DECISION

Number 35/PUU-X/2012

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Hearing constitutional cases at the first and final levels, has passed a decision in the case of Review of Law Number 41 Year 1999 concerning Forestry against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] 1. **THE INDIGENOUS PEOPLES' ALLIANCE OF THE ARCHIPELAGO (AMAN),** in this matter based on Article 18 paragraph (1) of Articles of Association is represented by:

Name	:	**Ir. Abdon Nababan**
Place, Date of Birth	:	Tapanuli Utara, April 2, 1964
Occupation	:	General Secretary of AMAN
Address	:	Jalan Tebet Utara II C Number 22 Jakarta Selatan

Hereinafter referred to as **Petitioner I;**

2. **INDIGENOUS PEOPLES OF KENEGERIAN KUNTU**

Kampar District Riau Province, in this matter is represented by:

Name	:	**H. BUSTAMIR**
Place, Date of Birth	:	Kuntu, March 26, 1949
Occupation	:	Khalifah Kuntu, with title Datuk Bandaro

Address	:	Jalan Raya Kuntu RT/RW 002/001 Kuntu Village, Kampar Kiri Sub-District, Kampar District, Riau Province

Hereinafter referred to as **Petitioner II;**

3. **INDIGENOUS PEOPLES OF KASEPUHAN CISITU**

Lebak District Banten Province, in this matter is represented by:

Name	:	**H. MOCH. OKRI alias H. OKRI**
Place, Date of Birth	:	Lebak, May 10, 1937
Citizenship	:	Indonesian
Occupation	:	Olot Kesepuhan Cisitu
Address	:	Kesepuhan Cisitu, RT/RW 02/02 Kujangsari Village, Cibeber Sub-District, Lebak District, Banten Province;

Hereinafter referred to as **Petitioners III;**

By virtue of Special Power of Attorney dated March 9, 2012 granting power to **Sulistiono, S.H., Iki Dulagin, S.H., M.H., Susilaningtyas, S.H., Andi Muttaqien, S.H., Abdul Haris, S.H., Judianto Simanjutak, S.H., Erasmus Cahyadi, S.H.,** all of whom are advocates and Legal Aid assistants, incorporated as **Team of Advocates of Indigenous Peoples of the Archipelago,** having address at Jalan Tebet Utara II C Nomor 22 South Jakarta, Jakarta, Indonesia, to act individually or jointly as authorizer;

Hereinafter referred to as **the Petitioners;**

[1.3] Having read the petition of the Petitioners;

Having heard the statement of the Petitioners;

Having heard and read the statement of the Government;

Having read the statement of the People's Legislative Assembly;

Having heard and read the statement of the experts of the Petitioners and Government;

Having heard and read thewitness statement of the Petitioners;

Having examined the evidence of the Petitioners,

Having read the conclusion of the Petitioners and Government;

2. THE FACTS OF THE CASE

[2.1] Considering whereas the Petitioners filed a petition dated 19 Maret 2012, which was received at the Registrar's Office of the Constitutional Court (hereinafter referred to as the Registrar's Office of the Court) on March 26, 2012, under Deed of Petition File Receipt Number 100/PAN.MK/2012 and recorded in the Registry of Constitutional Cases on April 2, 2012 under Number 35/PUU-X/2012 and having been revised and received at the Registrar's Office of the Court on May 4, 2012, principally describing the following matters:

I. INTRODUCTION

The fourth paragraph of the Preamble of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) has very clearly stated the aim of the establishment of the Unitary State of Republic of Indonesia (NKRI) is "*to protect all the people of Indonesia and all the independence and the land that has been struggled for, and to improve public welfare, to educate the life of the people and to participate toward the establishment of a world order based on freedom, perpetual peace and social justice* ". That paragraph would then become the basis of the formulation of Article 33 paragraph (3) of the 1945 Constitution that mandates the state to use the land, the waters and the natural resources within for the greatest benefit of the people. Therefore, all laws governing the land, water and all natural resources in Indonesia should refer to the aim intended through Article 33 of 1945 Constitution (**Exhibit P - 2**);

In implementing constitutional mandate, in the forestry sector as one of natural resources, the government prepared Law Number 41 Year 1999 on Forestry (hereinafter referred to as the Forestry Law). Article 3 of the Forestry Law states that "*Forest management shall be aimed at providing maximum prosperity for the people based on justice and sustainability*;

In fact for more than 10 years of enactment, the Forestry Act has been used as a tool by the state to take over the rights of indigenous peoples over their customary forests areas to become state forest, which then on behalf of the state were given/or handed over to capital owners, through various licensing schemes to be exploited without consideration to the rights and local wisdom of indigenous peoples in the region, this has led to conflict between indigenous peoples with enterpreneurs exploiting their customary forest. Such practices occur in most parts of the Republic of Indonesia, which ultimately led to the rejection of the enforcement of the Forestry Law (**Exhibit P-3**);

Rejection over enforcement of Forestry Law is continuously voiced by indigenous peoples, which reflected through demonstrations, and reports of complaints to state agencies, including the National Commission on Human Rights, even to law enforcement officers; however these efforts were responded with violence by the state and private actors. For indigenous peoples, Forestry Law creates uncertainty of rights over their customary forest; while these rights are hereditary in nature. The right is not granted by the state to the indigenous peoples, but hereditary, which arised from their process of civilization. Unfortunately, the state's claim over the forest has always been considered more valid than the claims made by indigenous peoples. Whereas indigenous rights over customary forests, which majority claimed as state forest, have existed long before the state's rights;

Whereas in practice, the Government often issued decrees of designation of forest area without prior check of claims made by indigenous peoples over the land and even where there have been indigenous peoples reside in the area. Data of Ministry of Forestry and Statistics Indonesia (BPS) show that there are 31.957 interacting with forests and 71.06 percent of them heavily depend on forest resources (**Exhibit P - 4**). In general, the people who reside and live in villages in and around the forest, who identified themselves as indigenous peoples or local communities, are living in poverty. CIFOR (2006) reported that 15% of the 48 million people who live in and around the forests are poor;

Whereas in the Strategic Plan of the Ministry of Forestry 2010-2014 shows data, that in 2003, out of 220 million Indonesian population, there are 48.8 million people who live in villages around forest area, and there are about 10.2 million poor people live around

forest area (**Exhibit P - 5**). Meanwhile other data released by the Ministry of Forestry and the Statistics Indonesia (BPS) in 2007 showed there are still 5.5 million people classified as poor live around forest area;

Some of conflict typologies over forest area related to indigenous peoples resulting from implementation of Forestry Law which often occur in the field, include:

1. indigenous peoples with a company(as experienced by Petitioner II), and;
2. indigenous peoples with Government (as experienced by Petitioner III);

Two forms of conflict over forest area illustrates that regulation on forest area in Indonesia ignores the existence of the rights of indigenous peoples over their customary territories. Though indigenous peoples have their own history of over land concession and resources, which impacted on different basis on claim with other parties including the Government (state) toward forest area. In fact, indigenous peoples have not acquired strong rights over their claims making them as criminals when they access the forest area, which they claimed as indigenous territories. The inclusion of customary forests as part of the state forest as set forth in Article 1 Point 6, Article 4 paragraph (3) and Article 5 paragraph (2) of Forestry Law is the main issue in this case. This provision indicates that the Forestry Law has an inaccurate perspective on the existence and the rights of indigenous peoples over their customary forests area;

It is said inaccurate, as Forestry Law does not regard the historical aspects of indigenous peoples' claims over their customary lands. Indigenous peoples have existed long before the birth of the Republic of Indonesia. This fact is recognized seriously by the Founding Fathers, which reflected in serious debates on the existence of indigenous peoples in the sessions of the Committee for Preparatory Work for Indonesian Independence (BPUPKI).

Whereas debates on indigenous peoples in the context of a country that was being built in the early days of independence have gained a large portion of BPUPKI sessions, which then crystallized in Article 18 of 1945 Constitution. Paragraph II of Elucidation of Article 18 of 1945 Constitution (before amendment) stated that: "*in the Indonesian State territoir there lk. 250 Zelfbesturende landschappen and Volksgemeenschappen, such as villages in Java and Bali, the country in Minangkabau, village and clan in Palembang and*

so on. Areas that have the original arrangement, and therefore can be considered as special regions" **(exhibit P - 6);**

It is further stated that, "*the Republic of Indonesia to respect the position of the special regions and all regulations regarding regions Negarayang it will considering the rights of the local origin*";

Through that elucidation, the Founding Fathers wanted to say that in Indonesia there were many community groups who have the original arrangement. The term *'original arrangement*"is intended to show communities who have their self-governance system or *Zelfbesturende landschappen* or indigenous peoples. Whereas self-governance that occur in a landscape environment generated by societal development, which can be seen from the phrase that combines the terms *Zelfbesturende* and *landschappen*. This means that self-governance is associated with a region. It is also intended to say that the implementation of the State through national development shall not ignore even deliberately abolished by the Government;

Sociologically, indigenous peoples have a very strong attachment to the forest and have built intensive interaction with the forest. In many parts of Indonesia, the interaction between indigenous peoples and forest reflected in the forest management models by indigenous peoples, which generally based on customary law and which usually contains rules on procedures of forest clearing for cultivation and other agricultural activities, farming, wildlife poaching and collection of forest products. The existence of various forest management practices by indigenous peoples are known by various terms such as *Mamar* in East Nusa Tenggara, *Lembo* in the Dayak community in East Kalimantan, *Tembawang* in the Dayak community West Kalimantan, *Repong* in Coastal Community in Lampung, Tombak in Batak community in North Tapanuli, and in relation to Petitioner III; it is known as *Titipan* Forest (entrusted forest), ie a forest area which should not be disturbed or destroyed. This area is usually sacred. Ecologically, the area is very important in protecting the environment and it serves as the source of life, and *Tutupan* Forest (closed forest); ie a forest area used for community interests. Generally, their use is very limited to the utilization of non-timber forest products, medicinal plants, rattan, honey. In addition, this area also serves as the keeper of the water spring;

Whereas such practices have shown that indigenous peoples have performed management over natural resources (forest) hereditarily. These patterns are known to have a system which strongly associated with the management of natural forest, plantation forest, plantation and farms creating diverse, dynamic, and integrated forms that produce many benefits for the community and the environment economically, socially, culturally, religiously, and ecologically (Suhardjito, Khan, Djatmiko, et al) **(Exhibit P - 7);**

Whereas basically, the existence of a regulation that specifically regulate how natural resources such as forests shall be protected and used and managed is important and compulsory, so that existing natural resources such as forest which owned by the nation can be managed and utilized properly and sustainable for the fair welfare and prosperity of the people, however implementation of Forestry Law has evicted indigenous peoples from their customary forests, which is an integral part of their lives, on the basis of these ideas, the Petitioners strongly reject the existence and validity of Article 1 point 6 on the word *"state",* Article 4 paragraph (3) on the phrase *"if any (read: indigenous peoples) still in existence and their existence is acknowledged as well as consistent with the national interest",* Article 5 paragraph (1), paragraph (2), paragraph (3) on the phrase *"and (2); and customary forests shall be stipulated if any (read: indigenous peoples) still in existence and their existence is acknowledged", and paragraph (4) , and Article 67 paragraph (1) on the phrase "if any (read: indigenous peoples) still in existence and their existence is acknowledged", paragraph (2), and paragraph (3) on the phrase "and paragraph (2)", of Forestry Law;*

