**THE LAND BURNER FOR PLANTATION: BETWEEN COMMUNAL TRADITION AND POSITIVE LAW OF INDONESIA**

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**ABSTRACT**

The purpose of this research is to study the land burning for plantation in the perspective of Dayak Kotabaru tradition in South Kalimantan Province and positive law perspective in Indonesia. This study uses normative juridical research methods. This normative legal research is carried out in a descriptive qualitative manner. The legal material is collected, sorted for subsequent research and analysis of their contents, so that the synchronization level, the appropriateness of norms, and the submission of new normative ideas. The results of this study found that in the customary culture of the Dayak Kotabaru tribe of South Kalimantan Province there is a tradition of burning land for plantation, which is also related to the concept of shifting cultivation. Customary tradition regarding the burning of land is not prohibited in customary law as long as it is in accordance with customary procedures and traditions. Whereas in positive law prohibits the burning and for plantation with a few exceptions related to the local culture of the indigenous community. In-depth studies are needed so that regulations aimed at eliminating the massive impact of haze still do not sacrifice indigenous rights with their lifestyle.

**Keywords**:*Burning, Swamps, Customs.*

1. **INTRODUCTION**

In Indonesia, forest and land fires in a number of areas had become a serious concern, especially when the 2015 forest and land fires that attracted serious attention from international countries. forest and land fires continue to occur every year with air pollution levels that are above average, especially in oil palm plantations. The burning of plantations in Indonesia is allegedly intentional by some aspects by utilizing the dry season / dry season for personal and company benefits and by saving on production costs and taking a relatively short time.

In 2018 forest fires in Indonesia have increased compared to 2017. The Ministry of Environment and Forestry (KLHK) recorded in January to August 2018 marked an area of ​​194,757 hectares of forests in Indonesia burned. This figure shows an increase when compared to the area of ​​forest that burned in the previous year, which is 165,528 hectares. In addition to the area, the number of hotspotsalso increased. In 2018, the number of hotspots was 9,205, while in 2017 there were 2,440 hotspots.

Table 1. Graph of Hotspots in 2017 to 2019



Source: Taufan Adharsyah.Source: SiPongi

Seen from the number of hotspots recorded during January-June 2019 as many as 1,772, which increased by 505 points from the same period in 2018. (cnbcindonesia.com: 2019)

 Table 2. Graph Number of Hotspots for the period January-July 2017 to 2019



Source: Taufan Adharsyah.Source: SiPongi

Indeed, forest fires affect not only human health but also affect political stability and bilateral relations with neighboring countries . In addition, forest and land fires also cause material losses. The significant negative impacts caused by forest fires include ecological damage, declining biodiversity, declining economic value of forests and soil productivity, micro and global climate change, and smoke disturbing public health and disrupting transportation both land, river, lake, sea, and air. Smoke disruption due to Indonesian forest fires that have even crossed national borders. So the losses incurred are also substantial covers economic, social, and environmental losses. (Worldbank).

In 2015 the World Bank reported through the report "Indonesia Economic Quarterly," a total loss of Rp. 221 Trillion. This amount is equivalent to 1.9% of Indonesia's total Gross Domestic Product (GDP) in 2015 and is twice the cost of reconstruction due to the 2004 Aceh Tsunami. The sector that suffered the most significant loss was agriculture. In a World Bank record, the value of this sector's loss in 2015 due to fire reached Rp 66.4 trillion (cnbcindonesia.com: 2019).

Forest fires often result from the burning of plantation land by the community. Although the burning of plantation land is not extensive, it can spread during strong winds and summer (Liputan6.com: 2019). Especially fires in the peatland area, it has a much higher impact than that on mineral land because of its fire density. (Herry Purnomo et al.: 2017).

 In Indonesia, the regulation of land burning is not only regulated in positive law contained in several rules but also regulated in customary law, which is derived from traditional customs / traditions carried down for generations. One of them is the customary law of Dayak Kotabaru, South Kalimantan.

1. **PROBLEM FORMULATION**

Based on the aforementioned background, it is interesting to study *first*, the extent to which the provisions of the Dayak Kotabaru customary law of South Kalimantan Province regulate the burning of plantation land. *Second*, the regulations on burning land for plantation in the positive law of Indonesia. *Third,* theapplication of positive law to indigenous peoples in traditional farming through burning land.

