



Legal Protection of Forest Customary Rights in Land Procurement from the Mineral Mining Industry

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Abstract: *This research aims to determine if legal protection is available for the use of forests, which are the customary rights of Adat and Indigenous Community from the mineral mining sector, which demands the use of extremely large territories. Fulfillment the utilizes state-controlled forest land, including protected forests, and industrial forests could be challenges. By considering environmental sustainability, legal protection ensures sustainable growth. To legally maintain customary forest rights, this study employs normative-juridical research utilizing primary and secondary legal sources about the acquisition of land for the mining sector, particularly for mineral mining. Agrarian, forestry, mining, and environmental protection and preservation legislation and decisions of the Constitutional Court of Indonesia on mining are examples of authoritative primary legal texts. All legal publications—including books, dictionaries, journals, and comments on court judgments—are considered secondary legal sources. This study finds that the legal protection of Adat and Indigenous Community's customary forest rights over the availability of land for mining firms must be profitable, prosperous, and fair for Adat and Indigenous Community members. Adat and Indigenous Community are community associations that live and grow happily together in a hereditary region based on ancestry and similarity of habitation. Forest use for this purpose requires a Borrowing and Use Permit, which must include criteria for periodic, quantitative, and transparent environmental management, and preservation.*

Keywords: *customary forest rights; land provision; legal protection; mineral mining business.*

I. Introduction

Indonesia is a state of law (*rechtsstaat*)¹ as mandated by the founding fathers of the

nation embodied under the 1945 Constitution of the Republic of Indonesia. Under the rule of law, the life of the nation and state must be

¹ Explanation of the 1945 Constitution

based on both written and unwritten laws. Every citizen is equal in the eyes of the law and government and is obliged to uphold the law and government with no exceptions².

Community associations that cohabitate and peacefully develop in one area passed down from generation to generation—based on genealogy and similarity of residence with patterns of order and traditional characteristics that are firmly held, believed, and obeyed to be conducted in common life with boundaries within the territory's certain binding force—are known as Adat and Indigenous Community (in Indonesia they are called *Masyarakat Hukum Adat*).

Adat and Indigenous Community is patterned as an association community that has its own characteristics and unique traits specifically owned by the members and not by other communities in different areas. Hence, all Adat and Indigenous Community in certain areas have customary and traditional rights attached to them that are maintained, developed, passed down from generation to generation. Based on Emily E. Harwell and Owen J. Lynch³, detailed rights are divided into 8 (eight) spectrums in ownership rights, in accordance with Adat and Indigenous Community ownership rights as follows:

1. Public property;
2. Private property;

3. Group rights;
4. Individual;
5. Public group;
6. Private individual;
7. Private group; and
8. Public individual.

At least 18 laws and regulations have been recognized during this reformation period for Adat and Indigenous Community. Primary examples of these laws and regulations include Article 18 B, Paragraph 2, and Article 28 I, Paragraph 3, of the 1945 Constitution of the Republic of Indonesia (hereafter, the 1945 Constitution) and in an MPR Decree No. XVII/MPR/1998 on Human Rights (HAM) Article 32⁴ and Chapter 41⁵ and in MPR Decree No. IX/MPR/2001 concerning Agrarian Reform and Natural Resource Management, Article 4, Item j.⁶ Likewise, juridically, through the decision of the Constitutional Court No. 06/PMK/2005⁷, the existence of legal protection has been recognized relative to the preservation of sustainable natural resources (SNA), especially concerning the protection of customary lands in the Adat and Indigenous Community unit. Furthermore, recognition, and protection are supported by the decision of the Constitutional Court No. 35/PUU-

² Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia

³ Emily E. Harwell and Owen J. Lynch, *Whose Resources? Whose Common Good? Towards A New Paradigm Of Environmental Justice And The Natioanl Interest In Indonesia* (Center for International Environmental Law (CIEL), 2002), 8; Owen J. Lynch, "Promoting Legal Recognition Of Community-Based Property Rights, Including The Commons: Some Theoretical Considerations," in *Symposium of the International Association for the Study of Common Property and the Workshop in Political Theory and Policy Analysis* (Bloomington, Indiana: Indiana University, 1999).

⁴ Article 32, Tap MPR No. XVII/MPR/1998 states: "Everyone has the right to have private property

rights and these property rights cannot be taken arbitrarily".

⁵ Ibid., Article 41, stated: "The cultural identity of traditional communities, including rights to customary lands are protected, in line with the times."

⁶ Article 4 letter j, MPR Decree No. IX/MPR/2001 states: "recognize, respect, and protect the rights of indigenous peoples and the nation's cultural diversity to agrarian resources/natural resources."

⁷ Constitutional Court Regulation Number 6/PMK/2005 concerning Guidelines for Proceeding in Cases Reviewing Laws against the State Constitution.

X/2012⁸. This was decided on May 16, 2013 related to a review of the Forestry Law that states that customary forests are no longer state forests. Likewise, in the decision of the Constitutional Court⁹ No. 55/PUU-VII/2010 and No. 122/PUU-XIII/2015 concerning plantations in relation to the rights of indigenous peoples (Adat and Indigenous Community), is considered a legal subject that is *gemeenschaap* (a legal alliance formed naturally due to social, economic, and political developments) and not a *verenigingen* (an alliance formed intentionally for the economic, social, and political interests of the people). As a legal entity, Adat and Indigenous Community has public rights (authorities).