II. AUTHORITY OF THE CONSTITUTIONAL COURT

1. Whereas Article 24C paragraph (1) of the third amendment to the 1945 Constitution states that: "*The judicial power shall be implemented by a Supreme Court and judicial bodies underneath it in the form of public courts, religious affairs courts, military tribunals, and state administrative courts, and by a Constitutional Court*";
2. Furthermore, Article 24C paragraph (1) of the third amendment to the 1945 Constitution states that: "*Constitutional Court shall have the authority to hear cases at the first and final levels the decisions of which shall be final to conduct review on*

laws under the 1945 Constitution of the State of the Republic of Indonesia, to decide disputes concerning to the authority of state institutions whose authority is granted by the 1945 Constitution of the State of the Republic of Indonesia, to make decisions on the dissolution of political parties and to decide disputes concerning the results of general elections";

3. Whereas based on the foregoing, the Constitutional Court has the authority to review the legislation (Law) against 1945 Constitution which is also based on Article 10 paragraph (1) letter a of Law Number 24 Year 2003 on the Constitutional Court, as amended by Law No. 8 Year 2011 concerning Amendment to Law Number 24 Year 2003 (hereinafter referred to the Constitutional Court Law), which states: "*The Constitutional Court has authority to hear at the first and last decision is final for: (a) review Laws (UU) against 1945 Constitution*";
4. Whereas the objects petitioned to be reviewed are Article 1 point 6 on the word *"state",* Article 4 paragraph (3) on the phrase *"if any (read: indigenous peoples) still in existence and their existence is acknowledged as well as consistent with the national interest",* Article 5 paragraph (1), paragraph (2), paragraph (3) on the phrase *"and (2); and customary forests shall be stipulated if any (read: indigenous peoples) still in existence and their existence is acknowledged", and paragraph (4), and Article 67 paragraph (1) on the phrase "if any (read: indigenous peoples) still in existence and their existence is acknowledged", paragraph (2), and paragraph (3) on the phrase "and paragraph (2)", of Forestry Law*, thus, the Court is authorized to hear and decide on the petition *a quo;*

III. LEGAL STANDING AND CONSTITUTIONAL INTEREST OF THE PETITIONERS

5. Whereas recognition of the right of every Indonesian citizen to submit a petition to review the 1945 Constitution is a positive indicator of constitutional development which reflects the progress for strengthening the principles of rule of law;
6. Whereas Constitutional Court of the Republic of Indonesia, among others, serve as a "guardian" of "constitutional rights" of every citizen of the Republic of Indonesia. The Constitutional Court of the Republic of Indonesia is a judicial body in charge of maintaining human rights as constitutional rights and legal rights of every citizen. With this awareness of the Petitioners submit a petition to review Article 1 point 6

on the word *"state",* Article 4 paragraph (3) on the phrase *"if any (read: indigenous peoples) still in existence and their existence is acknowledged as well as consistent with the national interest",* Article 5 paragraph (1), paragraph (2), paragraph (3) on the phrase *"and (2); and customary forests shall be stipulated if any (read: indigenous peoples) still in existence and their existence is acknowledged", and paragraph (4) , and Article 67 paragraph (1) on the phrase "if any (read: indigenous peoples) still in existence and their existence is acknowledged", paragraph (2), and paragraph (3) on the phrase "and paragraph (2)", of Forestry Law*, which Petitioners considered to be inconsistent with the spirits and Articles in 1945 Constitution;

7. Whereas, Article 51 paragraph (1) of the Constitutional Court Law in conjuction with Article 3 Constitutional Court Regulation Number 06/PMK/2005 on the Procedures of Judicial Review of Law states that: the Petitioner shall be the party who considers that his constitutional rights and/or authority is impaired by the coming into effect of the Law, namely as follows:
    a. individual Indonesian citizens;
    b. Community-based customary law groups in so far as they are still in existence and in accordance with the development of the community and the principle of the Unitary State of the Republic of Indonesia regulated in law;
    c. public or private legal entities;
    d. state institutions;
8. Elucidation of Article 51 paragraph (1) of the Constitutional Court Law states that "*as referred to as the "constitutional right" shall be the rights provided for by the 1945 Constitution*"*;*
9. Whereas Decision of the Constitutional Court Number 006/PUU-III/2005 and Decision Number 010/PUU-III/2007 have determined 5 requirements of constitutional impairment as intended in Article 51 paragraph (1) of the Constitutional Court Law, namely as follows:
    a. the existence of constitutional rights and/or authority granted by the 1945 Constitution;
    b. the constitutional rights and/or authority are considered to have been impaired by the coming into effect of the Law petitioned for review;

c. the impairment of such constitutional rights and/or authority must be specific and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring;
d. there is a causal relationship (causal verband) between the impairment of constitutional rights and/or authority and the Law petitioned for review; and,
e. the possibility that with the granting of the petition, the argued impairment of the constitutional rights and/or authority will no longer occur;

PETITIONER I IS A PRIVATE LEGAL ENTITY

10. Whereas Petitioner I is a private legal entity who is using organization standing (legal standing) procedure in petitioning this review;
11. Whereas Petitioner I has a legal standing as Petitioner of judicial review due to its causal relationship (*causa verband*) by the adoption and implementation of Forestry Law, which caused impairment of constitutional rights of Petitioner I;
12. Whereas organization standing or legal standing doctrine is a judicial procedure that is not only known in doctrine but also has been adopted in various laws in Indonesia such as Law Number 23 Year 1997 on Environmental Management as amended by Law Number 32 Year 2009 on the Protection and Management environment, Law Number 8 Year 1999 on Consumer Protection, and Forestry Law itself;
13. Whereas in practice of judicial system in Indonesia, the use of legal standing has been accepted and acknowledged to be a mechanism in the search for justice, which can be proved, such as:
    a. Constitutional Court Decision No. 060/PUU-II/2004 on Judicial Review of Law Number 7 Year 2004 on Water Resources against the 1945 Constitution;
    b. Constitutional Court Decision No. 003/PUU-III/2005 on Judicial Review of Law Number 19 Year 2004 Stipulation ofGovernment Regulation in Lieu of Act No. 1 of 2004 on the Amendment of Law Number 41 Year 1999 concerning Forestry Law against 1945 Constitution;
    c. Constitutional Court Decision No. 001-021-022/PUU-I/2003 on Judicial Review of Law Number 20 Year 2002 on Electricity;

d. Constitutional Court Decision Number 140/PUU-VII/2009 Judicial Review of Law No. 1/PNPS/1965 on the Prevention of Mistreatment of Religion and/or Blasphemy;

14. Whereas organization that can act on behalf of the public interest is the organizations that meet the requirements specified in various laws and jurisprudence, which are:
    a. formed as legal entity or foundation;
    b. which articles of association clearly stating the objectives of the establishment of the organization;
    c. which has implemented activities in accordance with its articles of association;
15. Whereas Petitioner I is a self supporting non-governmental Organization that grow and develop on their own wills among the community, which was founded on the basis of concern to give protection and enforcement of human rights in Indonesia with a focus of indigenous peoples, based on Article 1 paragraph (3) of its Articles of Association in the form of community organization legal entity named The Indigenous peoples' Alliance of The Archipelago **(***Aliansi Masyarakat Adat Nusantara*, "*AMAN*")(**exhibit P - 8**);
16. Whereas the duties and roles of Petitioner I in conducting activities of protection and enforcement of human rights in Indonesia has continuously utilized the institution as a mean to struggle for human rights, particularly for indigenous peoples;
17. Whereas the duties and roles of Petitioner I in conducting activities of protection and enforcement of human rights, in this matter has utilized the institution as a mean to involve as many members of the community in the struggle for appreciation and respect for the values of human rights against any person regardless of their gender, ethnicity, race, religion, etc. This is reflected in the principles and objectives, and activities run by Petitioner I, in which Articles of Association and/or Deed of Establishment read as follows:

Article 2

"*AMAN is based on the principle of Customs in the Bhineka Tunggal Ika (Unity in Diversity) and Pancasila*";

Article 5

"AMAN was established with following aims:

1. restoring confidence, dignity of Indigenous Peoples;
2. increasing self-confidence, dignity of women of Indigenous Peoples, enabling them to enjoy their rights;
3. restoring the sovereignty of Indigenous Peoples of the Archipelago to maintain the rights of economic, social, cultural and citizenship in state;
4. upholding reputation of Indigenous Peoples before authorities and entrepreneurs;
5. improving Indigenous Peoples ability in managing and preserving the environment"

Article 6

"To achieve the objectives set forth in Article 5 of this Articles of Association, AMAN conducts activities which include:

1. raising awareness of the rights of Indigenous Peoples;
2. empowering women of Indigenous Peoples;
3. strengthening economiy of Indigenous Peoples;
4. strengthening customary institutions at regional level;
5. promoting original values and wisdoms of Indigenous Peoples;
6. collaborating and building network with all parties who carry works in protecting the rights of Indigenous Peoples;
7. advocating Indigenous Peoples whom human rights were oppresed;
8. conducting efforts to influence structural policies/laws pertaining to Indigenous Peoples";

18. Whereas the basis and legal interest of Petitioner I in filing a Petition for Judicial Review of Forestry Law *a quo*, has been proven through Petitioner's Article of Association;

19. Whereas Article 3 of Articles of Association of Petitioner I states explicitly that AMAN is independent and non-profit, with following functions:
    a. as a forum of assembly for Indigenous Peoples who share the same struggle as victims of oppression, exploitation and deprivation of indigenous rights and who have the will to realize Indigenous Peoples who are sovereign politically, economically independent, culturally dignified;
    b. to advocate and to empower the rights of Indigenous Peoples;
    c. to accommodate, to integrate, to distribute and to struggle for aspirations and interests of Indigenous Peoples as well as raising political and legal awareness and preparing cadres of leaders of Indigenous Peoples in all aspects of societal life, in nation and state;
20. Whereas Petitioner I to achieve its aims and objectives have continuously conducted various efforts/activities to perform its duties and roles. This has become common knowledge (*notoire feiten*) even internationally. Whereas Petitioner I's activities on national scale are ranging from case advocacy, policy advocacy and campaigning, while on international level, Petitioner I has submitted a Report to the UN CERD Committee concerning the Government Programs to clear an area of forest covering 1.8 million Ha to become Palm Oil Plantation along the border of Borneo Island and Malaysia. This report was due to its major and bad impact for existing Indigenous Peoples living in the affected area, and thanks to this report the government had cancelled the program, following recommendation of the UN CERD Committee on the report (**exhibit P - 9**);
21. Whereas some forms of outcomes resulting from efforts and/or activities undertaken by the Petitioner I to achieve its aims and objectives are as follows:
    a. realization of the Memorandum of Understanding between the Alliance of Indigenous Peoples of the Archipelago (AMAN) and the National Commission on Human Rights (*Komnas HAM*), which was signed on Tuesday, March 17, 2009, at YTKI Building on Jalan Gatot Subroto No. 44 Jakarta, which essentially states that both parties (preliminary understanding of parties) and formulate necessary measures in "mainstreaming Human Rights Based Approach to Indigenous peoples in Indonesia" (**Exhibit P - 10**);

b. the realization of the Charter of Cooperation between the Ministry of Environment and Indigenous Peoples of the Archipelago, which was signed on January 27, 2010, which essentially aims "*to enhance the role of Indigenous Peoples in the protection and management of the environment*" **Exhibit P - 11**);

c. realization of the Memorandum of Understanding between the Alliance of Indigenous Peoples of the Archipelago with the National Land Agency of the Republic of Indonesia on the Enhancement of Indigenous peoples Role in Efforts Toward Justice and Legal Certainty for Indigenous Peoples, which was signed on Sunday, September 18, 2011 (**Exhibit P - 12**);