1. **RESEARCH METHODS**

This study uses normative legal research methods. Normative legal research is legal research that puts law as a norm building system. The norm system is about the principles, norms, rules of legislation, court decisions, agreements, and doctrines (Mukti Fajar and Yulianto Achmad: 2015). This type of research will refer more to the legal norms contained in legislation, court decisions, and general habits that are related but do not neglect the legal issues more meaningfully by making comparisons between *law in book* and *law in* *action*. (David M. Fetterman: 1998). Normative research is also interpreted as research by examining library materials (Soerjono Soekanto: 2007).

1. **DISCUSSION**

In positive law in Indonesia, the provisions on forest and land burning are regulated differently. But if you look at the practice in the community, the real prohibition of the burning land is a problem for shifting farmers who are mostly indigenous people who manage plantations in the traditional way. If you look at Law Number 32 of 2009 Concerning Environmental Protection and Management, there is a prohibition on pollution, inserting dangerous and toxic objects, entering waste into environmental media, opening land by burning and others. Where the ban is also followed by criminal provisions for violators. (Tribunnews: 2018).

In addition to being positive in law, Indonesia also recognizes customary law as one of the norms that are valid and adhered to by certain indigenous peoples. In South Kalimantan, for example, there are several indigenous tribes that have different laws. One of them is the Dayat Indigenous Tribe, which is also spread in several regions.

Burning itself is an intentional act of burning something with a specific purpose. Fire is the burning of something that creates danger or brings disaster. Fires can occur due to uncontrolled combustion, due to natural, spontaneous processes, or due to human negligence. The source of natural fire is lightning that grabs trees or buildings, volcanic eruptions that spread lumps of fire, and friction between dry branches of plants due to wind shaking that causes heat or sparks (KRMT Tejoyuwono: 2006).

Negligence is caused due to forgetfulness, ignorance, or carelessness so as to make accidental wrong actions. A combustion that causes a fire cannot be called negligence because it deals with the use of fire that is not controlled. This kind of event is produced by intentional ignorance of the conditions for applying fire technology. (KRMT Tejoyuwono: 2006).

Land burning in Indonesia is regulated in several regulations. Among them: ***First***, the Law governing the prohibition of opening area by burning is contained in Article 56 Paragraph 1 of Law Number 39 Year 2014 concerning Plantations, which states that "every plantation business actor is prohibited from opening and / or cultivating land by burning" .

***Second****,* Law Number 32/2009 on Environmental Protection and Management regulates, which prohibits anyone from clearing land by burning. But in this law it is permissible to burn land with several provisions. Among them by understanding the local culture of each region. (Article 69 Paragraph 2 of Law 32/2009). Local customs in this provision is to burn land with a maximum land area of ​​2 (two) ha per head of family to be planted with local varieties and surrounded by firebreaks to prevent the spread of fire to the surrounding area.

***Third***, the Environmental Regulation Number 10/2010 on the Mechanisms for Preventing Pollution and Environmental Damage on Forest and Land Fires Article 4 Paragraph (1) states that indigenous and tribal peoples who burn land with a maximum land area of ​​2 ( two) ha per head of family to be planted with local varieties must notify the village head with the note that it is not carried out under normal rainfall conditions, prolonged drought and or dry climate.

***Fourth***, in addition to the aforementioned provisions, in several regions also issued regional regulations governing land and forest fires. For example Central Kalimantan Governor Regulation Number 15/ 2010 on Guidelines on Land and Opening for Communities in Central Kalimantan, or Regional Regulation of the Province of South Kalimantan Number 1 / 2008 on Control of Land and Forest Fires which is under revision in 2019 (Tribunnews: 2019) .

What about customary traditions, which are also recognized as law for certain indigenous peoples in the legal system in Indonesia? Look at the definition of indigenous peoples found in Article 1 Paragraph 6 of Law 39 of 2014, namely a group of people who have traditionally lived in some geographical regions in the Unitary State of the Republic of Indonesia because of ties to ancestral origins, strong relationships to land , territories, natural resources which have customary government institutions and customary legal arrangements in their customary territories. Customary law is one source of unwritten law that is recognized and valid in social life.

