

Legal Protection of Customary Land Against the Development of Oil Palm Plantations in East Kotawaringin Regency, Central Kalimantan

Sangking¹ Moch. Bakri² I Nyoman Nurjaya³ Suhariningsih⁴

1. Doctoral Candidate of Civil Law at The Faculty of Law, Brawijaya University, Malang
2. Professor of Agrarian Law at The Faculty of Law, Brawijaya University, Malang
3. Professor of Anthropology of Law at The Faculty of Law, Brawijaya University, Malang
4. Professor of Civil Law at The Faculty of Law, Brawijaya University, Malang

Abstract

East Kotawaringin is a regency in Central Kalimantan province with the highest number of oil palm plantation business licenses. The area of oil palm plantation business license issued by regional government is included in *ulayat adat* of Dayak tribe indigenous people in Rural areas. In the *ulayat adat* comprised in the area of oil palm plantation business license, there is the potential of abundant natural resources and these customary lands are the source of livelihood or life for Indigenous People in East Kotawaringin regency, Central Kalimantan. As a law country, customary lands under *ulayat adat* and inside the area of oil palm plantation business license are supposed to be protected by law, but in fact there are customary lands owned by indigenous people in Kotawaringin East regency with no legal protection against the development of oil palm plantations.

Keywords: Legal Protection, Customary Land, Oil Palm Plantation, Business License, East Kotawaringin

1. Introduction

National development is a systematic effort and planning carried out by the Indonesian people in accomplishing independence and realizing a just and prosperous society in accordance with the ideals of the Proclamation of August 17, 1945 as mandated in paragraph 4 of the Preamble to the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution). The implementation of national development is supported by careful planning and other resources, both human resources and natural resources.

Indonesia is an agrarian country where most of its people work in the agricultural sector, so the demand for land is real and increasing in public life and in carrying out development. Land not only has social and religious function, but also economic commodity. Relating to the importance of land and natural resources in development, Suparmoko states:

“Land and natural resources are crucial factors for the development process of a country. Countries rich in natural resources and have fertile soil is likely to have a high level of agricultural productivity in the early stages of economic growth. Increasing agricultural productivity will greatly affect the development of other sectors such as industry and services in further stages of economic development.”¹

Furthermore, Jack Reynold Ch Ayamiseba said... development of land sector is fundamentally vital for the welfare and prosperity of the nation of Indonesia.² It is essential to recognize the importance of land as a commodity in the pursuit of economic prosperity and well-being in the life of community and in national development, so as to make regional government seeks to use land for various purposes, including for the interest of businessmen to make investment.

The Indonesian government that represents the country in utilizing land for development purposes, should be guided by the mandate of the constitution that has been formulated in Article 33 paragraph (3) of the 1945 Constitution, which states: "The land and the waters as well as the natural riches therein are to be controlled by the state to be exploited to the greatest benefit of the people".

The phrase 'controlled by the state' in Article 33 paragraph (3) of 1945 mentioned above means that the state has ultimate authority to regulate the use and the allocation of land for development purposes. In Article 33 Paragraph (3) of 1945 Constitution, it is mentioned that the state has the obligation to regulate the use and the allocation of land for development, that it should bring the greatest benefit of the people or prosperity for all Indonesian people. The provision in Article 33 paragraph (3) of the 1945 Constitution is that the land and natural resources are controlled by the state, with the intention that by regulating the use and allocation of land for various purposes, including for investment purpose, which is conducted by the government as the representative of the state, prosperity and the greatest benefit of the people can be achieved.

¹. Suparmoko.M, *Ekonomi Sumber Daya Alam*, (Yogyakarta: Inter University Center, Economics Study Gajah Mada University, year 1989), page 7

². Jack Reynold Ch. Ayamiseba, *Kedudukan Hak Ulayat Dalam Rangka Pengadaan Tanah Bagi Pembangunan Kepentingan Umum*; (Doctoral dissertation of Law, Graduate Program Padjadjaran University Bandung, 2004), page. 1.

According to Muchammad Zaidun, the importance of investment in development is:

"Investing is basically an absolute necessity of a country in order to continuously improve national productivity so as to increase national income and encourage the enhancement of community welfare".¹

In the New Order government, businessmen were given the widest possible opportunity to make investments in the forestry sector, especially for export. According to Bakri Muhammad with the enactment of the Law on Basic Provisions of Forestry and Law on Foreign Investment Year 1967 and Law on Domestic Investment in 1968, there are a big number of businessmen who invest in the exploitation of forests in Indonesia.² After the New Order government ended and the forests in Indonesia started to decrease, the government in the reform era began to shift investments in the forestry sector by providing opportunities for businessmen to invest in plantation sector. In the era of regional autonomy since the enactment of Law No. 22 year 1999 and Law No. 32 Year 2004 on Regional Government, wide opportunities have been given to regional governments to issue permits of land use in their area for development, including for the development of oil palm plantations.

