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**STRATEGIC STEPS FOR FOREST MANAGEMENT AND MECHANISMS
FOR DETERMINING CUSTOMARY FORESTS AFTER THE ISSUANCE OF
THE CONSTITUTIONAL COURT RULING NUMBER 35/PUU-X/2012
ON 16 MAY 2013**



Presented by
The Minister for Forestry
during
The National Workshop on Forestry Law: The Constitutional Court Ruling
Number 35/PUU-X/2012 on 16 May 2013
Hosted by the President's Delivery Unit for Development Monitoring and
Oversight (UKP4)

THE MINISTRY OF FORESTRY
Jakarta, 29 August 2013

**NATIONAL WORKSHOP ATTENDED BY THE MINISTRY OF FORESTRY,
HOSTED BY THE PRESIDENT'S DELIVERY UNIT FOR DEVELOPMENT
MONITORING AND OVERSIGHT (UKP4)**

Jakarta, 29 August 2013

Assalamualaikum Warrahmatullahi Wabarakatuh

May peace be upon us

1. Head of the President's Delivery Unit for Development Monitoring and Oversight
2. Dr. Jimly Asshiddiqie, Constitutional Judge, Constitutional Court of the Republic of Indonesia
3. Dr. Sandrayati Moniaga, Deputy Chairperson of the National Commission on Human Rights
4. Mr. Abdon Nababan, Secretary General of AMAN
5. The representative of the Ministry of Environment
6. Participants of the workshop

As religious people, we need to always show our gratitude to the Almighty God because for His blessing today that we are given a chance and health to gather in this room for the National Workshop between the Ministry of Forestry and the President's Delivery Unit for Development Monitoring and Oversight (UKP4).

According to the invitation sent by Head of the UKP4 dated 2 August 2013, in this occasion I would like to present my paper on **"Strategic Steps for Forest Management and Mechanisms for Determining Customary Forests After the Issuance of the Constitutional Court Ruling Number 35/PUU-X/2012 on 16 May 2013"**.

Distinguished guests,

As we all know that the Indigenous Peoples' Alliance of the Archipelago (AMAN), the Indigenous People Unity of Kenegerian Kuntu and the Indigenous Peoples Unity of Kasepuhan C situ jointly petitioned for the judicial review of Article 1 number 6, Article 4 paragraph (3), Article 5 paragraphs (1), (2), (3), and (4), and Article 67 paragraphs (1), (2), and (3).

The Constitutional Court has issued a ruling on 16 May 2013 granting revisions to some of the articles petitioned: Article 1 number 6, Article 4 Paragraph (3), Article 5 paragraphs (1), (2), and (3). And they decided to keep Article 5 paragraph (4) and Article 67 as is.

Articles petitioned are as follows:

- **ARTICLE 1 NUMBER 6:** Customary Forests are state forests in indigenous peoples' territories.
- **ARTICLE 4 PARAGRAPH (3):** State control of forests will remain by taking into account the rights of indigenous peoples, who insofar still exist and recognised, and their existence does not contradict the national interest.
- **ARTICLE 5**
 - Paragraph (1); based on the status, forests are divided into: **state forests**, and **private forests**.
 - Paragraph (2); State forests referred to in paragraph (1) point a, can be customary forests.
 - Paragraph (3); the government shall determine forest status as referred to in paragraphs (1) and (2); and customary forests shall be determined so provided that the indigenous peoples concerned still exist and recognised.
 - Paragraph (4); should the indigenous people concerned no exist, the right to manage customary forests shall be returned to the government.

• **ARTICLE 67**

- Paragraph (1); Indigenous peoples **who insofar still exist and recognised** have the rights to:
 - a. collect forest products to fulfill the daily needs of the indigenous peoples concerned;
 - b. manage forests based on the prevailing customary law which does not conflict any laws; and be empowered to increase their wellbeing.
- Paragraph (2); the recognition and elimination of the existence of indigenous peoples referred to in paragraph (1) shall be regulated in local regulations.
- Paragraph (3); further stipulations referred to in paragraphs (1) and (2) shall be regulated in government regulations.

