷ Achmadi and others, 'Concept Legal Culture of the Volkgeist-Based Adat Land Rights Conflict Resolution of the Dayak To-Mun Community in Central Kalimantan Indonesia', *Asian Social Science*, 16.1 (2020), 1911–2025.

²⁸ Heru Saputra Lumban Gaol, Rizky Novian Hartono, "Political Will Pemerintah dan Pembaharuan Konsep Pengelolaan Hutan Adat sebagai Upaya Penyelesaian Konflik Agraria." *BHUMI* 7, no. 1 (2021):42-56. <https://doi.org/10.31292/bhumi.v7i1.468>.

Adat areas, whether land, forests, waters and the natural resources on them and those contained therein, have certain limits passed down from generation to generation for their daily needs. The classification should be based on structure and function without involving the right to control space through land dispossession. The Indigenous Peoples Bill itself proposes four stages in recognising indigenous peoples, namely the identification, verification, validation, and determination stages. The calculation of the area of Adat territory to fulfil the four stages is still constrained by administrative obstacles when there are no district boundaries,²⁹ It is also in conflict with the regulation of land functions as protected areas and conservation forests other than Adat forests, for example, in the Adat forest of the Kasepuhan Ciptagelar community, which clashed with the conservation forest of the Gunung Halimun National Park.³⁰

In the case of the criminalisation of the Laman Kinipan indigenous community, PT Sawit Mandiri's claim to Adat land exceeds the permit from ATR/BPN and the Lamandau Regent's Decree, which is guided by the Lamandau Regent's Decree No. Ek.525.26/15/SK-IL/VI/2012 dated June 26, 2012, regarding Location Permits, Decree to the Investment Coordinating Board No. 1/PKH/PMDN/2015 regarding the Release of Forest Areas, Decree of the Regent of Lamandau No. 503.5/09/11./XII/BPPTPM-2015 about Extension of Location Permit, Decree of the Minister of Agrarian Affairs and Spatial Planning of the Head of the National Land Agency No. 82/HGU/KEM-ATR/BPN/2017 about usufructuary rights. The local government itself considers that the status of the Laman Kinipan forest area is a protected forest, not an Adat forest, during PT. SML as a corporation that has had an official license since many years ago.

The change in the status of control and use of Adat forest lands places PT. SML in a superior position compared to indigenous peoples as the original owners. The Central Kalimantan Regional Police arrest the Dayak Tomun indigenous people who oppose or use Adat forest lands. Apart from its legal status as an Adat forest that deserves to be protected, the Laman Kinipan Adat forest is also the last tropical rainforest area that plays a vital role on the island of Kalimantan. The rainforest was still authentic and not converted, so it is at risk of disturbing the balance of nature in Indonesia. Utilisation by corporations for industrial purposes violates the rights of indigenous peoples. Inversely, it endangers the climate when the area is still the focus of control of the indigenous Dayak Tomun community with their local knowledge, which has succeeded in preserving nature.

The position of indigenous peoples has weakened since the independence of the Republic of Indonesia. The state's doctrine of control of natural resources causes the concept of ownership by Adat law communities of Adat rights to be reduced. The right of state control should not defeat the right of possession (*beschikkingsrecht*), which indigenous peoples also own as the highest right that comes from the ancient belief that there is a magical and religious relationship. Even though, in practice, it is true that when the rights of the state are dominant through policies and structures, it causes the indigenous people's rights to be reduced or even extinct.

²⁹ Mansur, Adli, and Sulaiman, "Model Penentuan Batas Wilayah Kelola Masyarakat Hukum Adat Laot; Studi Kasus Wilayah Lhok Kuala Cangkoi, Ulee Lheu." *Jurnal Geuthèë: Penelitian Multidisiplin* 3, no. 02 (2020): 465–472, <http://www.journal.geutheeinstitute.com>.

³⁰ Sitta Nabilla et al., "Implikasi Putusan MK Terhadap Eksistensi Hutan Adat Masyarakat Yang Tumpang Tindih Dengan Hutan Konservasi Taman Nasional Gunung Halimun Salak." *Diponegoro Law Journal* 6, no. 35 (2017): 1–22.