The existence of this recognition is basically inseparable from the legal, political foundation that promises to the future generations of environmental rights. Therefore by granting legal recognition and political clout to the communal-based environmental rights for future generations. (Richard P. Hiskes: 2017). However, it needs to be understood that in a regulatory manner, there is only recognition of communal rights (Chip Fay and Ho-Ming in McCarthy: 2016) while the protection of collective rights in practice is still an ongoing problem whereas seeing several development studies that deforestation in Colombia decreased in communal areas after titling provided evidence of positive spillovers of reduced deforestation in nearby areas. (Romero & Saavedra: 2019).

In the customary traditions of several indigenous tribes, such as the Kotabaru Dayak customary law, the burning land for plantation is an agricultural tradition that is not a violation. With notes made through customary methods and provisions. The land burning was carried out in mutual cooperation, and alternately each head of the family involved all the villagers. The combustion process is carried out until entirely from the moment the fire is ignited until the fire goes out. In this process all residents were involved in one another by involving village and adat officials. The area of ​​land burned is not too large with alternating procedures.

The magnitude of the impact caused by forest and land fires caused forestry problems to get serious attention from the government, plus the pressure from other affected countries. Repressive acts of law enforcement against forest and land fire perpetrators have become massive news in the mass media. Indigenous peoples with the tradition of burning land for farming from generation to generation did not escape the law enforcement efforts. This is what later caused turmoil in Indigenous Peoples.

Actions and arrests (conviction) of indigenous peoples show that there is a mismatch between the spirit of prevention and mitigation of the impact of forest and land use with the protection of the forms of local wisdom prevailing in indigenous peoples. This is a problem that causes indigenous people to become increasingly discriminated against in the development of law and the economy (Richard Herz: 1993). So that measurable and structured steps are needed to bridge and accommodate both sides of the interest. Broadly speaking, several alternatives that can be formulated as a choice of solutions include:

1. Detailed regulation design refers to the regulatory hierarchy, ensuring that each regulation determined must be followed and elaborated by legislation below it in more detail to the level of technical guidelines for procedures / traditions and *Operational Procedure Standards* ( SOP) farming of indigenous peoples in each customary area. The aim is that the definition of acquisition and prohibition in regulation truly becomes a collective agreement with all elements of law enforcement and indigenous peoples in each customary area.
2. Facilitate the regulations through socialization for the smallest entities of indigenous tribes as a tradition to ensure these regulations awareness by minor units of indigenous peoples. One of the reasons for the criminalization of cultivators from indigenous peoples is their ignorance of the existence of rules that forbid the traditions they have adopted for generations. Considering the social life, communication patterns and interaction of indigenous peoples, it is necessary to adapt the method of socialization and assistance to the targets of indigenous peoples.
3. Assessment and comparison of agricultural methods, application of technology that is more efficient, effective, and economical. Economic reasons are the primary consideration for indigenous peoples choosing to burn land for agriculture. Alternative management of agricultural land is needed to create new local values, which can remain in line with technological developments and law. The inheritance of indigenous farming as an effort to fulfill basic human needs certainly cannot be limited by regulations without better substitution of land management and agriculture from various aspects that influence it.
4. **CONCLUSION**

The burning land of agricultural land in the concept of local tradition is part of culture in Indonesia. Local culture practices of land clearing through fire have been regulated in a number of laws. The implementation of this regulation needs supervision and coordination between related institutions and agencies.

The tradition of burning plantation land, which is also related to the concept of shifting cultivation and the culture of harvest celebration in the idea of adat is considered to be a local custom. Customary tradition regarding burning of plantation land is not something that is prohibited in customary law as long as it is in accordance with customary procedures and traditions. In positive law in Indonesia as stipulated in several regulations, actually burning of plantation land is a prohibited act, but several other provisions regulate by adjusting local wisdom in the community.

The regulation was made as a form of reaction to the magnitude of the impact of forest and land fires as outlined in several laws, of course, based on ethical values. However, if it is not elaborated either in the design, definition, and classification of technical implementation, it will potentially cause problems for indigenous peoples. Depth study required that the regulation which aims to eliminate the significant impact of smoke still could turn on little smoke at *rumah* *betang* indigenous peoples.

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