Considerations used as a basis for making the decision can be seen in the table. The following is a short explanation:

A. Articles of which the judicial review is granted

1. Article 1 paragraph (6) has been amended to "Customary forests are forests located in indigenous peoples' territories".
2. Article 4 paragraph (3) has been amended to "State control of forests shall be implemented by taking into account the rights of indigenous peoples, provided that the indigenous peoples still exist and it is in line with the evolution of the society and pursuant the principles adopted by Indonesia, as regulated in laws".
3. Article 5 paragraph (1) has been amended to "Based on the status, forests are divided into:
 - a. State forests, excluding customary forests.
 - b. Private forests.
4. Article 5 paragraph (2) reads: "State forests referred to in paragraph (1) point a, can be customary forests", has been declared to contradict the 1945 Constitution and lose its binding power.

5. Article 5 paragraph (3) has been amended to "The government shall determine forests status referred to in paragraph (1), and customary forests shall be determined so provided that the indigenous peoples concerned still exist and recognised".

B. The Constitutional Court's decision regarding articles of which the judicial review were not granted:

1. Article 5 paragraph (4) has been amended to "Should the indigenous peoples concerned no longer exist, the right to manage customary forests shall be returned to the government", and the status of the customary forests shall be converted into state forests.

2. Article 67 paragraphs (1), (2) and (3) remain to be effective:

- Paragraph (1)

Article 67 paragraph (1) of the Forestry Law has similar substance to that of Article 4 paragraph (3) of the Forestry Law. Therefore, the petition for the judicial review of Article 4 paragraph (3) of the Forestry Law has been amended by the Constitutional Court. Thus, the phrase referred to in Article 67 paragraph (1) should be understood as follows **"state control of forests shall be implemented by taking into account the rights of indigenous peoples, provided that they still exist and it is in line with the evolution of the society and pursuant to the principles adopted by Indonesia as regulated in laws."**

- Paragraph (2) **remains to be effective:** The recognition and elimination of indigenous peoples shall be regulated in local regulations.
- Paragraph (3) **remains to be effective:** Further stipulations regarding paragraphs (1) and (2) shall be regulated in government regulations.

We need to inform you that the consideration of why the Constitutional Court **did not grant** the judicial review of Article 5 paragraph (4) and Article 67 is as follows:

1. The consideration for denying the petition for the judicial review of Article 5 paragraph (4) was that because the Constitutional Court had reviewed Article 4 paragraph (3) of the Forestry Law regarding the phrase **"Provided that the still exist and recognised, and it does not conflict the national interest"**. Should the indigenous peoples concerned cease to exist, it is only right that the management of the customary forests to be returned to the government and **the customary forests are converted into state forests**.

Article 5 paragraph (4) of the Forestry Law is considered to conflict the 1945 Constitution by the Petitioners because it restricted the right of indigenous peoples to utilise natural resources contained in their territories and discriminated indigenous peoples.

The Constitutional Court's consideration regarding Article 4 paragraph (3) was: "state control of forests shall be implemented by taking into account the rights of indigenous peoples, provided that they still exist and it is in line with the principles adopted by Indonesia as regulated in laws."

According to the Constitutional Court, should the indigenous peoples concerned ceased to exist, it is only right that the management of the customary forests to be returned to the government and the customary forests are converted into state forests.

2. Article 67

- Article 67 paragraph (1) of the Forestry Law has similar substance to Article 4 paragraph (3) of the Forestry Law. Because the petition for the judicial review of Article 4 paragraph (3) of the Forestry Law was granted by the Constitutional Court, the phrase in Article 67 paragraph (1) reading "provided that they still exist and recognised" should be understood as follows **"State control of forests shall be implemented by taking into account the rights of indigenous peoples, provided that they still exist and it is in line with the evolution of the society and**

pursuant to the principles adopted by Indonesia as regulated in laws”.