Beginning from the link with the Ulayat Forest Rights or Customary Forests, as stated in the Constitutional Court Decision above, customary forests are no longer considered state forests. Hence, logically, when the government issues technical regulations under the law to regulate private forest issues (e.g., Minister of Environment and Forestry No. 32/2015 concerning Private Forests), the government includes provisions for changing the Forestry Law norms.

The forestry sector is experiencing degradation and deforestation. Damage or degradation of forest resources will most likely occur in open-access forests according to:¹⁰

1. Who is allowed to appropriate forest products;

2. The timing, quantity, location, and technology of appropriation;
3. Who is obligated to contribute labor or funds to provide or maintain the forest;
4. How appropriation and obligation activities are to be monitored and enforced;
5. How conflicts over appropriation and obligation activities are to be resolved; and
6. How the rules affecting the above will be changed over time with changes in the extent and composition of the forest and the strategies of participants.

Peter Ekbäck¹¹ categorizes property rights into 3 (three) regimes: (1) open-access, (2) common property, and (3) private property. Open-access resources can be claimed and used by anyone as there is no exclusivity (nonexclusive), and they can be transferred (transferable rights). Resources with a common property ownership regime are (1) jointly owned, (2) held in common, and (3) by a limited group of individuals. Communities have the right to exclude others from using its resources, and use by community members is monitored and determined by the group. Usually, rules exist that have been approved by the community members who position the majority of members to make binding decisions on matters that must be determined by majority vote. Finally, private property refers to rights over natural resources that cannot be limited by law and are held by certain individuals exclusively.

To avoid the tragedy of the commons, Elinor Ostrom describes eight design principles that contain important elements or conditions that

⁸ Decision of the Constitutional Court (MK) No. 35/PUU-X/2012 related to the Review of the Forestry Law. In this decision there is an acknowledgment of the existence of ADAT AND INDIGENOUS COMMUNITY as legal subjects.

⁹ Decision of the Constitutional Court (MK) No. 55/PUU-VIII/2010 and No. 122/PUU-XIII/2015 related to Review of the Plantation Law and the rights of Indigenous Peoples (ADAT AND INDIGENOUS COMMUNITY).

¹⁰ Elinor Ostrom, "Self-Governance And Forest Resources," *Occasional Paper*, no. 20 (1999): 2.

¹¹ Peter Ekbäck, "Private, Common, And Open Access Property Rights In Land-An Investigation Of Economic Principles And Legislation," *Nordic Journal of Surveying and Real Estate Research* 6, no. 2 (2009): 57–74.

must be met to achieve successful sustainability of the commons and ensure compliance from all succeeding generations. These eight principles are as follows ¹² :

- a. *Define clear group boundaries.*
- b. *Match rules governing use of common goods to local needs and conditions.*
- c. *Ensure that those affected by the rules can participate in modifying the rules.*
- d. *Make sure the rule-making rights of community members are respected by outside authorities.*
- e. *Develop a system, carried out by community members, for monitoring members' behavior.*
- f. *Use graduated sanctions for rule violators.*
- g. *Provide accessible, low-cost means for dispute resolution.*
- h. *Build responsibility for governing the common resource in nested tiers from the lowest level up to the entire interconnected system.*

In contrast, this study focuses on protecting Adat and Indigenous Community based on their customary forest or customary forest rights from the mining company or industry. The uniqueness of Adat and Indigenous Community contains their extremely important qualities as their natural resources may support development capital in all domains, both material, and spiritual, for the prosperity, and welfare of the people within the Adat and Indigenous Community without exception. Mining businesses or industries are closely tied to the initial business by supplying land with big enough areas with circumstances that do not interfere with environmental (ecological) management and sustainability. The mining industry or business requires a continuous and integrated process at all stages of the mining activity. These stages

include general investigation, exploration, feasibility study, construction, mining, processing and refining, transportation and sales, and post-mining activities. Proper planning and implementation involves a sequence of sustainable and ecologically sound mining management intended for reducing the negative impacts of mining company activities. For example, 13 (thirteen) businesses still receive licenses to perform open mining in a protected forest region with a total land usage of 927,648 ha., scattered throughout Papua, East Kalimantan, South Sulawesi, Southeast Sulawesi, North Sulawesi, the Archipelago Riau, North Maluku, South Kalimantan, East Kalimantan, and North Maluku. In this way, future generations can both appreciate and know the stories of their communities.¹³

Based on the foregoing, the authors suggest the following research project: Legal Protection of Forest Customary Rights in Land Procurement from the Mineral Mining Industry. Therefore, this study focuses on Adat and Indigenous Community rights to production forests, protected forests, and customary forests, which are primarily discussed in Law Number 41 of 1999 Jo. Law Number 19 of 2004 (Forestry Law), PPLH Law (Protection and Management of Environmental Law), and Minerba Law (Mineral, Energy and Coals Law).