22. Whereas the efforts for protection, advancement and fulfillment of human rights conducted by Petitioner I have been listed in the 1945 Constitution, which for this petition, particularly Article 27 paragraph (1), Article 28D paragraph (1), Article 28I paragraph (2), Article 28I paragraph (4) and Article 28I paragraph (5);
23. Whereas the efforts for protection, advancement and fulfillment of human rights conducted by Petitioner I have been listed and regulated strictly and clearly in the national legislation, namely the Law No. 39 of 1999 on Human Rights (see Article 6) (**exhibit P - 13**)
24. Whereas the efforts for protection, advancement and fulfillment of human rights conducted by Petitioner I have also been listed in various principles of international law concerning human rights;
25. Whereas Petitioner I also have the constitutional rights to collectively struggle for their rights for the interests of the nation and the state. According to Article 28C paragraph (2) 1945 Constitution states: "*Every person shall have the right to improve him/herself through collective struggle for his/her rights to develop his/her community, nation and state*";
26. Meanwhile, due to the universal nature, human rights issues related to indigenous peoples who serve as the object of Forestry Law petitioned are issues for every human; therefore human rights issues are not issues for Petitioner I alone who deals directly on the issues, human rights are issues for every human being in the world;
27. Moreover, filing a petition to review articles of Forestry Law *a quo*, is a manifestation of the concern and effort of Petitioner I for the protection,

advancement and enforcement of human rights in Indonesia, especially the rights for indigenous peoples;

28. Whereas therefore, the existence and enforceable of Article 1 point 6 on the word *"state",* Article 4 paragraph (3) on the phrase *"if any (read: indigenous peoples) still in existence and their existence is acknowledged as well as consistent with the national interest",* Article 5 paragraph (1), paragraph (2), paragraph (3) on the phrase *"and (2); and customary forest shall be stipulated if any (read: indigenous peoples) still in existence and their existence is acknowledged", and paragraph (4) , and Article 67 paragraph (1) on the phrase "if any (read: indigenous peoples) still in existence and their existence is acknowledged", paragraph (2), and paragraph (3) on the phrase "and paragraph (2)", of* Forestry Law *a quo,* have impaired constitutionalism rights of Petitioner I, directly or indirectly, as the relevant articles have harmed various activities and works that have been carried out continuously by Petitioner I, in carrying out its duties and roles for the protection, advancement and fulfillment of human rights in Indonesia, including to assist and to struggle for the rights of indigenous peoples which had been undertaken by the Petitioner I;

PETITIONER II AND PETITIONER III ARE INDIGENOUS PEOPLES

29. Whereas Petitioner II and Petitioner III are indigenous peoples which are still in existence and in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia regulated in the Law;
30. Whereas as stated by Ter Haar BZN in his book *Beginselen en Stelsel van het Adatrecht* cited by Soejono Soekanto in his book *Hukum Adat Indonesia* (Indonesian Customary Law), and has also been used as Jurisprudence of the Constitutional Court in Decision No. 31/PUU-V/2007, characteristics of characteristics indigenous peoples are as follow:
    a. the existence of organized groups;
    b. settling in a particular area;
    c. having its own government;
    d. having and immaterial objects;

31. Whereas Petitioner II and Petitioner III have legal standing as Petitioners of judicial review due to their direct causal relationship (*causal verbal*) by the implementation of Forestry Law, which caused impairment of constitutional rights of Petitioners;
32. Whereas Petitioner II and III are indigenous peoples who factually became victims ie. Who lost their customary forests, as a result of the implementation of Forestry Law, which caused impairment of constitutional rights of Petitioners;
33. Whereas in addition to the loss of their customary forests, Petitioner II and III felt and considered that the presence of articles and paragraphs in the Forestry Law under review has also lost their sources of income and livelihood and also threatened by criminal prosecution ie. Petitioners themselves and the members of the indigenous peoples;
34. Whereas Petitioner II is Indigenous peoples of Kenegerian Kuntu, which led by a leader titled as *Datuk Khalifah*, is one form of indigenous peoples that still exists and lives in Kampar Kiri, Kampar District, Riau Province;
35. Whereas Kenegerian Kuntu referred here is the name for an old village (*negeri*) in Riau province with a rich history, religion, customs and its role before and after independence. Indigenous peoples of Kuntu has been around since 500 (five hundred) years BC and the lengthy tale of this old *negeri* has been written in the history of Minang Kabau as East Minang Kabau region or Kuntu kingdom (**Exhibit P - 14**);
36. Whereas the structures of leadership of Kenegerian Kuntu is led by a *khalifah* (caliph) in charge of 3 *Kenegerian* ie Kenegerian Kuntu, Kenegerian Domo and Kenegerian Padang Sawah; and every Kenegerian is led by a *Pucuk negeri*. *Pucuk negeri* is in charge of regional leaders which consists of:
    a. land area owned and controlled by 10 *ninik mamak* called *datuk nansepuluh* and led by Datuk Mudo;
    b. river area owned and controlled by 6 *ninik mamak* called *datuk nanberanam* and led by Datuk Sutan Jalelo;
37. Whereas evidence of the existence of this indigenous peoples can also be seen from the evidence relating to the history of their ancestors such as the old cemetery, former village, buildings with old architectures and local folk tales, as well as the old-growth forests which shows this indigenous peoples has existed since hundreds

of years ago. Its community structure adopted multilevel institutional system based on religion and beliefs; customary law and institution shows the long establishment. Influences of the kingdom and Hinduism can be seen in the customs, laws and religious as well as its agricultural patterns;

38. Concession of customary land ie territory and its borders have been agreed by their ancestors. Customary land has a certain border sign in the form of natural signs such as river stream and certain vegetation. There are also boundaries that are marked with names and tales of a place and the tales that relate to specific events, ie the name *Sei Datu Mahudum* River means that the land located by the river, the upper and lower streams was ruled by *Datu Mahudum* tribe;

39. Whereas land and the forest has significance for indigenous peoples of Kenegerian Kuntu, much more than economic value; *pusako tinggi* (high heirloom) as they called it, high value heirloom and socio-culturally beneficial for the welfare of the community. As *pusako tinngi* customary land cannot for sale;
40. Whereas recognition on the existence and the existence of rights on the customary land in Kampar district in Riau Province, have been strictly regulated and recognized by the local government through regional regulation, in which also applies for the recognition and respect on the existence of Petitioner II as one of the indigenous peoples that still exist and live in Kampar District, Riau Province (**exhibit P - 15**);
41. Whereas to meet their basic needs, as the pillar of constitutional rights of Petitioner II, customary forests as part of the customary territory is the most important mean to develop themselves and their families, to maintain and improve the quality of life and living, for the benefit of themselves and their families;
42. Whereas the peace and tranquility of life with all the rights over the existing territory and customary law and apply on Petitioner II began to fail and vanished since the issuance of Decree of the Minister of Forestry No. 130/KPTS-II/1993 dated February 27, 1993, as subsequently amended by Minister of Forestry Decree No. 137/KPTs-II/1997 dated March 10, 1997, and lastly amended by the Decree of the Minister of Forestry No. 356/MENHUT-II/2004 dated October 1,

2004, on the Granting of Industrial Plantation Forest Rights in Riau Province to PT. Riau Andalan Pulp and Paper (hereinafter referred in to PT. RAPP) to ± 235,140 (two hundred thirty-five thousand and one hundred forty) ha (**exhibit P - 16**), because the area of concession is located in the territory of Petitioner II;

43. Whereas in practice, PT. RAPP has operated activities of Industrial Plantation Forest since around 1994, and since that time the territorial conflict began between Kenegerian Kuntu and several other Kenegerian with PT. RAPP;
44. Whereas PT. RAPP is operating within the territory of Petitioner II based on the permit to support business activities of pulp and paper (paper manufacturers) or as a wood supplier for materials of paper;
45. Whereas based on participatory mapping conducted by the Petitioner II, out of total of 280,500 (two hundred eighty thousand and five hundred) Ha of Production Forest Area and Industrial Plantation Forest owned by PT. RAPP, an estimated area of 1,700 (one thousand seven hundred) Ha, is located in customary forest area of Indigenous peoples of Kenegerian Kuntu;
46. Whereas the operation of Industrial Plantation Forest for pulp and paper of PT. RAPP within the territory of Petitioner II, has caused loss of access, utilization and concession for Petitioner II over their customary forest which is important for their community to develop themselves and their families, maintain and improve the quality of life and living, for the welfare of themselves and their families;
47. Whereas the loss of access, utilization and concession over forest which is part of their customary land, have caused Petitioner II to lost a place for job and livelihood sources;
48. Whereas Petitioner III is one of the fifteen (15) *Kasepuhan* (community) incorporated in Banten Kidul Indigenous peoples (*Kesatuan Adat Banten Kidul*, "SABAKI") located in Halimun Mountain Area, and Kasepuhan Cisitu has existed since 1621;
49. Whereas the existence of Petitioner III has obtained recognition from Regional Government of Lebak, Banten Province through Decree of Lebak Regent Number 30/Kep.318/Disporabudpar/2010 on Recognition of Indigenous peoples of Cisitu Banten Kidul in Lebak District dated July 7, 2010 (**exhibit P - 17**);

50. Whereas administratively *Kasepuhan* Cisitu is located in Cibeber Sub-District, Lebak District, Banten Province. There are two villages within the territory; Kujangsari Village and Situmulya Village. Infrastructures of Kasepuhan have developed recently including public facilities such as roads, water channel, electricity, building for educational facilities, Mosque, Village Office, Traditional House and Adat Hall and well-established housing (**exhibit P - 18**);
51. Whereas population of indigenous peoples of *Kasepuhan* Cisitu in 2010, has reached 676 households (families) with 2,191 people. There are 1,111 male residents. The main livelihood of this indigenous peoples is by farming. Specially for agricultural product, ie. rice, is not for sale. Other products are for sale. Agricultural activities are highly productive due to the fertile land and very supportive for food security in Cisitu community;
52. Whereas customary territories or the so-called *Wewengkon* of Kasepuhan Cisitu is located in the south of Halimum mountain. Administratively, the *wewengkon* (territory) is located in the Cibeber Sub-District, Lebak District, Banten Province. Wewengkon boundaries Kasepuhan Cisitu are as follows:
    - North: Mount Sangga Buana (*Kasepuhan* Urug), Bogor;
    - East: Mount Palasari (*Kasepuhan* Ciptagelar);
    - South: Muara Kidang (*Kasepuhan* Cisungsang)
    - West: Mount Tumbal (*Kasepuhan* Cisungsang);
53. Whereas physiographically, *wewengkon* (territory) of Kasepuhan Cisitu is an area of steep hills up to the mountains. This territory is bounded by the V-shaped river valley with a rocky base. Slope of over 40% with average daily temperatures between 20-30 degrees Celsius;
54. Whereas based on participatory mapping (in January 2010), which was facilitated by AMAN, JKPP and FWI, *wewengkon* (territory) of Kasepuhan Cisitu covers an area of 7,200 acres. Previously, *kaolotan* (the elders) only estimate area of 5,000 hectares. Mapping was conducted by using a Global Position System (GPS) and Land Sat Imagery (**exhibit P - 19**);
55. Whereas since the beginning of its existence until today, the existence of Petitioner III has been recognized by law through Decree of Lebak Regent and in practice Petitioner III also continues to maintain and conducted all existing

customary activities which apply to Indigenous peoples of Kasepuhan Cisitu (**exhibit P - 20**);