In fact, the development of oil palm plantation along with the allotment of land rights covering a large area to investors through Plantation Business license (hereinafter abbreviated to IUP/*Izin Usaha Perkebunan*) issued by the local government in many areas, have raised the issue of injustice, especially in terms of land tenure. According to Sri Harjati, giant companies usually dominate land procurement, and this may cause disparity and injustice in land ownership.³ Disparity and injustice in land ownership for the interests of giant companies have become a source of problem or land disputes both in the era of New Order government and in today's era of reform.

The use of customary land for oil palm development in the era of regional autonomy should be able to bring well-being and prosperity to the society, but in reality the authority given by the central government to local governments to issue various business licenses, including palm oil plantation business license, also brings new problems for the Indigenous people (hereinafter abbreviated to MHA/*Masyarakat Hukum Adat*) living in rural areas. This is experienced by people in Central Kalimantan, as informed by Arie Rompas, Executive Director of WALHI Central Kalimantan, in 'Kalteng Post' newspaper who said:

*"Regional autonomy expected to distribute development does not give any change, but increasing the suffering of the people in Central Kalimantan. The number of permits and the width of area for IUP jumped sharply from 2004 to 2010 ... And due to such authority, there are two regions namely North Barito and Kapuas regency which have issued licenses more than the total area of the regency."*⁴

In East Kotawaringin regency, in each IUP oil palm issued by local government where some of the area is inside *ulayat adat*, there is always a law case in the form of land disputes between the indigenous people or MHA in rural areas and the oil palm plantation company. According to A. Yunan Firdaus, land conflicts due to oil palm plantation are spreading in all the major islands in the archipelago.⁵ In East Kotawaringin regency there is a customary land owned by an individual which is unique and different from other areas such as in Bali and West Sumatra where indigenous lands are communal property, not individual property. Since the issuance of principle permit/recommendation on investment location, location permit and IUP by regional government, and the release of Cultivation Right (*Hak Guna Usaha/HGU*) from the Center of National Land Agency, disputes on customary land in the form of claims from individuals and groups of MHA or indigenous people in the rural areas over the lands used for palm oil plantations in East Kotawaringin regency have still taken place.

Based on the customary land disputes that occur in the development of oil palm plantations in East Kotawaringin regency mentioned above, the research problems defined in this study are as follows:

- (1) Why doesn't customary land owned by indigenous people or MHA receive legal protection against the development of oil palm plantations in East Kotawaringin regency Central Kalimantan Province?
- (2) What are the efforts taken by indigenous people or MHA to resolve land dispute with the business owner due to the development of oil palm plantations in East Kotawaringin regency Central Kalimantan Province?
- (3) What is the role of *Lembaga Adat Kedatangan* or *Kedatangan* Traditional Institution in resolving customary land dispute between indigenous people or MHA and business owner in the development of oil palm

¹ Muchammad Zaidun; "Kebijakan Pengaturan Investasi Di Indonesia Dalam Konteks Globalisasi"; (Yuridika, Law Magazine, Volume 19 January 2004), page 1

² Muhammad Bakri, *Hak Menguasai Tanah Oleh Negara (Paradigma Baru untuk Reformasi Agraria)*, (Jakarta : Citra Media, 2007), page 148.

³ Sri Hajati; *Restrukturisasi Hak Atas Tanah Dalam Rangka Pembaharuan Hukum Agraria Nasional*, a speech given on the inauguration ceremony as professor in law science conducted in the Faculty of law Airlangga University, Surabaya on Saturday, 5 March 2005. page 11

⁴ Arie Rompas; Kalteng Pos newspaper, *Kekuasaan Modal Menghancurkan Ekologi Melanggar Hukum dan Merampas (1)*, Tuesday 3 January 2012, page 11

⁵ A. Yunan Firdaus : *Korupsi dan Konflik Tanah di Kebun Sawit*, an article in Kompas newspaper, Tuesday , 18 September 2012, page 6.

plantations in East Kotawaringin regency Central Kalimantan Province?

2. Research Method

This dissertation research uses empirical legal research method. Empirical legal research method is used with the consideration that this research is the starting point in the analysis of the rule of law whether in the form of legislation or customary law that become the basis for legal protection of traditional rights of MHA over their customary land and the implementation of legal protection on customary land against the development of oil palm plantations in East Kotawaringin regency Central Kalimantan province.