Conditional recognition by the state is allowed as long as it is in line with economic interests and national security without compromising the environment and natural resources, including indigenous peoples' existence. Recognition, according to Article 1 point 2 of the draft bill on indigenous peoples, is a written statement by the state of the acceptance and respect for indigenous peoples and all rights and identities attached to them. The Central Government's role is to provide final recognition.³¹

To achieve the goal of the orderly administration of Adat lands, including Adat forests, the government orders each Adat area to register to obtain recognition. For example, the obligation to register Adat forests for recognition must recognise by the state's Ministry of the Environment. Recognition of indigenous peoples through indicative maps approved by the regent/mayor according to the location of the Adat law community. This implementation contrasts with the practice of recognising state forest areas belonging to the government, which has provided legal protection for pre-recognition and ratification of registration. Government should not state-sizing Adat areas.³² Adat forests and state forests should have equal and equally essential protection priorities. This difference in treatment causes Adat forests to remain vulnerable to being the target of business exploitation.

Every certificate of proof of land ownership and permits is indeed strong evidence of land ownership status as immovable property. Still, the legal certainty provided by the certificate and permit should support the legal aspect to fulfil legal certainty in the administrative order. Do not rule out legal justice, which is also essential to achieving legal goals for every class of society. Certificates and land permits, including proof of recognition of Adat community status registration, can be used as guidelines in legal actions and binding business agreements with Adat land objects. Still, the legality of correspondence alone does not determine the value of Adat land. Indigenous lands have been owned, used, and controlled by indigenous peoples long since implementing the rules for land certificates, investment permits, and Adat community registration letters, where the government created the entire system. It even existed long before the Republic of Indonesia was born.

Adat rights arise from an inner relationship passed from generation to generation, which is stronger than the legal force offered by a certificate of proof of ownership. The internal relationship is even a magical religious belief that land is a gift and supernatural power from ancestors deliberately passed on to their descendants throughout the ages without being bound by time so that their rights are eternal. Responding to this logical basis, the Indigenous Peoples Bill, which consists of 17 chapters and 58 articles, should be a new hope in fighting for the rights of indigenous peoples and must be able to restore the rights of citizens who have been mistreated. It should not just straighten out administrative procedures, even though it is also crucial for responsible *beschikking*.

Adat land that is appropriately used plays a role in maintaining the balance of nature. Humans can indeed change the shape and arrangement of their environment by burning forests, changing the land surface, and diverting the flow of rivers to build agricultural land and cities. Moreover, the number of people on earth has overgrown and requires a broader land area as the

³¹ Article 37 letter d Indigenous Peoples Draft Bill.

³² Noer Fauzi Rachman and Hasriadi Masalam, "The Trajectory of Indigeneity Politics Against Land." *Sriwijaya Law Review* 1, no. 1 (2017): 98–113.

demands of life are increasingly complex in this digital and sophisticated era. Nature is also affected. The oceans are acidic and polluted, the quality of the atmosphere is deteriorating, coral reef populations are critical, the area of tropical rainforests is decreasing, and biodiversity is declining. The high intensity of human needs gave birth to new legal relationships on Adat lands in the realm of public administration law and civil law. In this case, Adat land use should not only harm the interests of indigenous peoples, nor should it cause a natural imbalance due to over-manipulation of Adat land use.

Dispute resolution in the context of internal disputes within the Adat Law Community is resolved through the Adat Institution by deliberation and resulting in the decision of the Adat Institution. Adat sanctions are a component that determines the validity and binding power of Adat law if a case occurs between indigenous peoples and fellow indigenous peoples.³³ However, Adat sanctions cannot be applied to cases of indigenous peoples against corporations in the context of Adat land conflicts.

Adat land disputes are settled in the district court. However, when there are cases of Adat land disputes or criminal cases related to indigenous peoples, NGOs generally assist indigenous peoples from the non-litigation stage.³⁴ At this stage, complaints are usually submitted to local governments such as the Regent or Mayor and the local DPRD, relevant Ministries (Ministry of Environment, BPN, Ministry of Forestry), and Komnas HAM. The role of NGOs in assisting indigenous peoples when disputes occur is carried out proactively through court friends (*amicus curiae*). For example, the Institute for Community Studies and Advocacy (ELSAM) sent *amicus curiae* for the Criminalization Case of the Sakai Tribe for Article 82 Paragraph (1) letter c of Law Number 18 of 2013.