56. Whereas the policy on establishment of management of Halimun Salak Forest as Protected Forest Area has initiated since the Dutch East Indies government in 1924-1934, later in 1935 the area was established into Strict Nature Reserve and managed by *Jawatan Kehutanan* (Forestry Office). Whereas based on Government Regulation No. 35 of 1963 on Designation of Forest Area, the status of Strict Nature Reserve was changed into National Park, managed by *Perum Perhutani*, and lastly based on the Decree of the Minister of Forestry No. 282/Kpts-II/1992, the management of this National Park is handed over to Mount Gede Pengrango National Park Service;
57. Whereas initially was established as Strict Nature Reserve covering only of 40,000 Ha, and then based on Decree of Minister of Forestry No. 175/Kpts-II/2003 on Designation of Mount Halimun Salak National Park and Change of Function of Protected Forest Area, Permanent Production Forests, Limited Production Forest in Mount Halimun Forest and Mount Salak Forest, which area has expanded to ± 113,357 Ha (one hundred thirteen thousand and three hundred fifty seven) (**Exhibit P - 21**);
58. Whereas the problem arised when provisions in articles of Forestry Law under review in petition *a quo*, later implicated in the form of expansion of Mount Halimun Salak National Park, which was occurred without any knowledge, involvement and consent from Petitioner III; the expansion has caused inclusion of the whole area of customary land (not only customary forest area) of Petitioner III to the National Park, making Petitioner III and its indigenous peoples lose access and rights to use and manage their customary land; some members of the indigenous peoples have been imposed with criminal conducts by entering the area of Mount Halimun Salak National Park;
59. Whereas Petitioner III in effort to regain their customary lands, at present has continues to make efforts to strengthen their existence and to obtain affirmation/recognition as indigenous peoples. Through their continuous effort, at present, they have obtained affirmation given by Regional Government of

Banten through the issuance of Decree of Regent on recognition of the existence and region of Cisitu;

60. Whereas regrettably, though Petitioner III at present has finally obtain its affirmation/recognition from the Government of Lebak District, this affirmation does not restore power and authority of Petitioner III over its area of indigenous peoples, which now has become Mount Halimun Salak National Park;
61. Whereas more ironically after customary forest area of Petitioner III created into Mount Halimun Salak National Park, PT. Aneka Tambang was granted with concession permit for gold mining within the national park; this concession has resulted in conflicts between Petitioner III with PT. Aneka Tambang Tbk., and it created overlaps between land and forest area between Cisitu Indigenous peoples (Petitioner III) and Mount Halimun Salak National Park and also Gold Mining Concession Area with PT. Aneka Tambang Tbk. (**Exhibit P - 22**);
62. Whereas due to the implementation of Forestry Law under review *a quo*, Petitioner III has lost their rights on management and utilization of their customary forest, and even their rights to participate in the management and utilization of their customary forest, which are conducted by the Mount Halimun Salak National Park Service; Initially, Petitioner III and their members must raised a conflict, pleaded and begged to the manager of Mount Halimun Salak National Park (**Exhibit P - 23**);
63. Whereas based on abovementioned descriptions, Petitioner II and Petitioner III have legal standing as Petitioners of judicial review due to their direct causal relationship (*causal verbal*) by the implementation of Forestry Law, which caused factual impairment of constitutional rights of Petitioner I and Petitioner II;

IV. THE PETITIONERS HAVE THE CAPACITY AS PETITIONER OF JUDICIAL REVIEW

64. Whereas the Petitioners as part of Indonesian community are entitled to equal recognition, assurance, protection and fair rule of law and equal treatment before the law";

65. Whereas the Petitioners are also entitled to develop themselves, in order to meet their basic needs, to improve the quality of life, and human welfare;

66. Whereas based on abovementioned description, the Petitioners have clearly met the quality and capacity as "Indigenous peoples" Petitioner and "Private Legal Entity" Petitioner in Judicial Review on Forestry Law against 1945 Constitution, as determined in Article 51 point (c) Constitutional Court Law because the Petitioners have rights and legal interest and representing public interest to file a review on Article 1 point 6 on the word *"state"*, Article 4 paragraph (3) on the phrase *"if any (read: indigenous peoples) still in existence and their existence is acknowledged as well as consistent with the national interest"*, Article 5 paragraph (1), paragraph (2), paragraph (3) on the phrase *"and (2); and customary forest shall be stipulated if any (read: indigenous peoples) still in existence and their existence is acknowledged", and paragraph (4) , and Article 67 paragraph (1) on the phrase "if any (read: indigenous peoples) still in existence and their existence is acknowledged", paragraph (2), and paragraph (3) on the phrase "and paragraph (2)", of Law Number 14 of 1994 on Forestry against 1945 Constitution*;

67. Whereas abovementioned provisions of Forestry Law have impaired victims' rights to non-discriminatory, fair justice, legal protection; assurance that the human rights-related law has fulfilled legal principles that apply universally and recognized by civilized nations. Therefore, interests of the Petitioners that have been impaired by Articles in Forestry Law, as abovementioned and describe as follow in grounds of petition, are impairments for Petitioners as institution representing legal interest of victims as individuals and groups of indigenous peoples subjected by the law;

V. GROUNDS FOR PETITION

Scopes of articles, paragraphs and phrases in Law Number 41 of 1999 on Forestry which judicially reviewed against 1945 Constitution

1. Whereas provision of Article 1 point 6 of Forestry Law reads: "*Customary forest is a state forest situated in indigenous peoples area*";
2. Whereas Article 4 paragraph (3) of Forestry Law reads;

"*Forest concession by the state shall remain taking into account rights of indigenous peoples if any and its existence is acknowledged and not contradictory to national interest.*";

3. Whereas provision of Article 5 of Forestry Law, reads:

   paragraph (1) "*Forest shall by status consist of:*

   a. state forest, and

   b. title forest

   paragraph (2) "*State forest as referred to in paragraph (1) item a, can be in form of customary forest.";*

   paragraph (3) *"The Government shall stipulate status of forest as referred to paragraphs (1) and (2); and Customary forest shall be stipulated if any and its existence acknowledged";*

   paragraph (4) *"In case in its development indigenous peoples no longer exists the management right of indigenous law shall return to the Government"*;

4. Whereas provision of Article 67 Forestry Law, reads:

   paragraph (1) "*Indigenous peoples shall if any and still acknowledged shall be entitled to:*

   a. collect forest products to fulfill daily needs of relevant Community-Based Customary Law;

   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) "*Recognition of existence and extinction of –community-based customary law 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*";

5. Whereas to facilitate understandings on petition a quo, in general the petition for judicial review a quo is classified in 2 (two) groups, namely:

1) Judicial review on the provisions of the Forestry Law **regulating the status and determination of customary forest** as stipulated in Article 1 paragraph 6 on the word "*state*", Article 5 paragraph (1) and paragraph (2), in which the Petitioners considered as contradictory to the provisions of Article 1 paragraph (3), Article 28C paragraph (1), Article 28D paragraph (1), Article 28G paragraph (1), Article 33 paragraph (3) of the 1945 Constitution;
2) Judicial review on the provisions of the Forestry Law **regulating forms and procedures for recognition of indigenous peoples** as regulated in Article 4 paragraph (3) "on the phrase *"if any (read: indigenous peoples) still in existence and their existence is acknowledged as well as consistent with the national interest*", Article 5 paragraph (3) on the phrase "and paragraph (2); *and customary forest shall be stipulated if any (read: indigenous peoples) still in existence and their existence is acknowledged*", paragraph (4), Article 67 paragraph (1) on the phrase "*if any (read: indigenous peoples) still in existence and their existence is acknowledged*", paragraph (2), paragraph (3) on the phrase "and paragraph (2) *shall be stipulated by virtue of a Government Regulation*", in which Petitioners considered as contradictory with Article 1 paragraph (3), Article 28D paragraph (1), Article 18B paragraph (2), Article 28I paragraph (3);

Article 1 paragraph 6 on the word "*state*", Article 5 paragraph (1) and paragraph (2), in which the Petitioners considered as contradictory to the provisions of Article 1 paragraph (3), Article 28C paragraph (1), Article 28D paragraph (1), Article 28G paragraph (1), Article 33 paragraph (3) of the 1945 Constitution

6. Whereas Article 1 paragraph (3) of the 1945 Constitution, firmly states, "*Indonesia is a state based on the rule of law*";
7. Whereas the statement of Article 1 paragraph (3) of the 1945 Constitution, according to Jimly Ashiddiqie, implies the recognition of the supremacy of law and constitution, adoption of the principle of division and restriction of powers according to constitutional system set out in the 1945 Constitution, the assurance of human rights in the 1945 Constitution, the principle of fair trial and impartial that ensure equality

before the law, and to ensure justice for all, including toward abuse of power by authority (**Exhibit P - 24**);

8. Whereas a state based on the rule of law, as described by Frans Magnis Suseno, "... *is based on a desire that the power of the state should be exercise on the basis of legal and fair. The law shall become the basis of all state actions, and the law itself must be good and fair. Good as expected by the public from the law, and fair as its basic aim of every law. There are four main reasons to demand that state shall be run and carrying its duties according to the law: (1) the rule of law, (2) equal treatment, (3) democratic legitimacy, and (4) reasoning demand*" (Frans Magnis Suseno, 1994, *Etika Politik Prinsip-prinsip Moral Dasar Kenegaraan Modern*, Jakarta: Gramedia, pg. 295);
9. Whereas to meet the elements of a state based on the rule of law, particularly in terms of *rechtstaat*, Julius Stahl requires some principles, which include: a. protection of human rights (*grondrechten*) b. division of power (*scheiding van machten*); c. a government based on the rule of law (*wetmatigheid van bestuur*), and d. the existence of administrative court (*administratieve rechspraak*) (**Exhibit P - 25**);
10. Whereas based on the opinion of Jimly Asshiddiqie, there are at least 12 key principles of law applicable in present time. Altogether act as a main pillar supporting the state, so it can be referred to as the rule of law ~~Rule of law~~ in the true sense. The twelve key principles include: a. supremacy of law; b. equality before the law; c. due process of law; d. limitation of power; e. independent executive organ; f. impartial and independent judiciary; g. administrative court; h. constitusional court; i. human rights protection; j. democratic (*democratische rechstaat*); k. serves as a means to realize welfare (*welfare rechtsstaat*); i. transparency and social control (**Exhibit P - 26**);
11. Whereas in a state that based on the rule of law, one of the most important pillars is the protection and respect for human rights. Protection of human rights is disseminated widely in order to promote respect, protect, and fulfll human rights as an important characteristic for a democratic state that based on the rule of law. Since birth, every human being holds the rights and obligations that are free and rights. Formation of a State and exercise of power by a state should not diminish the meaning of freedom and the human rights. Even A.V. Dicey emphasized the principle that the content of constitution of a state that adheres to the rule of law must follow

the formulation of basic rights (constitution based on human rights). In addition to the principle of the supremacy of law, and equality before the law;

12. Whereas the state's obligation to promote respect, protection and fulfillment of human rights because the state is because basically, a state is formed to ensure the implementation of human rights principles. These are the basic and primary objectives of state formation; to protect, respect and fulfill human rights. John Locke carries the concept of state's objective. He stated, "A state exists and formed by humans solely to ensure the protection of their rights; which include their lives, liberties, and properties. These inherent rights were then interpreted as human rights, because humans own the rights since birth. This is Locke's idea that linked human rights and the state. The state is formed through a social contract among humans to preserve human rights. Besides serving as the aim, it is also serves as the basis of the state. Therefore, the preservation of human's property is the *raison d'etre* of the state;

13. Whereas the emphasis of A.V. Dicey was also affirmed by Eric Barendt. He said that in addition to set limitation of power for legislative and executive powers, and to encourage the strengthening and independence of the judiciary; the characteristic of the constitutional document, primarily, is to provide assurance of human rights.