3. Results and Discussions

C.1. Customary Land Which Should Get Legal Protection Against The Development of Oil Palm Plantations in East Kotawaringin Regency

Dayak tribe in East Kotawaringin regency has a living area for its community to make efforts for the survival of the community, in which by Ter Haar the area is known as "*beschikkingsrecht*". According to Ter Haar *beschikkingsrecht* environment also covers sea and land area as written in his book "*Beginselen En Stelsel Van Hret Adatrecht*" which states:

*"People can find the double "beschikkingsrech" environment (dubbelen beschikkingskring) in two ways. First (as an exception), a "beschikkingsrecht" environment of a village in a remote area, that is the inhabited area where people collect produce for their life, and in addition –sometimes far away from it– the "beschikkingsrecht" environment along the sea, from where the villages fetch sea products and salt which they urgently need. Then, more often there is double "beschikkingsrecht" environment that has such a shape that it includes the lands, including "beschikkingsrecht" environment of the village, and the community where the village is located."*¹

Ade Saptomo also says:

*"... that the object of community rights over their communal land (ulayat adat) is the land, water, plants and animals. Regions have clear boundaries, both factual (natural boundary or marks in the field), and symbolic (crow of rooster, the sound of gong that is still heard)"*²

In Dayak customary law *ulayat adat* for MHA or indigenous people in the rural areas in East Kotawaringin regency is recorded in Article 95 (*adat eka malan-manana, satiar bausaha*/customary place for farming and making a living) from the result of Damai Tumbang Anoi Big Meeting attended by all Dayak tribes from all parts of Kalimantan, including from Malaysia and Barunai, which was held in Tumbang Anoi village in 1894. In Article 95 of Dayak Customary Law, it is clearly stated that the coverage of *beschikkingsrecht* environment is embodied in the symbolic fact where area it covers is as far as the sound of gong along the river in every village. For Dayak tribe in East Kotawaringin regency Central Kalimantan province, the term *beschikkingsrecht* is better known as *ulayat adat*.

Dayak people in East Kotawaringin regency is as part of Dayak tribe in Central Kalimantan, and they also have a local wisdom/cultural value system related to the system of ownership and control of natural resources which is different from indigenous people or MHA in Bali, West Sumatra province and various ethnic groups in other provinces. In this case A. Lattif Fariqun asserts that:

*"In conjunction with the system of ownership and control of natural resources and its application in many communities and countries, tenurial system is created for different natural resources. This is because ownership or procurement rights as a social institution has the function to achieve the purpose of meeting the specific needs of human beings, both individuals and groups. That is why ownership system is created and maintained with a specific purpose, so the function of ownership system is heavily influenced by the development of society, including the choice of ideology or view point and tenet of the community."*³

The indigenous people of Dayak tribe in East Kotawaringin regency Central Kalimantan province, who live with local wisdom/cultural value system, have had ownership system and control of land or natural resources in *ulayat adat*, so that the Dayak community is appropriately referred to as indigenous people or MHA of Central Kalimantan.

¹ B. Ter Haar . *Beginselen En Stelsel Van Het Adatrecht* . Translation of K. Ng. Soebakti Pesponoto with the title *Asas-Asas dan Susunan Hukum Adat (Beginselen En Stelsel Van Het Adatrecht)*. (Jakarta; Balai Pustaka (Persero) , 2013), page 61.

² . Ade Saptomo. *Hukum & Kearifan Lokal; Revitalisasi Hukum adat Nusantara*; (Jakarta: PT. Gramedia Widiasarana Indonesia, 2010), page 16

³ . A. Lattif Fariqun ; *Pengakuan Hak Masyarakat Hukum Adat atas Sumber Daya Alam dalam Politik Hukum Nasional*; Doctoral Dissertation in Law Program, Law Faculty Brawijaya University Malang, 2007. page 54.

Since most of Dayak tribes in the rural area of East Kotawaringin regency live as farmers, in meeting their needs they are highly dependent on natural resources in *ulayat adat* space. According to Putu Rumawan Salain ...space is the reflection of human need for a box of life and livelihood. Nature has provided the land, people give names and meanings,...¹and for the Dayaks in East Kotawaringin regency, they believe that nature has provided *ulayat adatspace* and inside *ulayat adat*, there are names and meanings, whether it is the name of customary rightover land called customary land and other rights, all of which have a meaning in the life of Dayak tribe to support their lives and livelihoods.

The habit of MHA of Dayak tribe in rural area in East Kotawaringin regency is as moving farmers. The fallow which they cultivate annually is planted with rubber trees, rattan and other crops such as fruits. Thus, around the village, and even a few kilometers from the village, whether in *dusun* and in *pedukuhan* area, rubber plantation and rattan as well as fruits and fallow owned by villagers can be found. Lands that turn into communal plantations are acquired by their hereditary habits by opening up the forest as a place of farming and gardening. Besides, the forest area in *ulayat adat* serves as a place for the Dayak tribe to obtain forest produce, look for herbs and hunt animals while rivers and swamps serve as fishing spot and so forth.

