



## Eradication of Forest Fire and Land through the Application of Criminal Sanctions in Law No. 32 of 2009

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### **Abstract**

Forest and land damage in Indonesia has reached 43 million hectares per year. In general, this is due to unsustainable large-scale exploitation and ecological insufficiency of forest resources for the purpose of harvesting forest products, clearing plantation land and for other purposes such as mining. The problem of forest and land damage as described above is exacerbated by forest and land burning activities as a result of land clearing through burning. The burning of this forest and land has caused smoke pollution, which contributes to global warming and climate change, which in turn has placed its own burden and disturbance on the forest ecosystem.

**Keywords:** Eradication; Forest; Fire; Land; Application; Criminal; Sanction; Law

### **Introduction**

Forest and land fires in Indonesia have become annual disasters because these events occur almost every year. Some even call it the episode of forest fires. The episode that caused many people to flinch was the forest and land fires that occurred in 1996. These forest and land fires in 1996 caused huge economic losses not only for Indonesia but also neighboring countries, especially Singapore and Malaysia.

In an effort to overcome these forest and land fires, the Government of Indonesia through the Director General of Plantations issued Decree No. 38 / KB-110 / SK / DJ.BUN / 05.95, which requires land clearing without burning (zero burning). But unfortunately, in the forestry sector itself, this Government Regulation is not implemented consistently<sup>2</sup>. For example, Decree of the Director of Forest

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<sup>1</sup> Simon S.C. Tay, "Southeast Asian Fires: The Challenge for International Law and Development," XI The Georgetown International Environmental Law Review, 241-305 (1999), p. 293;

<sup>2</sup> Office of the State Minister for the Environment of the Republic of Indonesia and the United Nations Development Program (UNDP), *loc. cit.*

Protection and Nature Conservation No. 47 / Kpts / DJ-VI / 1997<sup>3</sup>, permits land clearing through burning under certain conditions (*controlled burning*).

In a state of chaos regarding legal products as mentioned above, the Government issued Law No. 23 of 1997 to protect the environment, including environmental protection in forest areas. This law does not specifically regulate the prevention of air pollution from forest and land fires. But, this Law becomes the legal basis which prohibits people and / or legal entities from polluting the environment including air<sup>4</sup>. For example, Article 6 states that "everyone has. . . preventing and overcoming environmental pollution and damage ", including air pollution due to forest and land fires. The prohibition of forest fires is specifically regulated in Law No. 41 of 1999 concerning Forestry, namely Article 50 paragraph (3) point d, which states that "everyone is prohibited from burning forests." But this provision only applies to activities in forest areas. Though forest fires can occur due to fire originating from the plantation area. As a result, at that time many forest and land fires were not overcome by the existence of Law No. 41 of 1999<sup>5</sup>.

To overcome the weaknesses and legal vacuum above, the Government of Indonesia promulgated Government Regulation No. 4 of 2001 concerning Control of Environmental Damage and / or Pollution Related to Forest and Land Fires<sup>6</sup>. This Government Regulation fills legal vacuum in Law No. 41 of 1999 by including land fires<sup>7</sup>, which are not regulated in this Law.

Based on Government Regulation No. 4 of 2001, the owner of an activity is not only required to prevent forest and land fires<sup>8</sup>, but also is considered responsible for forest and land fires that occur in the working area<sup>9</sup>. This provision is very useful to anticipate the arguments of plantation business owners who always say that fires that occur in their working areas are caused by farmers. This argument is often used in court to defend oneself. Mr. C. Gobi (the defendant in the case of land fires in the Bangkinang District Court) felt innocent of the land fires in his working area by showing some photos of community activities that were cooking in his working area. He said that it was the people who burned the land. He defended himself by using land clearing agreements with residents where he required that land clearing not be allowed to use fire. If this argument is presented before a hearing, the judge will ask the prosecutor to prove the physical offender, which of course requires traditional evidence such as matches, or petrol or fuel or jerry cans used to burn forests and land, which is certainly not possible in court. Judge Setia Rina and Judge Jony expressed their doubts about whether the prosecutor must prove the physical offender or not after hearing the defendant's statement by showing photos of the population cooking in the defendant's work area<sup>10</sup>.