14. Whereas human rights are the substance of a state that based on the rule of law also said by Brian Z. Tamanaha, in his book "On The Rule of Law". Tamanaha stated, that the substance of the rule of law is the fulfillment of human rights. According to him, individual rights, the right to justice and dignified act, and fulfillment of social welfare, are the cores of the rule of law. While implementation of governance and democracy, is the instrument or procedure to achieve the welfare that serves as the substance (**exhibit P - 27**);

15. Whereas definition of state that based on the rule of law in Indonesian that based on the 1945 Constitution and Pancasila, according to Simorangkir, is different from the definition of rule of law ~~rule of law~~ in the framework of *rechtsstaat*, which applies in the Netherlands. It is much more similar with the state that based on the rule of law. (**exhibit P - 28**);

16. Whereas Moh. Mahfud MD gave similar opinion with Simorangkir. Mahfud said, the use of the term *rechtsstaat* in the 1945 Constitution was highly oriented to the

conception of rule of law ~~rule of law~~ of Continental European, however, looking at material contents of 1945 Constitution, is more influenced by *anglo saxon*, in particular provisions concerning protection of human rights (**exhibit P - 29**);

17. Whereas Kusumadi Pudjosewojo stated, as a state that based on the rule of law, Indonesia; all authorities and actions of state officials must be based and regulated by law. State ruler is not a law maker, but the maker of law regulations, therefore the law is in effect not because it was determined by the ruler, but because the law itself. This creates consequences, that the ruler can be held accountable if he abuse his/her power beyond the limits set by law, or commit an unlawful act. Authorities of the ruler and the state organs are very limited by individual authority in the state, in the form of human rights. This opinion asserts that human rights are an essential element in a rule of law (**exhibit P - 30**);

18. Whereas the protection of human rights as an essential part of the concept of rule of law adopted in Indonesia has been stated in Chapter XA (Article 28A to 28J) of the 1945 Constitution on Human Rights. In particular affirmation on the assurance of human rights in a democratic rule of law contained in Article 28I paragraph (5) of the 1945 Constitution which states that "to uphold and protect human rights in accordance with the principles of a democratic state of, the implementation of the human rights is guaranteed, regulated and set forth in the legislation" (**exhibit P - 31**);

19. Whereas in the rule of law, created legislations should contain values of fairness for all people. As quoted by Jimly Asshiddiqie, from Wolfgang Friedman in his book, "Law in a Changing Society", that distinguished between organized public power (the rule of law in the formal meaning), with the rule of just law (the rule of law in material meaning). Rule of law in formal meaning (classical) means the definition of legal in the narrower sense, ie written legislation, and not necessarily ensures substantive justice. Rule of law in material meaning (modern) or the rule of just law is a manifestation of the rule of law in a broad sense related to definition of justice in within, which is the essence rather than merely enabling legislation in the narrower sense (**exhibit of P - 32**);

20. Whereas basically, Indigenous peoples face various issues; there are at least three groups of major issues:

1) Issues of Indigenous peoples with their land where they get their livelihood from, including its natural resources;
2) Issues of self-determination that often politically biased and to date still become heated debates;
3) Issues of identification, on who are indigenous peoples and what are the criteria etc.

21. Whereas provisions of articles *a quo*, clearly do not reflect rules that are clear, well understood and fairly enforced. Formulation in articles *a quo* that contain elements of discrimination against indigenous peoples, and inconsistent with the provisions in higher hierarchy (1945 Constitution) are form of violation of the concept of rule of law in which "a legal system in which rules are clear, well-understood, and fairly enforced ";

22. Whereas rule of law can be interpreted as "a legal system in roomates rules are clear, well-understood, and fairly enforced". With characteristics such as equality before the law, and legal certainty which contains the principles of legality, predictability, and transparency;

23. Whereas provisions in Article 1 point (6) on the phrase "state", Article 5 paragraph (1) and paragraph (2) of the Law *quo*, have given the consequences that all land and natural resources of the forest area in Indonesia is owned by the state. This policy allows state to provide concession of rights over customary land rights that are not/not yet processed without consent from indigenous peoples concerned and without triggering a legal obligation to pay "adequate" compensation to the indigenous peoples holding customary rights over the land. This practice has emerged, particularly in connection with the granting of forest concession, establishment of protected forest, and the allocation of land for transmigration project;

24. Whereas as one of the 12 key principles of a state that based on the rule of law, respect for human rights will be violated due to these articles. Provisions in these articles are discriminatory against the Petitioners. Reluctance of state to recognize the rights of indigenous peoples on their land and natural resources, or the failure or reluctance of the state to enforce the law is generally rooted in one cause; discriminatory regulations;

25. Rights of non- discriminatory relates to equality before the law, which is also one of the principles of the state that based on the rule of law. As a fundamental concept in human rights, the principle assured by various instruments, such as Article 2 and Article 7 of Universal Declaration of Human Rights (UDHR), then Article 2 paragraph (1), Article 3 and Article 26 of International Covenant on Civil and Political Rights, Article 2 paragraph (2), paragraph (3) and Article 3 of International Covenant on Economic, Social and Cultural Rights, as well as in the Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Even existence and rights of indigenous peoples has been specifically regulated in the United Nations Declaration on the Rights of Indigenous peoples (UNDRIP) (**exhibit P - 33**);

Whereas provisions of Article 1 point 6 on the phrase "State", Article 5 paragraph (1) and paragraph (2), of the Law *a quo*, has violated the principle of equality before the law as one of characteristics of rule of law or rule of law as contrary to the principle of legality, predictability, and transparency, which are recognized and regulated in the constitution, which became one of the main principles for the establishment of the rule of law as defined in Article 1 paragraph (3) of the 1945 constitution;

26. Whereas Article 28C paragraph (1) of the 1945 Constitution has given the constitutional guarantee for every citizen to develop himself, to improve the quality of life and human welfare. Mentioned in the Article is that, "*Every person shall have the right to develop him/herself through the fulfilment of his/her basic needs, in order to improve the quality of his/her life and for the welfare of human race*";

27. Whereas Article 28G paragraph (1) of the 1945 Constitution has provided a guarantee to the right to feel secure and protection for every citizen to be free from fear. The article clearly says that, "*Every person shall have the right to protection of his/herself, family, honour, dignity, and property, and shall have the right to feel secure against and receive protection from the threat of fear to do or not do something that is a human right*";

28. Whereas Indonesia recognizes the right to develop his/herself and the right to security as basic rights that should not be ignored. This is emphasized in the Preamble to the Charter of Human Rights, in Decree of the People's Legislative Assembly of the Republic of Indonesia Number XVII/MPR/1998 concerning Human

Rights. Second paragraph of the Charter says, "*Whereas human rights are fundamental rights inherent in human beings by nature, universal, and timeless as the grace of God Almighty, include the right to life, the right to family life, the right to self-development, the right to justice, the right to freedom, the right to communicate, the right to security, and the right to welfare, which therefore should not be ignored or taken by anyone. Furthermore humans also have the rights and responsibilities that arise as a result of the development of life in the community*."(**exhibit P - 34**);

29. Whereas the right to self-development is a human right that is principal and fundamental, as it will affect the fulfillment of other rights. This is stated in Section Three of Law No. 39 of 1999 on Human Rights. There are two dimensions of recognition to the right to self-development. This includes the recognition of civil and political rights, and economic, social and cultural;

30. Whereas legislations in Indonesia have provided a guarantee for everyone to protection of individual, family, honor, dignity, and his property. As defined in Article 29 paragraph (1) of Law No. 39 of 1999 on Human Rights, " *Everyone has the right to protection of the individual, his family, opinion, honor, dignity, and rights";*

31. Whereas there are some basic principles in the implementation of the promotion, enforcement and fulfillment of human rights, including the principles of indivisibility, interdependence and interrelatedness;

32. Whereas the principle of indivisibility means all components of human rights have equal status, none is important than the other. Therefore, if there is a denial of a particular right, then it will directly hinder the enjoyment of other rights;

33. Whereas the principle of interdependence and interrelatedness would like to emphasize that each right is interlinked and contribute to the fulfillment of the rights and dignity of the people. Right to health, for example, is depending on the fulfillment of the right to development, right to education and right to information (**exhibit of P - 35**);

34. Whereas based on the above principles, the limitation on the right to self-development in order to meet the basic needs of life and the right to security will affect and relate to the fulfillment of other basic rights. Including hindering of fulfillment of the right to work, right to health, right to education, right to property, etc.;

35. Whereas through reading at a glance of the Forestry Law on the basis of considerations part, it seems as if there is progress, where there is a need for a sustainable forest management with an international perspective so as to accommodate dynamic of aspirations and community involvement, customs and culture and societal values. But when it is further explored, a contradiction will be revealed between "custom and culture and societal values" on one hand and "national norms" on the other hand; a contradiction which should be used as a reference;

36. That the preamble of the Forestry Act considerations which initially intended to appreciate the position of indigenous peoples, customary law, cultural and social value of local governance was gone instantly as we follow the way of thinking of lawmakers that stay with the old concept adopted by previous Forestry Act;

37. Whereas Article 1 of Forestry Law mentions two types of forests, the forests and the rights of state forest. Private forest called the forest when it grows or is above a ground-burdened land rights. On the contrary will be called when the state forests are forests that grow above ground or that are not burdened with a right to the land. Customary forest even directly defined as a state forest that grows on the ground in the area of indigenous peoples. Even without a reasonable argument - as stated Article 1, point d, point e, and f grain customary forest necessarily categorized as state forest. Over again plainly stated that the country's forests could be customary forest, as it is called Article 5 paragraph (1) of the Forestry Law (abstracted from paper written by Maria Rita Roewiastoeti, S.H. titled *Gerakan Reforma Agraria Berbasis Masyarakat Suku-suku Pribumi* in Jurnal Bina Desa Sadajiwa Special Edition 25 year Anniversary, June, 2010);

38. Whereas based on the principles of indivisibility, interdependence and interrelatedness, the limitation on the right to self-development in order to meet the basic needs of life and the right to security will affect and relate to the fulfillment of other basic rights. Including hindering of fulfillment of the right to work, right to health, right to education, right to property and etc.;

39. Whereas the existence of provisions of articles in the Law *a quo* has limit constitutional rights of Petitioners to develop themselves, in order to meet their basic

needs in indigenous peoples simply because the area turned as National Park and/or given to the company as mining, palm oil or insdustrial forest concessions;

40. Whereas provisions of articles in on the Law *a quo* has created a sense of fear and take away the sense of convenient, wholeness, authority to manage and exploit all potential and existing natural resources within area Petitioners' area as indigenous peoples in order to meet their needs.