During the reign of East Indies government, customary lands belonging to MHA in *ulayat adat* in every village which are acknowledged by customary law and by the Dutch government are as far as the sound of a gong, where the distance is approximately 5 km from the left and the right along the river. Likewise, since the independence of Indonesia, customary land in the *ulayat adat* of the village uses the sound of gong as distance measurement, and it is still acknowledged by the Dayak tribe and in fact it still exists as a living space for the Dayak tribe in every village. In the *ulayat adat*, as far as the sound of a gong from the edge of the river, Dayak community usually builds a hut in their moving fields or build a semi-permanent lodge in the middle of the farm which serves as their business center. Therefore, it is not surprising in a radius as far as the sound of a gong from the riverbank in *ulayat adat* of the village, there are lodges built and inhabited by the Dayak people for months or even years, although they only return to the village once in a while to sell crops and other forest produce and buy living necessities from merchants in the village.

In the event of the death of a member of the community, accident or disaster and other things taking place in the village, the villagers can spread the news to their community who spend the night or stay in lodges in their fields, farms in the middle of the forest and in *pedukuhan*, in a quite unique way that is by hitting gong. Based on the sound of gong struck by villager, the people who spend the night or stay in their field or in the farm in the middle of the forest or live in *pedukuhan* will know the incident or accident, death or celebration in their village. If the sound of gong announces disaster in the village, the villagers who live in the fields or in *pendukuhan* will soon return to the village. Likewise, if there are villagers who collect forest produce or hunt animals in the woods in their *ulayat adat* and have not returned to their home in the village in the evening, people in the village hit the gong in order to look for or call their citizens who are lost in the woods. Through the sound of gong struck by the villagers, the people who get lost in the forest will find his way back to the village. That is the basic philosophy and also the local wisdom of Dayak tribe in establishing *ulayat adat* using the sound of gong that travels along the river.

In the area of *ulayat adat* as far as the sound of gong along the river in every village in East Kotawaringin regency, either in the business area and *pedukuhan*, there is always customary land obtained by the villagers from their hereditary habits, such as opening the woods for farming, planting and growing rubber plants, rattan and fruits as well as having *bahu* (fallow), whether the customary land belongs to an individual or is a community property.

In addition to customary land included in *ulayat adat* which stretches in a radius of the sound of gong along the river in every village in East Kotawaringin regency, there are also areas which are considered sacred by the indigenous Dayak people in a village. In the sacred forest area, there are various types of trees, plants and animals that should not be damaged or disturbed because these are haunted areas where spirits dwell, and when there are people who damage or disturb the living beings in the sacred area, they are subject to customary sanctions.

C.2. The Reason Why Customary lands of Indigenous People (MHA) do not receive legal protection against the Development of Oil Palm Plantations in East Kotawaringin Regency.

In governing and developing the nation, state administrator should obey the applicable laws and provide legal protection to the rights of community. According to Sudikno Mertokusumo, right is an interest which transforms into the demands of individuals or groups that are guaranteed and protected by law" 2 and the right of people to demand prosperity and well-being of the community as well as their survival should get legal protection from the

¹. Putu Ramawan Salain, a collection of writing in the book *Kearifan Lokal Dalam Pengelolaan Lingkungan Hidup*; (Denpasar: UPT Penerbit Universitas Udayana in cooperation with Environmental Research Center (Pusat Penelitian Lingkungan Hidup or PPLH) Unud, 2007), page 73-74.

². Sudikno Mertokusumo. *Mengenal Hukum Suatu Pengantar*. (Yogyakarta: Liberty, 1996), page 40.

state. Sudikno Mertokusumo further states:

"... Law serves as a protector of human interests and must be carried out normally and peacefully, but it is applied because of a violation of law. Violation of law occurred when a subject does not meet his obligations or he violates the rights of other legal subjects. Legal subjects whose rights are violated should be protected by law".¹

Sudikno Mertokusumo also said that human interests cannot always be fulfilled. There will always be obstacles and threats from nature and there will always be interference or danger to human interests emanating from the mankind himself. Humans always want to protect their interests, and they always want to live in peace and quiet, so it is necessary to create social norms that include the rule of law.² Things that may interfere with human rights in defending their interests and demands of life may be caused by unclear rules of law that provide legal protection to the rights of society, thus making it difficult for people to fight for and defend their rights when facing greater interest. As experienced by MHA in the rural area of East Kotawaringin regency in defending their customary lands, they always find difficulties because of the unclear rules of law which give legal protection to the customary lands that have been constitutionally recognized by the state.

In customary law of Dayak Ngaju, the existence of customary land in the ulayat adat is "still in existence" based on sociological law and is recognized by MHA. Therefore, it should get legal protection against the development of oil palm plantations in East Kotawaringin regency. During this time, a number of rules of law or regulations have been issued by the government of the Republic of Indonesia that gives recognition of traditional rights of MHA. Husen Alting affirms:

"The recognition of indigenous people's (MHA) existence along with their traditional rights at the level of Indonesia state law is scattered in various laws and regulations, either stated explicitly and clearly or vaguely, and from the highest regulation hierarchy to the lowest. However, in reality indigenous people (MHA) have not experienced the opportunity and fairness as the provisions of this regulation".³

The provisions on the recognition of MHA existence and their traditional rights are stipulated in Law No. 5 of 1960 on Basic Agrarian Law or UUPA and Law No. 41 Year 1999 on Forestry. In Law No. 5 of 1960 on UUPA, the recognition of MHA's rights is regulated in Article 3 which states:

"By taking into account the provisions of Article 1 and 2 about implementation of people's rights and other rights similar to those of traditional community, whenever it is still in existence, must be in accordance with national and state interest based on the unity of the nation and must not contradict with laws and higher regulations".