To make the norms that exist in Government Regulation No. 4 of 2001, the prohibition on land burning is explicitly stated in Law No. 32 of 2009 concerning Environmental Protection and Management, namely Article 69 paragraph (1) riots (h) which states that: "Everyone is prohibited from clearing land by burning." Even though legal reinforcement to prevent forest and land fires has been carried out by The Indonesian government, forest and land fires continue to be more and more massive and most perpetrators are not convicted and not even brought to justice.

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<sup>3</sup> Realizing the mistakes made, the Director General of Forest Protection and Nature Conservation (DG PHPA) revoked Director General PHPA No. 47 / Kpts / DJ-VI / 1997 by the Director General of PHPA No. 152 / Kpts / DJ-VI / 1997.

<sup>4</sup> Sukanda Husin, *op. cit.*, p. 86.

<sup>5</sup> *Ibid.*, P. 90

<sup>6</sup> "Government Regulation of the Republic of Indonesia No. 4 of 2001 concerning Environmental Damage and / or Pollution Control Related to Forest and Land Fires. "

<sup>7</sup> *Ibid.*, Read Article 11 ("Everyone is prohibited from doing the act of burning forest or land.").

<sup>8</sup> *Ibid.*, Read Article 23 "Every owner of activities which can have a major and significant impact on the environment in connection with forest and land fires is required to prevent the occurrence of forest and land fires in his working area".

<sup>9</sup> *Ibid.*, Article 18.

<sup>10</sup> Sukanda Husin, *op. cit.*, p. 90

With the laws and regulations being completed to prevent and eradicate forest and land fires, the fires continued even as the 2015 forest and land fires were the worst forest and land fires ever<sup>11</sup>. The land or plantation owners do not appear to be afraid of the threat of punishment stated in the legislation.

According to BNPB, forest and land fires in June to October 2015 cost financial losses of up to Rp 221 trillion. The amount is outside the calculation of losses in the health sector, education, germplasm, carbon emissions and others. Losses are higher compared to similar incidents in 1997 where forest and land fires cost the country up to Rp. 60 trillion. This loss is equivalent to 1.5 percent of the national Gross Domestic Product, meaning that forest and land fires hinder the pace of development, "said Head of the National Disaster Management Data and Information Center (BNPB) Sutopo Purwo Nugroho<sup>12</sup>. The World Bank estimates that the 2015 forest fires destroyed 2.6 million hectares of forest and agricultural land, with losses reaching 16.1 billion US dollars, or about 1.9 percent of gross domestic product (GDP). If each hectare of burned land is converted to oil palm plantations, Indonesia gets around 8 billion US dollars.

In law enforcement efforts, the National Police Headquarters has handled 148 cases of forest and land burning criminal cases which have been carried out through regional police task forces in Sumatra and Kalimantan and the Indonesian Police Criminal Investigation Agency. Of the 148 cases, cases that have been declared complete or P21 totaled 25 cases in the provinces of Riau, Jambi, Central Kalimantan and West Kalimantan. While the cases included in the investigation were 85 people and 27 corporations. There are 10. Cases that have been named as suspects and are being secured are 133 individuals and seven corporations in South Sumatra, Riau and Central Kalimantan, "said Chief of General Information Section of the National Police Commissioner Commissioner Suharsono at National Police Headquarters, Jakarta, Thursday (17 / 9/2015) Suharsono revealed that in order to ensnare perpetrators, the police adopted the Environmental Protection and Management Act, namely Article 108<sup>13</sup>.

Actually there are at least 3 (three) laws that can be used to punish the perpetrators of forest and land burning. The first is Law No. 32 of 2009 concerning Environmental Protection and Management. Second is Law No. 41 of 1999 concerning Forestry and the third is Law No. 39 of 2014 concerning Plantations.