Whereas based on the above descriptions, it is clear that the existence of Article 1 point 6 on the word "*State*", Article 5 paragraph (1) and paragraph (2) of the Forestry Law are inconsistent with Article 28C to paragraph (1), Article 28D paragraph (1) and Article 28G paragraph (1) of 1945 Constitution.

41. Whereas through reading at a glance of the Forestry Law on the basis of considerations part, it seems as if there is progress, where there is a need for a sustainable forest management with an international perspective so as to accommodate dynamic of aspirations and community involvement, customs and culture and societal values. But when it is further explored, a contradiction will be revealed between "custom and culture and societal values" on one hand and "national norms" on the other hand; a contradiction which should be used as a reference;

42. That the preamble of the Forestry Act considerations which initially intended to appreciate the position of indigenous peoples, customary law, cultural and social value of local governance was gone instantly as we follow the way of thinking of lawmakers that stay with the old concept adopted by previous Forestry Act;

43. Whereas Article 1 of Forestry Law mentions two types of forests, the forests and the rights of state forest. Private forest called the forest when it grows or is above a ground-burdened land rights. On the contrary will be called when the state forests are forests that grow above ground or that are not burdened with a right to the land. Customary forest even directly defined as a state forest that grows on the ground in the area of indigenous peoples. Even without a reasonable argument - as stated Article 1, point d, point e, and f grain customary forest necessarily categorized as state forest. Over again plainly stated that the country's forests could be customary forest, as it is called Article 5 paragraph (1) of the Forestry Law (abstracted from

paper written by Maria Rita Roewiastoeti, S.H. titled *Gerakan Reforma Agraria Berbasis Masyarakat Suku-suku Pribumi* in Jurnal Bina Desa Sadajiwa Special Edition 25 year Anniversary, June, 2010);

44. Whereas through the Forestry Law, the Government is in power to determine the status of the forest. A forest can be declared as customary forest if by fact the indigenous peoples concerned still exist, and its existence recognized by the Government. If during its development indigenous peoples extincts, the Government will take over management right over the forest, as provided in Article 5 paragraph (1) to paragraph (4). Furthermore, as provided in Article 67 paragraph (2), recognition of existence and extinction of indigenous peoples shall be stipulated by Regional Regulation. The implications of such big power is that the government is given the authority to restrict members of indigenous peoples to clear and to burn forest, to cut trees or to harvest and collect forest products in the forest without a permit by authorized officials, to herd cattle in the forest area, to bring tools which commonly used for cutting, chopping or splitting a tree in the forest area without a permit by authorized officials;

45. Whereas as described above, Article 5 of the Forestry Law clearly has given a power beyond limit to the Government over something that is not within their authority. However the existence (or extinction) of an ethnic group should not be handed over to state officials or the Government because it is part of the human rights of a group of people who should have been guaranteed and protected by the constitution, which requires the government to actualize it;

46. Whereas based on the principles of indivisibility, interdependence and interrelatedness, the limitation on the right to self-development in order to meet the basic needs of life and the right to security will affect and relate to the fulfillment of other basic rights. Including hindering of fulfillment of the right to work, right to health, right to education, right to property and etc;

47. Whereas Article 28D paragraph (1) of the 1945 Constitution states that "Every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law";

48. Whereas the legal certainty and equal treatment before the law are characteristics of the state that based on the rule of law as stated in Article 1

paragraph (3) of the 1945 Constitution which states that "Indonesia is a state that based on the rule of law," where legal certainty is a precondition that can not be dispensed;

49. Whereas **the principle of certainty before a just law** is also an important principle in a state that based on the rule of law, which can also be interpreted as "a legal system in which rules are clear, well-understood, and fairly enforced". It contains the principles of legality, predictability, and transparency;

50. Whereas the rule of law must also follow the concept of law which classified into three (3) general precepts by Gustav Radbruch, namely: purposiveness, justice, and legal certainty (see explanation of the Radbruch concept in Torben Spaak, "*Meta-Ethics and Legal Theory: The Case of Gustav Radbruch*");

51. Whereas the principles of fair law making by Lon Fuller in his book The Morality of Law (Law morality), include;

    a. laws must be understandable by commoner. Fuller also called this as a desire for clarity;
    b. laws must not contradict each other;
    c. laws must be firm. The laws must not change rapidly, so that every person no longer orients their activities to them;
    d. there must be consistency between the rules as announced by the actual implementation;

Whereas based on the descriptions above, the provisions in Article 1 point 6 on the word "state", Article 5 paragraph (1) and paragraph (2) of the Law *a quo* are inconsistent with Article 33 paragraph (3) of the 1945 Constitution;

52. Whereas Article 33 paragraph (3) of the 1945 Constitution has firmly stated that "*The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people*";

53. Whereas is based on the formulation in Article 33 paragraph (3) of the 1945 Constitution, then it becomes clear that the state has been given the authority and freedom to rule, to make policies, to manage and to monitor the use of land, waters and the natural riches within with constitutional measure "*to the greatest benefit of the people*";

54. Whereas based on decision of the Constitutional Court in Case Number 3/PUU/2010, has expressly provided standards of meaning of *to the greatest benefit of the people*, which are:

a. benefit of natural resources for the the people;
b. distribution level of benefit of natural resources for the the people;
c. level of people participation in determining the benefit of natural resources, and;
d. respect for the indigenous rights in using natural resources

Whereas based on the standards, provisions in Article 1 point 6, Article 5 paragraph (1) and paragraph (2) of the Forestry Law, are inconsistent with Article 33 paragraph (3) of the 1945 Constitution;

Article 4 paragraph (3) on the phrase *"if any (read: indigenous peoples) still in existence and their existence is acknowledged as well as consistent with the national interest*", Article 5 paragraph (3) on the phrase "and paragraph (2); *and customary forest shall be stipulated if any (read: indigenous peoples) still in existence and their existence is acknowledged*", paragraph (4), Article 67 paragraph (1) on the phrase "*if any (read: indigenous peoples) still in existence and their existence is acknowledged*", paragraph (2), paragraph (3) on the phrase "and paragraph (2) *shall be stipulated by virtue of a Government Regulation*", in which Petitioners considered as contradictory with Article 1 paragraph (3), Article 28D paragraph (1), Article 18B paragraph (2), Article 28I paragraph (3)

55. Whereas recognition and respect for indigenous peoples has been set forth in Article 18B paragraph (2) of the 1945 Constitution, which states "*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***", while the provisions of Article 28I paragraph (3) of the 1945 Constitution states "*The cultural identities and rights of traditional communities shall be respected in accordance with the development of times and civilisations*";

56. That recognition and respect for indigenous peoples as set forth in Article 18B paragraph (2) and Article 28I paragraph (3) is well recognized even by the founding

fathers at the time of the formulation of the 1945 Constitution. Awareness of the founders of the existence of indigenous peoples was crystallized in Article 18 UUD 1945 Constitution (before amendment) which states that, "*The division of the territory of Indonesia into large and small regions shall be prescribed by law in consideration of and with due regard to the principles of deliberation in the government system and the hereditary rights of special territories*". Moreover, Elucidation to the Article in paragraph II, stated that, "*In the territory of Indonesia there are approximately 250 self-governing regions (zelfbesturende landschappen) and village communities (volksgemeeschappen), such as the "desa" (village) in Java and Bali, the "nagari" in Minangkabau, the "dusun" and "marga" in Palembang and other social-adminstrative units. These regional units have their own indigenous social systems and thus may be considered as special regions*". Further elucidation to the Article states, "*The Republic of Indonesia respects the status of the special regions and any government regulation on these regions shall have due regard to their hereditary rights*";

57. Whereas hereditary rights of communities with indigenous social systems referred to in the above elucidation can be equated with traditional rights referred to in Article 18B paragraph (2) of the 1945 Constitution. Principle of recognition toward communities with indigenous social systems is described implicitly by AA GN Sutoro Eko Ari Dwipayana, who stated, "recognition toward communities with indigenous social systems was using the principle of recognition". This principle is different from the principles known in the local government system: deconcentration, decentralization and the duty of assistance. If the principle of decentralization is based on the principle of hand-over of power by central to the autonomous regional government to regulate and administer government affairs, the principle of recognition is the recognition and respect of the state to indigenous peoples and their traditional rights (autonomy of communities);

58. Whereas recognition and respect to indigenous peoples means the recognition and respect for its existence as a community group with a set of hereditary rights therein including the right to land and natural resources, including the forest and also the recognition and respect for their ability in regulating social relations and

well as the ability to regulate land governance and natural resources, including forest itself;

59. That recognition and respect for indigenous peoples as autonomous community group is also recognized by the world as seen from the provisions contained in the United Nations Declaration on the Rights of Indigenous peoples. In Article 3 of the Declaration states that "indigenous peoples have the right to self-determination". Based on that right, they freely determine their political status and freely pursue their economic, social and cultural progression. Furthermore, in Article 4 states that " Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to, their internal and local affairs, as well as ways and means for financing their autonomous functions";

60. Whereas provisions in Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution, have explicitly determined that:

    a. the State is obliged to recognize and respect indigenous peoples along with their traditional customary rights;
    b. the State is obliged to respect the cultural identities and rights of indigenous peoples;

61. Whereas above Article has clearly and strictly instructed the State through the Government to;

    a. recognize and respect indigenous peoples along with their traditional customary rights
    b. respect the cultural identities and rights of indigenous peoples;

62. Whereas formulation of the subject, object and the rights of indigenous peoples, has been formulated by many legal experts of customary law which described as followings;

63. Whereas formulation of the subject of indigenous peoples in Indonesia are the similarities of territory (region), genealogy (hereditary), and territory-genealogy (region and hereditary), so that there are diversities of indigenous peoples from one area to another (Ter Haar, 1939 Abdurahman & Wentzel, 1997; Sutantosutanto, 1999; Titahelu 1998);

64. Whereas the object of the customary rights is the right to their customary lands (customary rights) which includes water, vegetation (trees), and animals, rocks that

have economic value (on the ground), minerals, and also along the coast beach, well above the water, in the water, or in land. As for the territory, it has clear boundaries, both factual (natural boundary or signs on the ground) or symbolic (the well-sounded of the gong); how the customary law govern and determine relationship and if the transactions on the land were carried out according to the rules and customary institution (Mahdi 1991, in Abdurahman & Wenyzel 1997);

65. Whereas the rights of indigenous peoples, include;
    a. regulating and organizing the use of land (for housing, farming, etc.), supply (developing new housing/farm, etc), and the maintenance of the land;
    b. regulating and determining legal relationship between people and land (giving certain rights to a particular subject);
    c. regulating and determining legal relationship between people and legal acts related to the land (sale and purchase, inheritance, etc.);
66. Whereas according to Mary Sumardjono (1999), in simple term, following criteria can be used to see whether a indigenous peoples, their identity and rights are recognized and respected:
    a. existence of indigenous peoples that meet certain characteristics as the subject of customary rights;
    b. existence of and/areas with specific boundaries as *lebensraum* (living space) which is the object of customary rights;
    c. existence of authorities to perform certain acts related to the land, other natural resources and legal acts;
67. Whereas according to Article 18B paragraph (2) of the 1945 Constitution, it is clear that the state is obliged to recognize and respect indigenous peoples and their traditional rights insofar still in existence and in accordance with the development of society and the principles of the rule of law;
68. Whereas in order to recognize and to respect indigenous peoples and their traditional rights have been clearly and explicitly mentioned and shall be governed by law;
69. Whereas the mandate to regulate procedures to recognize and to respect indigenous peoples and their traditional rights is mandated by Article 18B paragraph