It is also regulated in Law Number 41 of 1999 on Forestry as stipulated in Article 67 paragraph (1), (2) and (3) which states:

Paragraph (1). Indigenous law community shall if any and still acknowledged shall be entitled to:

- a. collect forest products to fulfill daily needs of relevant customary law community;*
- b. manage forest according to the prevailing indigenous law and not in contravention of the law; and*
- c. obtain empowerment for welfare improvement.*

Paragraph (2) Affirmation of existence and extinction of indigenous law community as referred to in paragraph (1) shall be stipulated by Regional Regulation.

Paragraph (3) Further provisions as referred to in paragraphs (1), and (2) shall be stipulated by virtue of a Government Regulation.

Similarly, Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia (hereinafter abbreviated to the 1945 Constitution), was amended by the People's Consultative Assembly of the Republic of Indonesia in 2000, which reads:

"The State recognises and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law."

Similarly, in Article 2 paragraph (9) of Law Number 32 Year 2004 on Regional Administration, it has been arranged that the state shall acknowledge and respect units of customary community and their traditional right, provided that they still exist and accord with the development of community and the principles of the Unitary State of the Republic of Indonesia.

Based on the rule of law mentioned above, it is obvious that UUPA, Forestry Law, the Law on Regional

¹. *Ibid*, hal 140.

² Sudikno Mertokusumo. *Teori Hukum*. (Yogyakarta: Universitas Atma Jaya, 2011), page 14.

³ Husen Alting. *Dinamika Hukum Dalam Pengakuan Hak Masyarakat Hukum adat Atas Tanah; (Masa Lalu, Kini, dan Masa Mendatang)*, (Yogyakarta: LaksBang PRESSindo, Cetakan ke II, year 2011). page 102

Administration, and the 1945 Constitution of the Republic of Indonesia, acknowledge and respect the unity of MHA and traditional rights of MHA including land rights, despite some requirements such as MHA should still exist and accord with the development of community and the principles of the Unitary State of the Republic of Indonesia. Such conditional recognition is a proof that the state is half-hearted in acknowledging the traditional rights of MHA. A more real evidence is that the government and the House of Representatives until now (16 years running) has not yet stipulated an Act to regulate the presence of MHA and their traditional rights as mandated by Article 18B paragraph (2) of 1945 Constitution.

Central Kalimantan Provincial Government also issued an acknowledgment of the existence of Dayak MHA as stated in Regional Regulation No. 16 Year 2008 on Dayak Customary Institution in Central Kalimantan (Central Kalimantan Provincial Statute Book Year 2008 Number 16) on December 20, 2008. Meanwhile, the regulation which governs recognition of customary lands and traditional rights of MHA Dayak is Governor Regulation No. 13 Year 2009 on customary lands and traditional rights in Central Kalimantan province.

Legal protection in the form of conditional recognition on the rights of MHA contained in regulations issued by the central government and the provincial governments of Central Kalimantan mentioned above have not yet been able to ensure legal certainty in providing legal protection for customary lands of MHA community in rural areas against the development of oil palm plantations in East Kotawaringin regency. Hence, for each oil palm plantation business license issued by local governments there is always customary land dispute between the indigenous people and oil palm plantation company.

Similarly, research findings as well as data from various parties state that the width of the areas for development of oil palm plantations in East Kotawaringin regency exceeds plantation business license and cultivation right issued by the local government. The data on the width of oil palm plantation area outside business license and cultivation right in East Kotawaringin regency is 61,632,31 ha.¹ Likewise, the data obtained by the author from the Plantation Office regional and provincial governments clarify that most of the lands for plantation in Central Kalimantan, including in East Kotawaringin regency, are not based on cultivation right stipulated in Article 16 of the Basic Agrarian Law (UUPA), but based on the plantation business license (IUP) issued by the Regional Government.

C.3. The Efforts of MHA in Resolving Dispute over their customary lands with Business Owner in the development of Palm Oil Plantations.

C.3.1. Individual efforts done by Indigenous People (MHA)

The life of villagers in East Kotawaringin regency is actually quite secure and peaceful as they do not bother one another and seize other's land. However, with the inclusion of the development of oil palm plantations in East Kotawaringin regency, legal problems i.e. disputes of customary land between villagers and oil palm companies start taking place.

Most of the villagers in East Kotawaringin regency are farmers so it is reasonable if they always try to defend their rights and perform legal protection against their customary lands which are scattered in *ulayat adat*. Legal protection done by MHA to their customary lands which are under plantation business license can be in the form of appeal to employers of oil palm plantations to reimburse their customary lands, or they request that the customary lands are left (enclave) in the middle of oil palm plantations.