According to Law No. 32 of 2009, clearing land by burning is unlawful as regulated in Article 69 paragraph (1) riots (h). The act of opening land by burning is threatened with imprisonment for a minimum of 3 (three) years and a maximum of 10 (ten) years and a fine of at least Rp. 3,000,000,000.00 (three billion rupiah) and a maximum of Rp. 10,000,000,000.00 ( ten billion rupiah), as stipulated in Article 108 of Law No. 32 of 2009.

### ***Problems Formulation***

Based on the background of the problems outlined above, the formulation of the research problems are as follows:

1. What is the current environmental legal system to combat forest and land fire crimes?
2. What are the legal considerations for judges to determine the punishment for forest and land burners?

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<sup>11</sup> Inilahcom Website; <http://nasional.inilah.com/read/detail/2260157/kebakaran-hutan-2015-rugikan-indonesia-us-16-m.>, last visited on 7-1-2016.

<sup>12</sup> Republika Online Website, <http://nasional.republika.co.id/berita/nasional/umum>, last visited 7-1-2016.

<sup>13</sup> Kabar.24.com.jakarta, <http://kabar24.bisnis.com/read//kebakaran-hutan-polri-sudah-tangani-148-kasus-pidana>.

## Discussion

### 1. Environmental Law System that Applies to Combat Forest and Land Fire Crimes

Law No. 32 of 2009 concerning Environmental Protection and Management is a legal umbrella (*umbrella provisions*)<sup>14</sup> to regulate the management of natural resources and the environment and its ecosystem in a sustainable manner in order to prevent human activities and legal entities that may cause waste, destruction and pollution of the environment and its ecosystem.

Environmental law as regulated in Law No. 32 of 2009 is a sub-system of administrative law, civil law and criminal law, including civil procedural law and criminal procedure law. This is caused by the existence of Law No. 32 of 2009 as a functional law (*functioneel rechtsgebied*). However, as a legal sub-system, environmental law requires other laws and regulations to specify more specifically the norms that protect the environment and its ecosystem. So in this context, Law No. 32 of 2009 became general law (*lex generalis*) for the protection and management of the environment and its ecosystem. While other laws and regulations function as a special law (*lex specialis*) for the protection and management of the environment and its ecosystem.

In protecting forests and their ecosystems, there are several special laws (*lex specialis*) for operationalizing *lex generalis*. The laws and regulations referred to are: Law No. 41 of 1999<sup>15</sup> concerning Forestry as amended by Law No. 19 of 2004<sup>16</sup>. While the special law to protect the environment in the plantation sector, the Government of the Republic of Indonesia promulgates Law No. 39 of 2014 concerning Plantations<sup>17</sup>. This law specifically contains a prohibition on land clearing by burning, which in many cases results in forest fires.

The following will discuss the provisions of the *lex generalis* and all the special laws (*lex specialis*) above in the framework of the environmental legal system in Indonesia. It aims to elaborate in detail the relationship between *lex generalis* and *lex specialis* in environmental protection in the forestry sector, especially those related to forest fires.

### 2. Matters that become Legal Considerations for Judges to Determine Punishment for Forest and Land Burners

In Indonesian law practice, there have been several court decisions regarding cases of forest and land fires. The cases presented in this study illustrate the views of judges in enforcing the law on combating forest fires. These cases are interesting to study because there are disparities in judges' decisions. To elaborate on this, the researcher will discuss and analyze the case of PT Kalista Alam in the Meuleboh District Court in Aceh Province.

This case is a case of land fire that occurred on PT. Kalista Alam. In this case the defendant was Ir. Khamidin Yoesoef, an estate manager. So this case is a case of corporate responsibility (corporate crime).