II. Legal Materials and Methods

This type of research is normative legal research or doctrinal legal research, namely legal research that conceptualizes law as a norm, because this research is normative legal research, to solve or answer the

¹² Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (New York: Cambridge University Press, 1992), 90.

problems (legal issues) proposed approaches are used: first, a conceptual approach (conceptual approach), and secondly, the statutory approach (statute approach). The analysis technique used for both primary and secondary legal materials is carried out using descriptive techniques and qualitative interpretation. The primary legal materials used are authoritative materials: statutory regulations such as the Agrarian Law, Forestry Law, Mining Law, Environmental Protection and Preservation Law and Constitutional Court Decisions concerning Open Pit Mining in Areas Protected forest. The secondary legal materials used are all legal publications such as text books, legal dictionaries, legal journals, and comments on court decisions.

III. Results and Discussion

Adat and Indigenous Community and Environmental Sustainability of Customary Forests

The main effort that must be prioritized by the state to realize a just and prosperous life with justice for all its people without exception, including Adat and Indigenous Community, is sustainable equitable development without environmental damage. This is followed by formulating a sustainable development program (i.e., environmentally

sound development). Environmentally sound development is an effort to gradually improve the quality of human life by considering people's environments and how they cohabitate as community members. Environmentally sound development is known as sustainable development.¹⁴

According to R. La Porta, the state's interest in providing legal protection has 2 (two) characteristics: prevention and punishment.¹⁵

To ensure that the development process is environmentally sound, special attention must be given to the mining industry¹⁶. The mining industry process starts from scratch and is related to the provision of large areas of land or locations, at least ten, hundreds, or even thousands of hectares in one location. The existence of this vast land, of course, can only be provided by state or customary forests. Under the provisions of Law No. 41 of 1999 Jo. Law Number 19 of 2004 concerning Forestry¹⁷, Article 38 explains that "mining is allowed in the production forest area¹⁸ and protected forest."¹⁹ The target involves customary forest rights. The mining industry demands continuous and integrated process at all stages of mining activities. These include part or all activities in the context of research, management, and exploitation of minerals, or coal. In turn, these include general investigations,

¹⁴ <http://www.pradietapelestarianlingkunganHidup.blogspot.com>, understanding of the environment, accessed on February 19, 2014.

¹⁵ Rafael La Porta, "Investor Protection and Corporate Governance," *Journal of Financial Economics*, no. 58, October (1999): 9.

¹⁶ There are 3 types of mining business that is: Class A, or strategic mining materials. Is a mining material that can only be owned by the government. Examples include: coal, petroleum, aluminum, tin, iron, etc. Group B, or vital minerals. Is a mineral that can guarantee the livelihood of many people. Examples include: gold, silver, magnesium, zinc, tungsten, gemstones, zinc, etc. Group C, namely mining materials that are not included in groups A or B. Examples are industrial materials.

¹⁷ UU no. 19 of 2004 Regarding the Stipulation of Government Regulation in Lieu of Law No. 1 of 2004 concerning Amendments to Law No. 41 of 1999 concerning Forestry into Law.

¹⁸ Protected forest is a forest area that has a main function as a protection for life support systems, namely, to regulate water systems, prevent flooding, control erosion, prevent seawater intrusion and maintain soil fertility.

¹⁹ Production forest is a forest area that has the main function of producing forest products. Production forest consists of Permanent Production Forest (HP), Limited Production Forest (HPT) and Converted Production Forest.

exploration, feasibility studies, construction, mining, processing, and refining, transportation and sales, and post-mining activities²⁰. Proper planning and implementation involve a series of sustainable and environmentally friendly mining management to counteract the negative impacts of mining business activities.

Consequences of land acquisition for mining businesses related to customary forest land/customary forest rights under Adat and Indigenous Community customary rights must be protected in accordance with Law No. 4/2009 on Mineral and Coal Mining, which states that the legal principles of mining management²¹ are based on benefit, justice, and balance; siding with the interests of the nation; participation, transparency, and accountability; and sustainability and environmental soundness.

Since the 1972 United Nations Conference on the Environment in Stockholm, sustainable development began receiving great attention from countries worldwide. Globally, countries realized that besides individuals being citizens of a country, they are also citizens of the world. The convention placed sustainable development as the main issue facing future development challenges, which are increasingly deprioritizing environmental sustainability. Development is not only aimed at material/economic aspects but also environmental sustainability for the future of the next generation, which must be realized from now on, before it is too late. In the 1980s, the global political agenda for the environment began focusing on the

sustainable development paradigm that emerged in the World Conservation Strategy of the International Union for Conservation of Nature. Lester R. Brown used the term “sustainable development” in his book *Building a Sustainable Society* (1981). The term then became very popular through the Brundtland report, “Our Common Future.”²²

Sustainable development was defined by the World Commission on Environment and Development in its report to the United Nations in 1987. This sustainable consideration certainly must not leave the concept of justice, which is the basis, and the main need—public welfare. During and after the globalization of the economy and information, the world has become increasingly borderless within the sovereignty of their respective independent countries. Subsequently, in the 1992 Summit in Rio de Janeiro, Brazil, sustainable development with economic and social aspects was successfully formulated. Environment, essentially driven by environmental damage, tends to be severe. Historically, economic development is emphasized too much that environmental aspects and natural resource conservation are sacrificed. In the Earth Summit, a conflicting dichotomy emerged: saving the environment and increasing economic development.²³

Sustainable development was defined as “development that meets the needs of the present generation without compromising the ability of future generations to meet their needs.” This definition was then used as a principle in the Rio Declaration at the Earth

²⁰ Adapted from Article 1 point 1 of Law no. 4 of 2009 concerning Mineral and Coal Mining.