Besides, the customary lands which become the source of dispute with the owner or employers of oil palm plantation should receive legal protection or should be resolved properly so that no one is harmed. The effort of MHA in resolving dispute over customary land with the employers against the development of oil palm plantations is one of the legal anthropology studies, as expressed by F.von Benda-Bechmann² who said: Legal anthropology essentially serves as anthropology of settlement of disputes. Efforts made by the villagers in resolving dispute over their customary lands with employers of oil palm plantations in East Kotawaringin regency are done in various ways, and according to the researchers, this is quite interesting to be assessed through the study of legal anthropology.

The means of dispute resolution over customary land in the village with employers or owner of oil palm plantation in general are not resolved through general courts. In addition, there is a factor which discourages the villagers to settle the dispute over their customary lands through general court, as stated by Teguh Prasetyo et al³:

"In a later development, general court is considered as a dependent institution because any arising cases are mostly won by those with large capital, and there is also judicial mafia (unscrupulous law enforcement officials), resulting in continuous decline of public trust in the judiciary."

¹. Data Based on the result of satellite imagery analysis obtained from the Head of Spatial Planning and Strategic Region Development, Public Works Office, Central Kalimantan Province.

². F.von Benda-Bechmann. *Antropologi Hukum Sebuah bunga Rampai*. Penyunting T.O. Ihromi. (Jakarta: Obor Indonesia, 2013). hal. 5

³Teguh Prasetyo; *Et. al. Hukum dan Undang-Undang Perkebunan*. (Bandung: Nusa Media, 2013), page 151.

The data obtained in the field show that the attempts of indigenous people (MHA) in resolving customary land dispute with the owner or employer of oil palm plantation are done individually or in groups. Individual effort is carried out through:

- a. Negotiation and Mediation
- b. Any other means deemed respectable by the MHA.

Negotiation effort is an effort to resolve customary land dispute between MHA and oil palm plantation company. It can involve various parties or only done by the owners of customary land. Rachmat Safa'at states that:¹

"Negotiation and mediation are part of the process of cooperative dispute resolution with the aim of solving problem together. Negotiation or mediation is one of the arenas to solve problems outside the court. In negotiation, the parties in dispute do not depend on rigid and written legal norms as well as statute books or various other regulations. In addition, negotiation also provides a space for the parties to find win-win solution. In negotiation, nobody experiences absolute lose or absolute win. All parties have the opportunity to explain different issues in the negotiation process. "

In the development of oil palm plantations, a lot of disputes on customary land between employers of oil palm plantations and MHA can be resolved through negotiation conducted by indigenous people (MHA) in Kotawaringin East regency. Based on the findings on the field, there is also a negotiation done by the village residents with the involvement of government officials as has been done by the family of Saur Ladung in resolving dispute over his customary land. In the negotiation carried out by Saur Ladung, the local government formed a commission team and from the result of commission team, they recognized that the 45 hectare customary land belonged to the family of Saur Ladung. However, until now Saur Ladung's family has never received any compensation from the oil palm plantation company because the company was only willing to pay Saur Ladung's rattan field at a price of Rp 1,500,000 per hectare, while Saur Ladung asked for Rp. 2,500,000 per hectare. Because Saur Ladung disagreed with the price offered by the company, until now Saur Ladung has not received any money from the oil palm company.

Another respectable way in resolving disputes over customary lands with oil palm plantation company is demonstrated by Junaidi, a resident of Pantai Harapan village in East Kotawaringin regency. Junaidi's customary land was planted with rubber plant, but a company with oil palm plantation business license cleared his land and then planted oil palm on his customary land. Junaidi did not ask for payment of his customary land although his rubber plantation was cleared. Yet, he defended his customary land by erecting wooden fence and prohibited the company to clear and harvest the oil palm plants on his customary land. Thus, his customary land is now status quo. Junaidi did not ask for compensation for his 5-hectare rubber plantation that had been cleared and cultivated by the company, with the consideration that the oil palm plants cultivated by the company on his land was the compensation for his rubber plantation.

The effort made by Junaidi is ultimately unprofitable because until now Junaidi does not dare to harvest the oil palm plants for he fears of being reported by the oil palm company to the police. He can be charged with theft of oil palm plants, just like some arrests made by the police on people from several villages because they harvest the oil palm grown on disputed land.²

Such effort done by Junaidi in defending his customary land is also done by other villagers in East Kotawaringin regency.

C.3.2. Efforts of MHA as a Group.

a. Through Community Organization.