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<sup>14</sup> Alvi Syahrin, *Some Revised Edition Environmental Law Legal Issues*, (Jakarta: Sofmedia, 2009), p. 21

<sup>15</sup> Law No. 41 of 1999 concerning Forestry, Republic of Indonesia State Gazette of 1999 No. 167, Supplement to the State Gazette of the Republic of Indonesia No. 3888.

<sup>16</sup> Law No. 19 of 2004 concerning Establishment of Government Regulation in Lieu of Law No. 1 of 2004 concerning Amendments to Law No. 41 of 1999 concerning Forestry Became Law, Republic of Indonesia State Gazette of 2004 No. 86, Supplement to the State Gazette of the Republic of Indonesia No. 4412.

<sup>17</sup> Law of the Republic of Indonesia Number 39 of 2014 concerning Plantations, State Gazette of the Republic of Indonesia of 2014 Number 308, Supplement to the State Gazette of the Republic of Indonesia Number 5613.

### a. Case Position

PT. Kalista Alam is included in the Leuser Ecosystem and National Strategic Areas with oil palm plantations covering an area of 1605 Ha and has obtained a plantation business permit in accordance with the Aceh Governor's Letter No. 525 / BP2T / 5322/2011 dated August 25, 2011 concerning Business Permit for Oil Palm Plantation Areas

On Friday 23 March 2012 a fire broke out in A2 block VII Division PT. Kalista Alam on a plantation area of ± 5 hectares. The area is included in the Suak Bahong plantation area which has not yet been planted with oil palm but has been stacked and a hole has been prepared. The fire originated from PT. Kalista Alam and the fire spread to the A2 block garden land that has been done stacking but not yet planted, at that time the fire burned the pile lanes (north to south) on block A2, this fire lasted until Tuesday, March 27, 2012 and there was no blackout efforts from PT. Natural Kalista.

The fire also repeated again, namely on Sunday, June 17, 2012 to Sunday, June 24, 2012 in Block E42B Division VIII covering an area of 8 hectares. At that time the fire headed north burning stacking stack and palm trees that are not good (the growth is dwarf and the leaves are yellow), in this incident also the PT. Kalista Alam did not extinguish efforts because it turned out that this company did not have a system in controlling / preventing fires, namely: not having adequate fire fighting equipment, not having firefighters who had received training / skills in the field of fire control, did not have easy road access passed in mobilization, do not have officers and carry out the duties of monitoring and supervision of the possibility of land fires that are prone to fire, including the provision of sufficient and adequate costs in land fire prevention / control programs.

### b. Prosecutors' demands

Based on the position of the case outlined above and after examining the evidence submitted and after hearing the statements of witnesses, expert witnesses, defendants, and defense lawyers, the Public Prosecutor General reads the demands and requests the Panel of Judges to:

1. State the defendant Ir. Khamidin Yoesoef as Estate Manager Development of PT. Kalista Alam has been proven to burn land as referred to in Article 69 paragraph (1) letter (h) which is carried out continuously as stipulated and threatened with criminal sanctions in Article 108 jo Article 69 paragraph (1) letter (h), Article 116 paragraph (1) ) letter (a), Article 118, Article 119 of Law Number 32 of 2009 concerning the protection and Management of the Environment and *jo* article 64 paragraph (1) of the Criminal Code; and
2. Imposing imprisonment for the defendant Ir. Khamidin Yoesoef as Estate Manager Development of PT. Kalisa Alam with imprisonment for 3 (three) years and a fine of Rp. 3,000,000,000 (three billion) rupiah subsidiary 5 (five) months of confinement.