- Article 67 paragraphs (2) and (3) remains to be effective.

With regard to the recognition and elimination of indigenous peoples that shall be regulated in local regulations and further stipulations shall be regulated in government regulations, the Constitutional Court decided that it is authority delegation regulated in Article 18B (2) of the 1945 Constitution reading ***"The State recognises and respects indigenous peoples and their traditional rights, provided that they still exist and it is in line with the evolution of the society and pursuant to the principles followed by Indonesia, as regulated in laws."***

Since the law mandated by Article 18B (2) of the 1945 Constitution has not been enacted, and given the urgency, the arrangements made by establishing governments regulations and local regulations can be justified.

Distinguished guests,

I need to inform you that with regard to the issuance of the Constitutional Court Ruling Number 35/PUU-X/2012, the Ministry of Forestry has taken the following strategic steps:

1. Take inventory of local regulations concerning indigenous peoples.
2. Expedite the legalisation of the bill recognizing and protecting indigenous peoples (an initiative from the parliament). The Ministry of Forestry has been appointed as a coordinator or the preparation of the said bill.
3. Establish a work team to prepare the bill recognizing and protecting the rights of indigenous peoples, supported by Decree of the Minister of Forestry Number SK.3201/Menhut-II/Kum/2013 dated 18 June 2013.
4. Establish a team to popularise the Constitutional Court Ruling No.35/PUU-X/2012, supported by Decree of the Secretary General No. SK.167/II-Kum/2013 dated 15 July 2013.

5. Issue Circular of the Minister of Forestry No SE.1/Menhut-II/2013 dated 16 July 2013 to Governors/District heads/Mayors throughout Indonesia and to Heads of Provincial/District/Municipal Offices in charge of forestry. This circular included **the Constitutional Court Ruling**.
6. Expedite the issuance of a government regulation concerning the management of customary forests as the implementation of Law Number 41/1999.
7. Coordinate with the Ministry of Home Affairs to encourage local governments to immediately collect data, conduct research and recognise the existence of indigenous peoples and their territories.
8. Decide that if there are evidently indigenous peoples' territories, according to the local regulations, in forests. They will be excluded from the forests.

Further, based on an assessment, there are regulations concerning mechanisms for determining customary forests. Those regulations are:

1. Regulation of the Head of the National Land Agency No. 5/1999, regulating that, among others, the determination of the existence of customary rights shall be based on research conducted by local governments involving experts in customary law, the indigenous peoples in the areas in question, NGOs and agencies managing the natural resources.
2. Special Local Regulation of Papua Province No. 23/2008, regulating that, among others, the recognition of indigenous peoples shall be based on a decree (from a governor/district head/mayor) made as a result of research conducted by the Team for Researching the Existence of Indigenous Peoples.
3. A bill recognising and protecting indigenous peoples is currently being drafted, as an initiative of the parliament. This bill will regulate, among others, that "Indigenous peoples shall be declared as exist based on results of the identification and verification as included in local regulations."

The inventory of local regulations concerning **"the recognition of indigenous peoples"**, that has been conducted so far shows that there

are 4 (four) provincial regulations and 4 (four) district regulations, and nearly all of them do not explicitly determine the borders and locations of the indigenous peoples' territories.

With regard to the recognition of indigenous peoples, I would like to reconfirm that based on Article 67 of Law 41/1999, the requirements for an indigenous community to be recognised are as follows:

1. The community is still in the form of *paguyuban*,
2. There is a government or leadership,
3. The territory has been clearly defined,
4. There are norms and legal instruments, in particular a traditional judiciary system, that are still followed; and
5. They still collect products from nearby forests to fulfill their daily need.

That is what I can inform you all about the strategic steps for forest management and mechanisms for determining customary forests after the issuance of the Constitutional Court Ruling Number 35/PUU-X/2012.

I hope this will be useful for further discussions.

Wabilahitaufik Walhidayah

Wassalamualaikum Warahmatullahi Warakatuh

The Minister of Forestry

Zulkifli Hasan