Customary land dispute resolution through community organization is based on an awareness that human beings would not be likely to succeed on his own in his fight without cooperating with others. This is in line with the opinions of Richard H. Hall, as quoted by Budhi Paramitha, which states:

"The answer to why we have organizations is simple: to get things done. We have organizations to do things that individuals cannot do by themselves".³

In rural areas in East Kotawaringin regency, there are many traditional land disputes with oil palm company where individual effort to settle the problem experiences failure. Therefore, indigenous land owners request the assistance of community organizations to solve their problems. One community organization that has quite many experiences in resolving disputes over customary land in Central Kalimantan province, including in Kotawaringin East regency is Central Institute of Small Level Public Opinion Sharer of Central Kalimantan,

¹. Rachmad Safa'at, *Advokasi Dan Alternatif Penyelesaian Sengketa, Latar Belakang, Konsep, dan Implementasinya.* (Malang: Surya Pena Gemilang, 2011), page 84-85.

². Resume of interview result with Junaidi in his house in Pantai Harapan village, Cempaga Hulu subdistrict, East Kotawaringin regency, on 8 July 2013.

³. Budhi Paramitha, *Struktur Organisasi Di Indonesia*, Jakarta : Universitas Indonesia, 2005. page 67.

(“*Lembaga Pusat Pembina Penyalur Pendapat Masyarakat Tingkat Bawah Daerah Kalimantan Tengah*”, abbreviated to LP.IV.MTBDKT). This organization was founded in Palangkaraya, and quite a lot of MHA people request its assistance in resolving land disputes with employers of oil palm plantations in Central Kalimantan province, including resolving disputes over customary land owned by Rantau Sepan, Paria Nata and Gambut, the residents of Mentawa Hulu Utara village, Mentawa Hulu Ketapang subdistrict, East Kotawaringin regency, who have a legal dispute with PT. Agro Bukit oil palm plantation company.

b. Through Traditional Ritual *Hinting Pali* Installation

The traditional ritual *Hinting pali* installation is one of the traditional rituals for adherents of *Kaharingan* (now the adherents of *Kaharingan* join with Hindu religion, and it is called Hindu *Kaharingan*) in Central Kalimantan. *Hinting pali* means prohibition line (a sort of police line) that prohibits a person to enter an area. It is a sort of notice to people that in a neighborhood/village there is a religious ceremony or ritual custom, and if some people enter the neighborhood/village there are some prohibitions that should not be violated, and for those who violate the prohibition shall get traditional fine called *singer*.

The traditional ritual *Hinting pali* installation should be done by the Dayaks in their Hindu *Kaharingan* religious activities and other traditional rituals, used also by the MHA in the rural areas in East Kotawaringin regency to settle the dispute over their customary lands with employers of oil palm plantation. The implementation of dispute resolution of customary land with oil palm plantation company is carried out by MHA by installing *hinting pali*¹ which blocks the way from the oil palm companies to the customary land.

As a result of the installation of *hinting pali* (which should not be removed without going through the correct ritual) which blocks the oil palm plantation company's way, some of them are successful in bringing the employers of oil palm plantation in East Kotawaringin regency to resolve the dispute over customary land.

C.4. The role of *Kedamangan* Customary institution in resolving customary land dispute with business owner in the development of Oil Palm plantation

The result of research in the field shows that *kedamangan* customary institution does not play an important role in providing legal protection as the institution does not issue Certificate of Customary Land to MHA who are in dispute with the employer of oil palm plantation because the institution fears of getting a reprimand from the regent. Since *Kedamangan* customary institution does not dare to issue Certificate of Customary Land (in accordance with its authority in Provincial Regulation No. 16 of 2008) on the land owned by villagers which are a part of plantation business license (IUP) and are in dispute with employers of oil palm plantations, the villagers have difficulty in providing written evidence on their customary land ownership. The Certificate of Customary Land from *Kedamangan* customary institution is supposed to be useful for the villagers in strengthening the proof of ownership of their customary land.

To make it worse, *kedamangan* customary institution in East Kotawaringin regency does not play any role in resolving customary land disputes between employer of Oil Palm plantation and the villagers. In the case of customary land disputes in the development of oil palm plantations, village head and subdistrict officials in fact play a bigger role. The data were obtained from Drs. Hawianan, Head of Regional Secretary Division, East Kotawaringin regional government, who said:²

Where there are people in a village who directly report to the regent about the land dispute with the oil palm plantation company, the regional government usually hands it over to subdistrict head and village head to be resolved with the plantation company. In reality, quite a lot of customary land disputes between indigenous community and plantation company can be solved by the village head.

The data obtained from the Head of Regional Secretary Division, East Kotawaringin Regional Government, is also justified by Puja Guntura,³ *Damang Adat* Leader of Parenggean Subdistrict who said that he is never involved in the resolution of land disputes between indigenous people in the village and employers of oil palm plantations, except in the case of customary land dispute among villagers, *damangis* involved in the settlement of problem. If the decision of *kerapatan mantir adat* at village/subdistrict level is not accepted by either party, they will make an appeal to *kedamangan* in the subdistrict.