### c. Defendant's Defense

1. The defendant has never committed or ordered to clear land by burning or causing fire on PT. Kallista Alam;
2. The fire that occurred on the defendant's land was on March 23, 2012 covering 5 hectares and on June 17, 2012 covering 8 hectares;

3. Defendant is an employee who has experience in plantations and works in accordance with the company policy line which obeys the law;
4. PT. Kallista Allam has a policy that prohibits burning in all logging and has a system, facilities and infrastructure to prevent and control fires;
5. The defendant never ordered to set fire, let alone controlled burning, and never allowed a fire to occur because land fires were detrimental to the company so the defendant avoided;
6. Fires at PT. Kallista Alam occurs after land clearing activities are finished because what is burned is piles and plants;
7. There has never been a reprimand, sanction or any action from the provincial government, local government or plantation and / or environmental agencies in the area related to fire on PT. Kallista Alam;
8. There was no longer any activity carried out by the defendant in the IUP-B Plantation Business permit area for 1605 hectares since November 2011;

#### d. Judge's Decision

1. State the defendant Ir. Khamidin Yoesoef Bin Muhammad Yoesoef has been proven legally and convincingly guilty of committing criminal acts "The Environment Continuously Conducted";
2. Convicts a criminal against a Defendant and therefore is imprisoned for 3 (three) years and a fine of Rp. 3,000,000,000 (three billion); and
3. To determine if the fine is not paid, it is replaced with imprisonment for 5 (five) months.

### **Conclusions**

1. The environmental legal system in combating forest and land fires is that Law No. 32 of 2009 is a functional law (*functioneel rechtsgebeid*). However, as a legal sub-system, environmental law requires other laws and regulations to specify more specifically the norms that protect the environment and its ecosystem. So in this context, Law No. 32 of 2009 became general law (*lex generalis*) for the protection and management of the environment and its ecosystem. Whereas other laws and regulations function as special laws (*lex specialis*) including: Law No. 41 of 1999 concerning Forestry and Law No. 39 of 2014 concerning Plantations.

2. Judges' consideration in the case of Ir. Khamidin Yoesoef as Estate Manager Development of PT. The Kalista Alam case is very comprehensive and has included all elements of the criminal act which was tried. Judges' considerations in this case not only refer to positive law but also incorporate the principles of international law as stipulated in the 1972 Stockholm Declaration and the 1992 Rio Declaration, such as the *pollter pays principle* and *precautionary principle*. However, the consideration of the panel of judges in the case can be considered excessive and the interpretation of the *precautionary principle* is also incorrect. While in the case of PT. National Sago Prima, represented by the Management / Power of Attorney acting for and on behalf of the defendant Eris Ariaman, SH., Was more careful in considering the elements of criminal acts prosecuted by the prosecutor both for primary and secondary and secondary

charges. In giving their deliberations, the panel of judges considered the elements of the charged articles. Judges' considerations are not only based on Law No. 32 of 2009 but also Law No. 41 of 1999. Even further considering government regulations, for example Government Regulation No. 4 of 2001, especially regarding mandatory and obligatory facilities that must be owned by companies that open plantations. The judge's verdict in this case which acquitted the defendant from the charges of First Primair, First Subsidair, Second, Third and Fourth was very appropriate. Then the Panel of Judges argued that only the element of negligence was fulfilled. Judges' consideration in this matter is also accurate because the facts of the trial prove that the fire was carried out by a third party who felt hurt by PT. NSP, witness Sendi als Rendi, explained that he who did the burning because of heartache was not lent money by PT. NSP.

### **Suggestions**

1. Due to the complicated Indonesian environmental legal system, where there is a *lex generalis* and *lex specialis* relationship, the judge is advised to examine the use of laws used in deciding cases of forest and land fires. For example in the case presented in this thesis, the judge must determine whether the panel will decide by Law No. 32 of 2009 (*lex generalis*) or *lex specialis* as Law No. 41 of 1999 concerning Forestry or Law No. 39 of 2014 concerning Plantations.
2. In deciding a case, the consideration of the panel of judges must be appropriate and appropriate to provide a sense of justice, certainty and usefulness of the law. Based on the two cases above, the judge is advised to give legal and proper legal considerations so as not to arouse suspicion and a sense of injustice. Therefore, the judge is advised to ensure that his judgment is truly beneficial to justify his sentence.

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