(2) of the 1945 Constitution, that regulation will falls under category of organic laws (laws mandated by the 1945 Constitution);

70. Whereas based on above descriptions, it is clear that indigenous peoples requires certainty of rights that is specific in nature (exclusive: do not overlap with other rights), where indigenous peoples is able to conserve, to utilize (including to cultivate), to market the natural resources therein; where the rights are not transferable to other parties outside of the community, so that their cultural identities and rights will receive attention and firm protection in the 1945 Constitution;

71. Whereas the existence of the provisions in articles of the Forestry Act under review in the petition *a quo*, has led to deprivation and destruction of indigenous peoples and their territories and rights, which make these provisions to be in conflict with Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution;

72. Whereas based on above description, provisions in Article 67 of the Forestry Law which set procedures of recognition of existence or extinction of indigenous peoples which governed by Local Regulation is clearly against the constitution; inconsistent with the provisions of Article paragraph 18B (2) of the 1945 Constitution;

73. Whereas based on above description, it can be concluded that provisions in the Forestry Law have hindered Petitioners' rights to recognition, security, protection, and fair legal certainty and equal treatment before the law and therefore the provisions of the Act Forestry is considered inconsistent with Article 28D paragraph (1) of the 1945 Constitution;

74. Whereas Article 1 paragraph (3) of the 1945 Constitution, firmly stated, "*Indonesia is a state that based on the rule of law";*

75. Whereas statement of Article 1 paragraph (3) of the 1945 Constitution, according to Jimly Ashiddiqie implies the recognition of the supremacy of law and constitution, espoused the principle of separation of powers and restrictions set forth under the constitutional system of the Constitution, the guarantee of human rights in the Constitution Constitution, the principle of fair trial and impartial guarantee every

citizen equal in law, and to ensure fairness for everyone, including the abuse of authority by those in power;

76. Whereas in a state that based on the rule of law, one of the most important pillars is the protection and respect for human rights. Protection of human rights is disseminated widely in order to promote respect, protect, and fulfll human rights as an important characteristic for a democratic state that based on the rule of law. Since birth, every human being holds the rights and obligations that are free and rights. Formation of a State and exercise of power by a state should not diminish the meaning of freedom and the human rights. Even A.V. Dicey emphasized the principle that the content of constitution of a state that adheres to the rule of law must follow the formulation of basic rights (*constitution based on human rights*). In addition to the principle of *the supremacy of law, and equality before the law;*

77. Whereas the protection of human rights as an essential part of the concept of rule of law adopted in Indonesia has been stated in Chapter XA (Article 28A to 28J) of the 1945 Constitution on Human Rights. In particular affirmation on the assurance of human rights in a democratic rule of law contained in Article 28I paragraph (5) of the 1945 Constitution which states that "to uphold and protect human rights in accordance with the principles of a democratic state of, the implementation of the human rights is guaranteed, regulated and set forth in the legislation";

78. Whereas in the rule of law, created legislations should contain values of fairness for all people. As quoted by Jimly Asshiddiqie, from Wolfgang Friedman in his book, "*Law in a Changing Society",* that distinguished between organized public power (the rule of law in the formal meaning), with the rule of just law (the rule of law in material meaning). Rule of law in formal meaning (classical) means the definition of legal in the narrower sense, ie written legislation, and not necessarily ensures substantive justice. Rule of law in material meaning (modern) or the rule of just law is a manifestation of the rule of law in a broad sense related to definition of justice in within, which is the essence rather than merely enabling legislation in the narrower sense;

79. Whereas Article 5 paragraph (3) of the Forestry Law does not reflect rules that are clear, well understood and fairly enforced. Formulation of Article 5 paragraph (3) of the Forestry Law contain elements of discrimination against indigenous peoples,

and inconsistent with the provisions in higher hierarchy (1945 Constitution) are form of violation of the concept of rule of law in which "*a legal system in which rules are clear, well-understood, and fairly enforced*". Therefore, Article 5 paragraph (3) of the Forestry Law is considered to be inconsistent with Article 1 paragraph (3) of the 1945 Constitution. It does not reflect the principle of equality before the law as one of characteristics of a state that based on the rule of law.

80. Furthermore, if we look into ILO Convention 169 (**exhibit P - 36**); the rights to land and natural resources are protected under Part II that consists of Article 13 through Article 19. In Article 13, the states are required to respect the unique relationship between indigenous peoples with the their land or territory, in particular the collective aspects of this relationship. In the term of "soil" contains the concept of "territory" that includes the entire environment of the area that has been occupied or used by those indigenous peoples;

81. Whereas Article 14 and Article 15, ILO 169 set forth the protection of the rights of indigenous peoples over their and and natural resources. The rights of ownership and possession of the peoples concerned over the lands that they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities;

VI. PETITUM

Based on abovementioned matters, we petitions the Panel of Justices of Constitutional Court of Republic of Indonesia who hear and make decision on judicial review petition related to Article 1 point 6, Article 4 paragraph (3), Article 5 paragraph (1), paragraph (2), paragraph (3), paragraph (4), Article 67 paragraph (1), paragraph (2), paragraph (3) of Forestry Law to pass the following decisions:

1. to accept and grant the Petitioners' Petition in its entirety;
2. to declare provision in Article 1 point 6 of Forestry Law on the word "*state",* as inconsistent with 1945 Constitution and therefore it has no binding force. Article 1 point 6 of Forestry Law should be read as follow: "*customary forest is a forest located in indigenous peoples area";*

3. to declare provision in Article 4 paragraph (3) of Forestry Law on the phrase *"if any (read: indigenous peoples) still in existence and their existence is acknowledged as well as consistent with the national interest*" as inconsistent with 1945 Constitution and therefore it has no binding force. Article 4 paragraph (3) of Forestry Law should be read as follow: "*forest concession by the state should considers the rights of indigenous peoples.*"
4. to declare provision in Article 5 paragraph (1) of Forestry Law as conditionally unconstitutional against 1945 Constitution and has no binding force unless interpreted as follow "Forest shall by status consists of: (a) State forest; (b) Title forest; and (c) Customary forest";
5. to declare provision in Article 5 paragraph (2) Forestry Law as inconsistent with 1945 Constitution and therefore it has no binding force;
6. to declare provision in Article 5 paragraph (3) of Forestry Law on the phrase "and paragraph (2); *and customary forest shall be stipulated if any (read: indigenous peoples) still in existence and their existence is acknowledged*" as inconsistent with 1945 Constitution and therefore it has no binding force. Article 5 paragraph (3) Forestry Law should be read as follow: "The Goverment determines forest status as referred to in paragraph (1)";
7. to declare Article 5 paragraph (4) of Forestry Law as inconsistent with 1945 Constitution and therefore it has no binding force;
8. to declare Article 67 paragraph (1) of Forestry Law on the phrase "*if any (read: indigenous peoples) still in existence and their existence is acknowledged*" as inconsistent with 1945 Constitution and therefore it has no binding force. Article 67 paragraph (1) Forestry Law should be read as follow: "indigenous peoples is entitled to:
    a. to collect forest products to meet daily needs of the indigenous peoples concerned;
    b. to conduct forest management activities based on effective customary law and not in contrary to the law;
    c. to get empowerment in order to improve their welfare";
9. to declare Article 67 paragraph (2) of Forestry Law as inconsistent with 1945 Constitution and therefore it has no binding force;

10. to declare Article 67 paragraph (3) of Forestry Law on the phrase "and paragraph (2)" as inconsistent with 1945 Constitution and therefore it has no binding force. Article 67 paragraph (3) Forestry Law should be read as follow: "*further provision as referred to in paragraph (1) shall be governed in Government Regulation*";
11. or if the Panel of Justices of the Constitutional Court of the Republic of Indonesia has a different opinion, decisions shall be made by principles of what is fair and just – *ex aequo et bono*

[2.2] Considering that in support of the arguments, the Petitioners have filed a written exhibit which marked as Exhibit P - 1 until Exhibit P - 34, as follows:

1. exhibit P – 1 : Photocopy of Law No 41 of 1999 on Forestry;
2. exhibit P – 2 : Photocopy UUD 1945 Constitution;
3. exhibit P – 3 : Photocopy of collection of news clipping;
4. exhibit P – 4 : Book "*Menuju Kepastian dan Keadilan Tenurial*" (Toward Certainty and Justice of Tenure);
5. exhibit P – 5 : Photocopy "Strategic Plan 2010-2014" Ministry of Forestry;
6. exhibit P – 6 : Photocopy of Elucidation of 1945 Constitution;
7. exhibit P – 7 : Photocopy of opinion given by Suhardjito Khan quoted in Series of Policy I : "*Kajian Kebijakan Hak-Hak Masyarakat Adat di Indonesia; Suatu Refleksi Pengaturan Kebijakan dalam Era Otonomi Daerah*" (Assessment on Policy of Indigenous peoples Rights in Indonesia: A Reflection on Policy Setting in the Era of Regional Autonomy);
8. exhibit P – 8 : Photocopies of:
    - Notarial Deed of Notary H. Abu Jusuf, S.,H. on Indigenous peoples Alliance of The Archipelago (AMAN);
    - Tax Identification Number of Indigenous peoples Alliance of The Archipelago (AMAN);
    - Articles of Association of Indigenous peoples Alliance of The Archipelago (AMAN);
9. exhibit P – 9 : Photocopies of:
    - Collection of news clipping on activities of AMAN;

- Request for Consideration of the Situation of Indigenous peoples in Kalimantan, Indonesia, under the United Nations Committee on the Elimination of Racial Discrimination's Urgent Action and Early Warning Procedures;

10. exhibit P – 10 : Photocopy of Memorandum of Understandings between Indigenous peoples Alliance of The Archipelago (AMAN) dan National Commission of Human Rights (Komnas HAM);
11. exhibit P – 11 : Photocopy of Cooperation Charter between Ministry of Environment and between Indigenous peoples Alliance of The Archipelago (AMAN);
12. exhibit P – 12 : Photocopy of Memorandum of Understandings between Indigenous peoples Alliance of The Archipelago (AMAN) and National Land Agency;
13. exhibit P – 13 : Photocopy of Law Number 39 of 1999 on Human Rights;
14. exhibit P – 14 : Photocopy of History of Indigenous peoples of Kenegerian Kuntu;
15. exhibit P – 15 : Photocopy of Regional Regulation Number 12 of 1999 on Customary Land Rights;
16. exhibit P – 16: Photocopy of Decree of Minister of Forestry Number SK.356/MENHUT-II/2004 dated 1 October 2004 on Amendment of Decree of Minister of Forestry Number 130/KPTSII/1993 dated 27 Februari 1993 jo. Decree of Minister of Forestry Number 137/KPTS-II/1997 dated 10 March 1997 on Industrial timber plantation Permit in Riau Province to PT. Riau Andalan Pulp and Paper;
17. exhibit P – 17 : Photocopy of Decree of Lebak Regent Number 430/Kep.318/Disporabudpar/2010 dated 7 July 2010 on Recognition of Existence of Indigenous peoples of Cisitu Banten Kidul Lebak District;
18. exhibit P – 18 : Photocopy of an article regarding History of Indigenous peoples of Cisitu;
19. exhibit P – 19 : Photocopy of Map of Customary forest of Cisitu, Cibeber Sub-district, Lebak District, Banten Province;
20. exhibit P – 20 : Photocopy of collection of photographs of ritual of customary activities of Indigenous peoples of Cisitu;
21. exhibit P – 21 : Photocopy of Decree of Minister of Forestry Number 175/Kpts-II/2003 dated June 10, 2003 on Determination of Mount Halimun-Salak National Park area and function changes of protected forest, permanent production forest, limited production forest, in Mount Halimun and Mount Salak forest block of