²¹ Chapter 2 Law no. 4 of 2009 concerning Mineral and Coal Mining.

²² A. Sonny Keraf, *Etika Lingkungan: Teori-Teori Etika, Etika Lingkungan, Dari Ilmu Pengetahuan*

Dan Teknologi Kembali Ke Kearifan Local (Jakarta: Kompas, 2006), 166.

²³ N.H.T Siahaan, *Hukum Lingkungan Dan Ekologi Lingkungan* (Jakarta: PT Gelora Aksara Pratama, 2004), 140.

Summit in Rio de Janeiro in 1992.²⁴ Sustainable development contains two (2) important ideas: (a) the idea of needs, especially basic human needs to support life, and (b) the idea of limitations, or the limited ability of the environment to better meet current and future needs.²⁵ Several principles of sustainable development have been agreed upon, accepted, and referenced by countries in the world that have forests as follows:

1. *Principle of intergenerational equity*

This principle is based on the fact that natural resources are a gift from God for future generations. Each generation safeguards the Earth for the next generation and, simultaneously, benefits from the efforts of the previous generation.

2. *Principle of justice in one generation (intragenerational equity)*

This principle is called intragenerational equity, which is closely related to environmental problems, requiring community togetherness. Justice existing in people's lives in a generation describes the objective conditions of life created especially in the framework of sustainable development that prioritizes attention to the protection of natural resources and environment from damage.

3. *Principle of early prevention (precautionary principle)*

Conclusive and definite scientific evidence being absent in the threat of irreversible environmental damage cannot be used as an excuse to delay efforts to prevent environmental damage.

4. *Principle of biodiversity conservation*

This principle emphasizes that biological natural resources are to be maintained and developed. These include efforts to diversify in the context of food, medicine, maintenance of soil fertility. Additionally, the environment is considered a place and source of recreation and a source of inspiration and cultural identity.

5. *Principle of internalizing environmental costs*

This principle means that environmental and social costs must be integrated into the decision-making process related to the use of natural resources. As a result of economic activity, social costs of environmental damage must be considered important to the decision-making process to achieve both short- and long-term economic benefits.²⁶

Since the Stockholm Declaration in 1972 to Rio de Janeiro in 1992 and according to Johanes Bek in 2002, coordination, and integration of natural resources, human resources, and artificial resources are necessary in every nation's development plan. Population, development, and environmental approaches must integrate social, economic, and environmental aspects.²⁷

According to A. Sonny Keraf, sustainable development at the Rio Summit was considered a political development agenda for all countries in the world. Keraf stated that the sustainable development paradigm has limited implementation not only in Indonesia but also worldwide owing to greater prioritization on economic growth.²⁸

According to Susan Smith, sustainable development improves the quality of life of

²⁴ Siahaan, 71.

²⁵ Siahaan, 71.

²⁶ Siahaan, 1–3. Ibid., p. 1-3.

²⁷ Jatna Supriatna, *Preserving Indonesia's Nature* (Jakarta: Indonesia Obor Foundation, 2008), 363.

²⁸ Keraf, *Etika Lingkungan: Teori-Teori Etika, Etika Lingkungan, Dari Ilmu Pengetahuan Dan Teknologi Kembali Ke Kearifan Local*, 167.

the current generation by reserving capital or natural resources for future generations. Smith suggests that four goals can be achieved through sustainable development: (a) maintenance of the results achieved in a sustainable manner on renewable resources, (b) conservation and replacement of saturated natural resources, (c) maintenance of ecological support systems, and (d) maintenance of biodiversity.²⁹

Garrett Hardin suggests that when everyone uses the limited natural resources, each individual would use them extensively, decreasing the availability of natural resources and leading to all parties suffering losses.³⁰

Development is the deliberate effort to cultivate and utilize natural resources to increase the prosperity of the people to achieve physical prosperity and inner satisfaction. Therefore, natural resources must be used in harmony and balance with environmental functions.

Development continuously utilizes natural resources to improve people's welfare and quality of life. Meanwhile, the availability of natural resources, both in quantity, and quality, is limited, and uneven. Conversely, the demand for natural resources is increasing because of the increased development activities to meet people's needs, the carrying capacity of the environment can be disrupted, and the carrying capacity of the environment can decrease.

Development integrating the environment, including natural resources, becomes a means to achieve sustainable development and guarantees the welfare and quality of life of present and future generations. Wise development must be based on environmental insight to achieve sustainability and guarantee the welfare of present and future generations.³¹

Hence, the environment must be managed while preserving the function of the environment in a harmonious and balanced manner to support sustainable development under an environmental perspective that improves the welfare and quality of life of present and future generations.

Article 33, Paragraph 4, of the 1945 Constitution affirms the existence of sustainable principles in the principles of economic democracy espoused by the Indonesian constitution as follows:

"The national economy is organized based on economic democracy with the principle of togetherness, efficiency with justice, sustainability, environmental insight, independence, and by maintaining a balance of progress and unity of the national economy."