According to Chinghi⁴ *Damang adat* leader at Telawang subdistrict, *kedamangan* customary institution

¹. In Bahasa Dayak Ngaju, the word *Hinting* means rope and *Pali* means prohibition, so *Hinting Pali* is a kind of Police Line which has the form of prohibition sign for everyone to enter an area or to do an activity in that area. When installed high enough above the ground, it can also be a notification to the people that in a region there is a religious or customary ritual (*Tiwah* ceremony and others), and every person who enters the area should not do anything forbidden by the participants of the ritual.

² Interview result with Drs. Hawianan, Head of Regional Secretary Division, East Kotawaringin regional government, in his office on 13 of November 2013.

³. Interview result with Puja Guntura, *damang adat* leader of Parenggean subdistrict, East Kotawaringin regency, in his house in Pundu village; on 13 June 2013.

⁴. Interview result with Chinghi, *damang adat* leader of Telawang subdistrict East Kotawaringin regency, in his house in Pondok Damar *Dusun* Tanah Putih village; on 2 November 2013.

only involved in resolving disputes when there is eviction of graveyard done by oil palm plantation company during the process of land cultivation. The role of *kedamaian* customary institution in dispute resolution related to eviction of villagers' graveyard contained in *ulayat adat* of the village is limited to upholding the customary sanctions to employer of oil palm plantation which has evicted villagers' graveyard by applying *Singer*¹ customary sanctions because of destroying the graveyard.

4. Conclusion

From the explanation and the data obtained in the field, it can be concluded that:

1. Customary land not protected by law against the development of oil palm plantation in East Kotawaringin regency is the result of conditional recognition on the traditional rights of Indigenous People contained in Article 3 of Law No. 5 year 1960 About the Basic Agrarian Law (*UUPA*) and some other laws, and it is stated well in article 18 paragraph (2) of 1945 Constitution (amended by People's Consultative Assembly in 2000), have not been able to provide legal certainty to protect the traditional rights of MHA or customary land owned by people in the rural areas of East Kotawaringin regency. Data in the field show that the area of oil palm plantation in East Kotawaringin regency exceeds the width of land covered in plantation business license issued by the local government.
2. There are no provisions of the standard methods that ensure legal certainty in resolving disputes over customary land with the owner of oil palm plantations in East Kotawaringin regency, so MHA or indigenous people in the village try to resolve the land dispute with employers of oil palm plantations individually or as a group by engaging many people through social organizations and traditional rituals.
3. *Kedamaian* customary institutions has no autonomy in giving legal protection to the customary lands of its people, especially in the form of issuing Certificate of Customary Lands to the villagers whose land is included in plantation business license (IUP) or is under dispute with employers of oil palm plantations because the institution is afraid of getting a reprimand from the Regent of East Kotawaringin regency. Moreover, *kedamaian* customary institution has insignificant role in resolving customary land dispute between MHA and oil palm plantation company in East Kotawaringin regency, but it is the village officials that play more important role in resolving customary land dispute. The role of *kedamaian* customary institution is merely to resolve dispute by implementing *Singer* traditional sanction to oil palm company that carries out eviction of villagers' graveyard in the area of *ulayat adat*.

5. Recommendations

From some of the above conclusions, the following recommendations can be given:

1. In order to ensure the certainty of legal protection of customary lands or traditional rights of MHA in Indonesia, People's Consultative Assembly of the Republic of Indonesia should amend Article 18B paragraph (2) of 1945 Constitution of the Republic of Indonesia so that it reads: "The State recognizes and respects the unity of MHA and provides legal protection of their traditional rights as long as these remain in existence and are maintained by MHA, and in accordance with the principle of Diversity in the Unitary State of Indonesia of the Republic of Indonesia, and shall be regulated by law."
2. There should be legal certainty in the resolution of customary land dispute with employers oil palm plantations. Thus, all elements of MHA should urge the central government to form a team of customary land dispute settlement in the development of oil palm plantation in East Kotawaringin regency and also urge the central government to form evaluation and audit team on oil palm plantation business license in East Kotawaringin regency.
3. If the results of evaluation and audit on oil palm plantation business license states that there is a company which develop oil palm plantations outside its business license and its cultivation right violates the rules of law and harms people or creates a dispute with MHA in the village, the company should be prosecuted and customary land outside IUP and cultivation right should be returned to MHA.
4. *Kedamaian* Customary institution must have autonomy (not influenced by the regent) to provide legal protection to indigenous people or MHA against the development of oil palm plantation, and efforts to increase the autonomy of *kedamaian* are conducted in a way that the personnel of *kedamaian* are not appointed by Regents's/Mayor's decree, but by Dayak Customary Council (*Dewan Adat Dayak/DAD*).

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¹. In Article 32 (c) of Central Kalimantan provincial regulation No 16 year 2008 on Dayak *Adat* institution in Central Kalimantan, *Singer* is another term for fine or compensation.

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Law No 32 of 2004, jo Law No 23 of 2014 on Regional Government.
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