Legal harmonisation aims to harmonise written law that refers to philosophical, sociological, and juridical values. From a philosophical aspect, the Indigenous Peoples Draft Bill should carry out the mandate of Article 18 B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution concerning the existence and rights of indigenous peoples, including their Adat lands and Article 33 concerning the state's authority to control the earth including land with tenure rights. The mandate of these articles could be regulated and implemented coherently.

The rules that are hierarchically under the 1945 Constitution must not conflict with the spirit and philosophy contained in the three articles. In the example, Law Number 41 of 1999 concerning Forestry, which initially did not concede the existence of indigenous peoples, was later changed with the Constitutional Court Decision Number 35/PUU-X/2012, which made the status of Adat forests not part of state forests. Therefore, their existence must require since the early stages of drafting regulations.

From the sociological aspect, there should not be a gap between the regulation of Adat land at the *das sollen* level and the implementation of the transfer of Adat rights to private and corporate lands at the *das sein* level, resulting in conflicts between indigenous peoples and non-

³³ Umbu Rauta et al., "Tiga Gerakan Moral Sebagai Hukum Adat Masyarakat Sumba Tengah." *Refleksi Hukum: Jurnal Ilmu Hukum* 1, no. 2 (2017): 213-231. <https://doi.org/10.24246/jrh.2017.v1.i2.p213-232>.

³⁴ Yance Arizona, Muki Trenggono Wicaksono, and Jacqueline Vel, 'The Role of Indigeneity NGOs in the Legal Recognition of Adat Communities and Adat Forests in In-Donesia', *The Asia Pacific Journal of Anthropology*, 20.5 (2019), 487-506.

indigenous peoples. Both parties have different values of life and different purposes for using Adat land. There is a risk of problems arising from social changes that occur in people's behaviour. Adat land, which was initially valued for social and religious purposes, then shifted to the economic interests of individuals and corporations, which the government facilitated as the institution authorised to issue permits.

From the juridical aspect, the Indigenous Peoples Draft Bill has good intentions in applying criminal sanctions to outside parties such as corporations. According to local wisdom and legislation, it could prevent indigenous peoples who have been given recognition in managing and utilising natural resources in their Adat areas with threats of imprisonment for a maximum of five years or a fine maximum of five billion rupiahs. However, this article should be a counterweight. Criminal sanctions in the Bill on Indigenous Peoples and other related regulations do not turn against indigenous peoples as inferior parties, namely by applying criminal sanctions and legal protection provided by the government since before a community or society. Adat is administratively registered because indigenous peoples have grown and survived since time immemorial and must still be respected, whether they have been or have not been registered. Therefore, the Indonesian government should prioritise the declarative legal protection system.

CONCLUSION

The criminalisation of indigenous peoples still occurs because the legal protection provided by the Indonesian government to Adat lands is not yet perfect. Existing legal rules such as the UUPA, Forestry Law, Plantation Law, Environmental Law (including various implementing regulations), and new draft regulations such as the Indigenous Peoples Draft Bill still prioritise administrative order and document legality over legal justice. Legal protection is given after the issuance of recognition and registration. The status of indigenous peoples thereby overrides the indicative principle in determining Adat territories and weakening the position of indigenous peoples when Adat land disputes occur, leading to the imposition of criminal sanctions. Protection of indigenous people should automatically provide, or in other words, a declarative system, not a constitutive one. The declarative system needs to be applied to confirm the existence of indigenous peoples from the early stages of drafting regulations for the conformity of the philosophy of indigenous peoples' rights. Harmonisation of existing legal regulations and the bill must meet philosophical, sociological and juridical aspects to be more synchronised with relevant laws at the central and sectoral levels. So, there is no conflict in the implementation. Existing legal regulations such as the Forestry Law, Plantation Law, and the Environment Law need to be accompanied by steps to abolish criminal articles against indigenous peoples to stop the criminalisation of indigenous peoples who deviate from justice and expand legal assistance for indigenous peoples in the context of implementing the rule of law.

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