Therefore, the terms "sustainable" and "development" can be said to be closely related to each other. This is because environmental insight is referred to in the 1945 Constitution. Conversely, for sustainable development without the environment as a primary element, no environmental insight can be achieved.³²

²⁹ Siahaan, *Hukum Lingkungan Dan Ekologi Lingkungan*, 147–48.

³⁰ Garret Hardin, "The Tragedy Of The Commons," *Science, New Series* 162, no. 3859 (1968): 1243–48.

³¹ Otto Soemarwoto, *Atur Diri Paradigma Baru Pengelolaan Lingkungan Hidup (Set Yourself a New Paradigm of Environmental Management)*

(Yogyakarta: Gadjah Mada University Press, 2009), 85.

³² Jimly Asshiddiqie, *Green Constitution : Nuansa Hijau Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* (Jakarta: Rajawali press, 2009), 133–34.

The definition of sustainable development is also contained in Article 1, Point 3, of the PPLH Law³³ is:

A conscious and planned effort that integrates environmental, social, and economic aspects into a development strategy to ensure the integrity of the environment as well as the safety, capabilities, welfare, and quality of life of present and future generations.

As a development process, sustainable development optimizes the benefits of natural and human resources sustainably by harmonizing human activities according to the capabilities of natural resources that support them in a space of land, sea, and air as a single unit.³⁴

The explanation of Article 2, Item b, of the PPLH Law states:

The principle of sustainability and sustainability is that everyone bears obligations and responsibilities to future generations and to each other in one generation by making efforts to preserve the carrying capacity of the ecosystem and improve the quality of the environment.

Based on the description above, sustainable development cannot be separated from the basic principles of sustainable development with an environmental perspective³⁵ as in Article 1, Number 2, of the PPLH Law:³⁶

The protection and management of the environment in question is an integrated effort to preserve environmental functions, which include policies for structuring the use of development, maintenance of restoration, supervision, and control of the environment.

Sustainable development with an environmental perspective is a conscious and planned effort that integrates the environment, including resources, into the development process to ensure the welfare and quality of life of present and future generations. Positive socioeconomic changes do not ignore the ecological and social systems that society depends upon. Their successful implementation requires integrated policies, planning, and social learning processes. Its political stability depends on the full support of the community through its government, social institutions, and business activities³⁷.

One way to implement sustainable development in managing and using natural resources that are environmentally sound is by observing natural resources. Conservation can be interpreted as preserving nature for human survival³⁸, as regulated in Article 1 number 18 of the PPLH Law³⁹, which states that “natural resource conservation is the management of natural resources to ensure their wise use and sustainable availability

³³ State Gazette of the Republic of Indonesia Year 2009 Number 140, Supplement to State Gazette of the Republic of Indonesia Number 5059.

³⁴ Aca Sugandhy, *Penataan Ruang Dalam Pengelolaan Lingkungan Hidup* (Jakarta: PT. Gramedia Pustaka Utama, 2000), 59.

³⁵ Aca Sugandhy and Rustam Hakim, *Prinsip Dasar Kebijakan Pembangunan Berkelanjutan Berwawasan Lingkungan* (Jakarta: Bumi Aksara, 2007), 1.

³⁶ State Institutions of the Republic of Indonesia Year 2009 Number 140, Supplement to the State Gazette of the Republic of Indonesia Number 5059.

³⁷ Otto Soemarwoto, *Pembangunan Berkelanjutan: Antara Konsep Dan Realitas* (Bandung: Universitas Padjajaran, 2006), 29.

³⁸ M. Suparmoko, *Ekonomi Sumber Daya Alam Dan Lingkungan; Suatu Pendekatan Teoritis*, 4th ed. (Yogyakarta: BPFE, 2008), 20.

³⁹ State Gazette of the Republic of Indonesia Year 2009 Number 140, Supplement to State Gazette of the Republic of Indonesia Number 5059.

while maintaining and improving the quality of their values and diversity.”

Conversely, Article 1, Number 2, of Law No. 5 of 1990 concerning Conservation of Biological Natural Resources and Their Ecosystems states:⁴⁰

Conservation of living natural resources is the management of living natural resources whose utilization is conducted wisely to ensure the continuity of their supply while maintaining and improving diversity quality and value.

Furthermore, Article 2 states the following⁴¹ : “Conservation of living natural resources and their ecosystems is based on the principle of preserving the ability and strengthening of living natural resources and their ecosystems in a harmonious and balanced manner.” On Article 2, all natural resources, including biological natural resources, must be utilized for the welfare of society and mankind and according to their capabilities and functions. However, its use must be in accordance with this law so that it can take place sustainably for the present and future. Utilization and conservation must be conducted in a harmonious and balanced manner as a manifestation of the principle of Conservation of Biological Natural Resources and Their Ecosystems.

Article 33, Paragraph 3, of the 1945 Constitution as a constitutional basis requires that natural resources be used for the greatest prosperity of the people, which must be enjoyed from generation to generation in a sustainable manner.

Sustainable development has received the attention of countries in the world at the

Stockholm Conference in 1972. Therefore, sustainable development is a fundamental in future development challenges conducted by various countries that are committed to advancing their people’s welfare. Essentially, as a fundamental issue of sustainable development, it aims to provide protection of natural resources and the environment.

Sustainable development in the State of Indonesia is referred to in the preamble of the 1945 Constitution, Paragraph IV:

“Protecting the entire Indonesian nation and the entire homeland of Indonesia, promoting public welfare, and educating the nation’s life and participating in implementing world order based on freedom, eternal peace, and social justice.”

Therefore, the function of the environment must be preserved. For national development policies applying the principles of sustainable development that combine the three pillars of development—economic, social, and environmental fields—the concept of sustainable development arises and develops because of the awareness that economic and social development cannot be separated from environmental conditions.

State control is defined as follows:

“The state has full freedom or authority (volldige bevoegdheid) to determine the necessary policies in the form of regulating (regelen), managing (besturen), and supervising (toezichhouden) the use and utilization of national natural resources”⁴².

Protecting Sustainable Indigenous Forest

⁴⁰ State Gazette of the Republic of Indonesia of 1990 Number 49, Supplement to the State Gazette of the Republic of Indonesia Number 3419.

⁴¹ *Ibid.*

⁴² Rafiuddin, Abrar Saleng, and M. Guntur Hamzah, “Hakikat Pengelolaan Pertambangan Berbasis Partisipatif,” *Jurnal Penelitian Hukum Fakultas Hukum Universitas Hasanuddin* 2, no. 1 (2012): 219.

As an integral part of the Indonesian nation, Adat and Indigenous Community must be protected. Protection, thus, extends to the customary rights attached to them, including customary land, customary forest, or customary waters. Traditional forests include Adat and Indigenous Community in the form of an area/area whose land is overgrown with trees, places for wild animals, and forest birds to live. Formerly, these areas were used as hunting grounds for animals such as deer, residences such as boarding houses, and places for executives, and employees to enjoy.⁴³ Indigenous forests are different from jungle forests. In Indonesia, forests are designated as groves, virgin forests, protected forests, and savanna forests⁴⁴.

According to Dengler, forests are as follows:

“A number of trees that grow in a fairly large field, so that the temperature, humidity, light, wind, and so on no longer determine the environment but are influenced by new plants/trees as long as they grow in a large enough place and grow quite horizontally and densely.” Dengler states that the characteristics of forests are as follows: (1) presence of trees that grow on large areas of land (excluding savanna and gardens) and (2) trees growing in groups.

The above definition is in line with Article 1, Point 1, of Law No. 5 of 1967 concerning the Basic Provisions of Forestry. In that article, forest is “a field for growing trees

(overgrown with trees) which, as a whole, is an association of living nature and its environment, and which is designated by the government as a forest.” Meanwhile, in Article 1, Point 2, of Law No. 41 of 1999 concerning Forestry⁴⁵, “forest” is defined as “an ecosystem unit in the form of a stretch of land containing biological natural resources dominated by trees in the fellowship of their natural environment, which cannot be separated from one another.”

The definition of forest vertically adheres with the legal conception among the land, trees, flora and fauna, and their environment are part of a unified whole. Forests are classified into several types based on the provisions of Articles 5 to 9 of Law No. 41 of 1999 concerning Forestry⁴⁶ and on the following:

- a. Status. Based on its status according to Article 5, Paragraph 1,) of Law No. 41 of 1999 concerning forestry, “forest” is divided into two types: state forest and private forest.
- b. Forest function. Forests are divided into 3 (three) types as regulated in Article 6, Paragraph 1, Law No. 41 of 1999 concerning Forestry⁴⁷ namely: Conservation Forest which functions as: (1) natural reserve forest area⁴⁸, (2) nature conservation forest area⁴⁹, and (3) hunting

⁴³ Henry Campbell Black, *Black's Law Dictionary*, Fifth Edit (St. Pul Minn: West Publishing Co, 1979), 584.

⁴⁴ Leden Marpaung, *Tindak Pidana Terhadap Hutan, Hasil Hutan Dan Satwa* (Jakarta: Erlangga, 1995), 11.

⁴⁵ The State Gazette of the Republic of Indonesia of 1999 number 167, an additional Sheet of the Republic of Indonesia number 3888.

⁴⁶ State Gazette of the Republic of Indonesia of 1999 Number 167, Supplement to the State Gazette of the Republic of Indonesia Number 3888.

⁴⁷ Ibid.

⁴⁸ Nature reserve forest area is a forest with certain characteristics, which has the main function as an area for preserving the diversity of plants and animals and their ecosystems, which also functions as an area for a life support system.

⁴⁹ Nature conservation forest area is a forest with certain characteristics that have the main function of protecting life support systems, preserving, and sustainably utilizing living natural resources and their ecosystems.

park⁵⁰. Particular, the nature conservation area according to Article 29, Paragraph 1, of Law No. 5 concerning Conservation of Biological Natural Resources and Their Ecosystems, consists of three parks as follows: 1. National Park, 2. Grand Forest Park and 3. Tourist Park⁵¹.

Forests in Indonesia, including customary forests in general, include tropical forests, which have almost the same flora and fauna, but have different landscape conditions. However, forests have conservation, protection, and production functions. Each forest area in Indonesia can be confirmed to have different conditions according to physical conditions, flora, and fauna, and biodiversity, and ecosystems. According to Endang Suhendang, the term “sustainable forest management” is taken from the term sustainable forest management. Christian Barr, for instance, calls it illegal logging or “sustainable logging.” If translated literally, sustainable logging seems to be continuous logging (or clearing) of forests⁵². If so, then the notion of forest seen from the aims and objectives of a sustainable forest management system is considered irrelevant. According to Law No. 41 of 1999 concerning Forestry, sustainability is defined as “the implementation of forestry based on benefits and sustainability.” This term connotes prioritization of benefits (utility), which, when compared to other terms, emphasizes the sustainability aspect. The economic and utility aspects will automatically be achieved.

The term “sustainable forestry development” refers to sustainable development established at the Rio Summit for all development activities. The aspect of sustainable

development that underlies forest management has become a consideration or reference to cultural, ecological, and environmental factors relative to economic aspects⁵³.

III. Protection of Customary Forests as Customary Rights (Adat and Indigenous Community)

Based on Law No. 41 of 1999 Jo. Law Number 19 of 2004 concerning Forestry in Article 38, mining businesses or industries that are allowed in production forest areas and protected forests are only required to obtain a ministerial permit for use of forest areas. Constitutional Court Decision No. 35/PUU-X/2012 has newly allowed the changing of the existence of customary forests (customary territories), which specify that state control over customary forests opposes the 1945 Constitution.

Mining arrangements in forest areas in the reform period are:

- a. Mining in forest areas according to Law No. 41 of 1999 concerning Forestry. Regulation in the natural resources sector at the beginning of regional autonomy was marked by the issuance of Law No. 41 of 1999 concerning Forestry. This shows that forestry is a critical sector. Moreover, this provision does not hinder mining operations in forest areas. As regulated in Article 38 of this Forestry Law, mining is permitted in production and protected forest areas. Obtaining a ministerial permit for the use of forest areas is only required. Based on the provisions of Article 38, Paragraph 4,

⁵⁰ Hunting Park is a forest area designated as a hunting tourist spot

⁵¹ State Gazette of the Republic of Indonesia of 1990 Number 49, Supplement to the State Gazette of the Republic of Indonesia Number 3419

⁵² Ibid.

⁵³ Ibid.

specifically for forest areas, open mining is not allowed but must use an underground/tunnel system. This provision then gave rise to various protests from mining entrepreneurs who already had mining permits before Law 41 of 1999 was ratified and during the New Order government. Responding to the protests of mining entrepreneurs against the issuance of provisions of Law 41 of 1999, which were an obstacle for mining companies that had obtained permits during the New Order government, the reformed government on March 11, 2004, issued Government Regulation in Lieu of Law (Government Regulation in lie) No. 1 of 2004 concerning Amendments to Law No. 41 of 1999 concerning Forestry.

b. Government Regulation in Lieu of Law (Government Regulation in lie) No. 1 of 2004 concerning Amendments to Law No. 41 of 1999 concerning Forestry. In the consideration, Government Regulation in lie No. 1 of 2004 stated that the purposes and objectives of issuance are as follows:

- (1) To regulate and ensure the legal status/position of mining permits or agreements that have been issued prior to the enactment of Law No. 41 of 1999.
- (2) Avoiding the possibility of lawsuits from permit holders or parties entering into mining agreements.
- (3) Through the Government Regulation in lie, the government hopes that it will continue gaining investor trust.

Table 1: Legislation regarding Mining in Forest Areas 1999–2016 Period

No	Regulation	Setting Substance
1	Law 41 of 1999 concerning Forestry	a. Special regulation of mining in forest areas b. Allow mining in production forest and protected forest areas. c. Mining in protected forest areas must be conducted in private.
2	Government Regulation in lie of Law No 1 of 2004 Amendments to Article 38 of Law 41 of 1999	Exclude prohibition of open mining in protected forest areas by allowing 13 mining companies to openly mine in protected forest areas.
3	Law 19 of 2004 concerning the Stipulation of Government Regulation in lie of Law No. 1 of 2004 became law	Affirming the provisions of Government Regulation in lie No. 1 of 2004, which allows 13 mining companies to mine openly in protected forest areas.
4	Government Regulation No. 2 of 2008 concerning Types and Tariffs for Types of Non-Tax State Revenues Derived from the use of forest areas for Development Purposes Outside Forestry Activities Applicable to the Ministry of Forestry	This Government Regulation is of a general nature in imposing tax on the use of forest areas for non-forestry activities. However, the information in the appendix indicates that the main target of non-tax revenues from the use of forest areas is the mining sector in forest areas.
5	UU No. 4 of 2009 concerning Mineral and Coal Mining	a. Does not specifically regulate mining in Forest Areas. b. Forest is not an area that is prohibited to be mined. c. Mining in forest areas and outside forest areas does not have different rights and obligations.
6	PP No. 24 of 2010 concerning the use of forest areas jo. Government Regulation No. 61 of 2012 concerning Guidelines for Borrowing and Using Forest Areas	Mining scheme in forest area with a Borrow-to-Use Forest Area permit.
7	Presidential Decree No. 41 Year 2004	Permits or agreements in the mining sector located in protected forest areas.

Source: Law 41 of 1999, Government Regulation in lie 1 of 2004, Law 19 of 2004 pp. 2 of 2008; UU No. 4 of 2009; Government Regulation No. 2 of 2008; Government Regulation No. 24 of 2010 concerning the use

of forest areas jo. Government Regulation No. 61 of 2012 concerning Guidelines for Forest Area Experts; Presidential Decree No. 41 of 2004, processed.

The contents of this Government Regulation in lie in Article 1 adds a new provision in the closing chapter used as Article 83A and Article 838, which reads: “All permits or agreements in the mining sector in forest areas that existed before the enactment of Law No. 41 of 1999 concerning forestry are declared to remain in effect until the expiration of the said permit or agreement.” According to some experts, Government Regulation in lie No. 1 of 2004 does not meet the procedural requirements of Article 22 of the 1945 Constitution⁵⁴. In the provisions of this article, a Government Regulation in Lieu of Law can be issued if the conditions for a coercive urgency are met. Based on this constitutional provision, some of the inconsistencies are as follows:

- (1) Based on Law No. Prp. 23 of 1959 concerning Dangerous Conditions, Article 1, Paragraph 3, stipulates that one of the qualifications for a state of emergency/danger is “the life of the state is in a state of danger or from special circumstances it turns out that there are, or it is feared that there are symptoms that can endanger the life of the state.”
- (2) Elements of the state in a state of urgency and coercion are not found in Government Regulation in lie No. 1 of 2004. One of the objectives of the issuance of the Government Regulation in lie is to provide position and certainty for mining permits and agreements in protected forest areas as a result of the prohibition by Law No. 41 of 1999. In the consideration, Government Regulation in lie No. 1 of 2004 does not indicate that the state is

in a state of urgency and coercion. Thus, issuing a Government Regulation in lie is necessary.

- (3) On the element of saving the state, the purpose of issuing the Government Regulation in lie is not based on efforts to save the state but threatens protected forests. Instead, this Government Regulation in lie seems to benefit mining investors who have held mining permits and agreements before the issuance of Law No. 41 of 1999.
- c. Presidential Decree No. 41 of 2004 concerning the Stipulation of Permits or Agreements in the Mining Sector Located in Forest Areas. Based on Government Regulation in lie No. 1 of 2004, the government then stipulates permits and agreements in the mining sector located in forest areas. Presidential Decree No. 41 of 2004 stipulates that to “stipulate 13 (thirteen) permits or agreements in the mining sector that existed before the enactment of Law No. 41 of 1999 concerning Forestry as stated in the Attachment to this Presidential Decree, to continue its activities in forest areas until the expiration of the said permit or agreement.” Moreover, “implementation of business for 13 (thirteen) permits or agreements in the mining sector in protected forest areas is based on a borrow-to-use permit whose provisions are stipulated by the Minister of Forestry.”

IV. Conclusion and Suggestion

Based on our analyses, recognition, and legal protection from the state is half-hearted and conditional for Adat and Indigenous Community. All of their “ulayat”

⁵⁴ Fathi Hanif, *Bunga Rampai Hukum Dan Kebijakan Pengelolaan Sumberdaya Alam*

Kalimantan Timur (Samarinda: Bigraf Publishing-Ulin Foundation, 2004), 90.

rights/customary rights and/or traditional rights—especially those of customary forest rights—are inherent in heredity. Heredity by genealogy and similarity of residence with ancestors who have lived in and developed an area or territory of a certain alliance are within the scope of the Unitary State of the Republic of Indonesia. This legal recognition and protection by the state has been realized through at least 18 laws and regulations, with the following requirements:

- a. Adat and Indigenous Community elements, namely, a group of people who still exist, live, and are still bound by their customary law as joint citizens of a certain legal alliance, recognize and apply these provisions in their daily lives according to the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated by law.
- b. The element of a clear customary law area is that certain customary rights (e.g., land, waters, or forest) have become the living environment of the members of the legal alliance and their source of daily necessities.
- c. The element of the relationship between the community and the area and its environment are both physical and magical, namely, that there is a customary law order regarding the management, control, protection, maintenance, and use of ulayat rights (land, waters, or forest) that remain valid and obeyed by the members of the alliance.

The Mineral Mining Industry, located within the legal territory of Adat and Indigenous Community forest customary rights or customary forests within the territory of the Unitary State of the Republic of Indonesia, must comply with the loan-use permits with sustainable environmental management and

development, because minerals are natural resources and wealth and are not renewable energies. They are gifts from God Almighty. Because these resources are critical and fulfill the needs of many people, mining must be prioritized in a balanced way as follows:

a. Adat and Indigenous Community who lives near mining regions deserves to live and flourish.

b. The state controls actual, managed, measured, and sustained environmental sustainability to support sustainable national development and maintain the welfare and prosperity of the people in an equitable way, by paying particular attention to the following issues when designating mining areas:

- (1) In a transparent, participative, and responsible manner and (2) In an integrated approach by considering the viewpoints of key government agencies, the community, and, particularly, the Adat and Indigenous Community in their region and considering the ecological, economic, and sociocultural elements, and by using an environmental perspective and prioritizing the needs of the local area.

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Law No. 5 of 1960 concerning Basic Agrarian Regulations (LN. 1960-104 TLN.2043);

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Decision of the Constitutional Court (MK) No. 35/PUU-X/2012 related to the Review of the Forestry Law

Decision of the Constitutional Court (MK) No. 55/PUU-VIII/2010 and No. 122/PUU-XIII/2015 related to Review of the Plantation Law and the rights of indigenous peoples (ADAT AND INDIGENOUS COMMUNITY).