±113,357 ha in West Java and Banten Province into Mount Halimun-Salak National Park;

22. exhibit P – 22 : Photocopy of news articles titled:
    1) PT Antam's Office is Destroyed by Mass Rage;
    2) Kaolotan Cisitu Threaten to Enforce Customary Law;
    3) Assessment Result on Overlapped Managementof Natural Resources in Halimun Ecosystem Area (Implementation of RATA in Lebak District);
23. exhibit P – 23 : Photocopy Letter of Proposal to assist, to guard and to manage National Park of Gunung Halimun Salak (Wewengkon/Wilayah) Kesatuan Sesepuh Adat Cisitu Banten Kidul;
24. exhibit P – 24 : Photocopy of pages of book written by Prof. Dr. Jimly Asshiddiqie, S.H. titled "*Pokok-pokok Hukum Tata Negara Indonesia Pasca Reformasi"* (Principals of Constitutional Law of Indonesia Post Reform);
25. exhibit P – 25 : Photocopy of pages of book written by Prof. Miriam Budiarjo titled "*Dasar-dasar Ilmu Politik*" (The Basics of Political Science);
26. exhibit P – 26 and exhibit P – 31: Photocopy of pages of book written by Prof. Dr. Jimly Asshiddiqie, S.H. titled "*Konstitusi dan Konstitusionalisme Indonesia*" (Constitution and Constitutionalism of Indonesia);
27. exhibit P – 27 : Photocopy of pages of book written by Brian Z. Tamanaha titled "On the Rule of Law: History, Politics, Theory";
28. exhibit P – 28 : Photocopy of pages of book written by Dr. J.C.T. Simorangkir, S.H. titled "*Hukum dan Konstitusi Indonesia*" (Law and Constitution of Indonesia);
29. exhibit P – 29 : Photocopy of pages of book written by Dr. Moh. Mahfud MD titled "*Hukum dan Pilar-pilar Demokrasi*" (Law and Pillars of Democracy)
30. exhibit P – 30 : Photocopy of pages of book written by Prof. Kusumadi Pudjosewojo, S.H. titled "*Pedoman Pelajaran Tata Hukum Indonesia*" (Guidelines for Indonesian Law Governance Study);
32. exhibit P – 32 : Photocopy of United Nations Declaration on the Rights of Indigenous peoples;
33. exhibit P – 33 : Photocopy of Decree of the People's Legislative Assembly of the Republic of Indonesia Number XVII/MPR/1998 concerning Human Rights;

34. exhibit P – 34 : Photocopy of pages of book titled "*Hak Sipil dan Politik, Esai-esai Pilihan*" (Civil and Political Rights, Selected Essays)*;*
35. exhibit P – 35 : not submitted;
36. exhibit P – 36 : Paper on Khalifah of Kuntu.

Moreover, the Petitioners also submit written statements of five experts and six witnesses which have been heard by the Court on June 5, 2012, June 14, 2012 and June 17, 2012, which principally describing the following matters:

Petitioners' Experts

1. Dr. Saafroedin Bahar

1. Introduction

- The expert argue that although material of this is directly related to the relationship between the state forest with customary forest in the context of the Forestry Law, indirectly it will related to the status and recognition on the existence of indigenous peoples and its constitutional rights as a whole by Unitary State of the Republic of Indonesia;

- Petitioners argued that Articles in this Forestry Law petitioned for judicial review, which include Article 1 point 6 on the word *"state",* Article 4 paragraph (3) on the phrase *"if any (read: indigenous peoples) still in existence and their existence is acknowledged as well as consistent with the national interest",* Article 5 paragraph (1), paragraph (2), paragraph (3) on the phrase *"and (2); and customary forest shall be stipulated if any (read: indigenous peoples) still in existence and their existence is acknowledged", and paragraph (4) , and Article 67 paragraph (1) on the phrase "if any (read: indigenous peoples) still in existence and their existence is acknowledged", paragraph (2), and paragraph (3) on the phrase "and paragraph (2)"*, has violate constitutional rights of indigenous peoples, therefore they need to be revoked and declared inconsistent with 1945 Constitution; while the Government argued that these Articles do not violate the rights of indigenous peoples, therefore this petition has to be rejected entirety;

- Although it seems contradictory, but there are two positive matters, according to the Expert, which can allow a fair settlement in this case: firstly, the affirmation that there is absolutely no intention from the government to deny the existence of indigenous peoples and their rights to their customary land, and secondly, a willingness, even a petition, from both parties. If the Constitutional Court has a different opinion, decisions shall be made by principles of what is fair and just;

- Thus, there is a favorable starting point for the settlement of this case, what is needed is a framework of reference and format that can integrate two opinions abovementioned into a coherent whole;

- Although judicial review is aimed at the Forestry Law, the themes of respect, protection, advancement, and fulfillment of the rights of indigenous peoples are also part of the international law of human rights, which have a long history, since the 15th century AD;

- 1945 Constitution uses some terms to refer to indigenous peoples, such as indigenous peoples, *adat*community and traditional community, allowing these terms to be used at once or alternated;

2. Overview from Historical Perspective

- From the historical perspective, it can be stated categorically that the root of the problem petitioned in this judicial review is related to competing claims or the presence of two or more claims on the same area of land claimed by the two asymmetric parties, ie indigenous peoples and the state *c.q.* government;

- The asymmetrical position does not arise at once, but gradually. It is a historical fact, that before the existence of kingdom, empire, and national states, indigenous peoples have existed; born and grew naturally in a region. They are the natives or indigenous peoples in the region. Boundaries between the regions of one community and the other were agreed collectively by using natural boundaries, such as rivers, mountains, trees, or link;

- Problems arise after the formation of political authority over the indigenous peoples, both political authority of the same race or ethnicity, or political

authority of other races or ethnicities. Of course, the indigenous peoples would not just simply handed over their territory which they owned from generation to generation, their source of living since, to the political authority. Conflicts, even battles and wars, always occur before, during, and even after, that indigenous peoples to be subdued under the new political authority;

- The most important moment in the world history, with respect to concession of indigenous peoples by political authorities, occurred in 1494, nearly six centuries ago, when Pope Alexander VI of Borgia issued Tordesilas Decree, a name based on an island in the Atlantic Sea. This decree unilaterally divided the world into two major parts, the western part of the island was allocated to the Spain Empire, and its eastern side was allocated to the Portuguese Empire. Based on this 1494 Tordesilas Decree. the archipelago claimed by the Portuguese Empire as their rights, then followed by various European empires which came after, including Dutch Empire, which gradually since 1602 began to declare their power in the archipelago. Basically, starting from that year disputes over land rights of indigenous peoples began to arise;

- To follow up the claim over the whole world, Hugo de Groot (Grotius) developed theories of *mare liberum, rex nullius*, and *rex regalia*, that denies all the pre-existed rights, including the rights of indigenous peoples directly or indirectly, the theory of *rex nullius* and *rex regalia* become the basis for forcibly concession of various regions in the world by Western empires, also serve as references for theory of *domein verklaring* adopted by the Dutch government for control lands that were not controlled directly by indigenous peoples;

- Initially the Dutch Empires had no intention to control the archipelago region at a whole and directly, but limited to control its natural resources to make the region as market for of their products. That was how *Verenigde Oost Indische Cornpagnie* (VOC), a trading company established;

- With limited resources from the Dutch Empire, they develop an effective and efficient system, by forming two regions in the archipelago, namely: a) directly controlled territory (*directe bestuurs gebied*) which generally located in urban

areas, and b) indirectly controlled territory (*indirecte bestuurs gebied*) which generally located in rural areas, who were mostly indigenous peoples, under the leadership of their own traditional customs;

- To control the vast archipelago, the Dutch intellectuals were divided into two major groups, ie group from Utrecht University who tend to make unification of law for all the Dutch East Indies, and the group from Leiden University, who defended the existence of indigenous peoples and their rights to customary land;

- Due to the persistent struggle of figures of Leiden University; Prof. Mr C. van Vollenhoven and Mr. B.Z.N Ter Haar, the existence of indigenous peoples and their rights, including rights to their customary land as attributes and collective owned or communal property of indigenous peoples, were recognized by the colonial government of Dutch East Indies. Both pioneers of customary law also suggested that for indigenous peoples, customary land is not only an economic mean but part of their whole life, and seen as sacred, magical, and religious. Thus, if the colonial government or large companies wanted to use customary land owned by indigenous peoples, it was not done through revocation of rights (*onteigening*), but through a direct lease agreement;

- Immediate recognition on the existence of the indigenous peoples and their rights, including rights on customary land was passed by the Founding Fathers of the Republic of Indonesia in general, and the legislator of 1945 Constitution in particular. Indigenous peoples were recognized as special regions, which have hereditary rights, which must be respected in making policies and regulations of the state. Legal norm on this automatic recognition toward indigenous peoples is set forth in Article 18 of the 1945 Constitution and its Elucidation;

- Automatic and unconditional recognition of indigenous peoples was interrupted abruptly in 1960, when the Law No. 5 of 1960 on Agrarian Law set a requirement for recognition on the existence of indigenous peoples. Certainly in theory this can be disputed, on what was the background of such conditionality, which can be interpreted that at some point, based on government discretion, a indigenous peoples can be declared as no longer exist or no longer qualified as a indigenous

peoples. Stipulation of this requirement is an oddity, because formation process of indigenous peoples is different from formation of institutions or other legal entities. There was never any intention that at some point indigenous peoples will be dissolved;

- Stipulation of this requirement for recognition of indigenous peoples artificially in 1960 has ignored the fact, that during the second Dutch military aggression, from December 19, 1948 until July 13, 1949, when the Indonesian troops got heavily pressured by from the Dutch, it was by moral, logistic, and personnel supports from these indigenous peoples that allowed this Republic of Indonesia to survive;

- In the province of Central Sumatra; which now proliferated into Provinces of West Sumatra, Riau and Jambi, an area of guerrilla of Emergency Government of the Republic of Indonesia *Pemerintah Darurat Republik Indonesia*, PDRI), where *Barisan Pengawal Nagari dan Kota* (BPNK) was formed in each Nagari, who fought alongside the regular Army (*Tentara Nasional Indonesia*, TNI). The combination of the power was very effective, made the Dutch government had to send his Red Beret troops twice in seven months period of guerrilla war. The Dutch forces were not able to subdue the combined resistance of regular military forces and irregular people forces;

- Law No. 32 of 1999, and the Regulation of the Minister of Agrarian Affairs/Head of National Land Agency Number 5 of 1999 stipulate that the recognition of indigenous peoples is regulated by district regulation. Clearly, district regulation can not and should not be regarded as a source of law for the existence of indigenous peoples, or their rights on customary land, because the legal basis for the existence of indigenous peoples and their rights are already set forth in the 1945 Constitution;

- Thus, the district regulation as formal legal requirement set forth in two legislative product needs to be understood merely as an administrative requirement. It is important to underline this, to avoid issue of legal standing of

indigenous peoples in filing petition of judicial review to the Constitutional Court;

- If that is not the case, it is estimated that the issuance of district regulation will become a major barrier for the recognition, protection, advancement, and fulfillment of the rights of indigenous peoples, because the marginalized position of indigenous peoples complicates their access to the district legislature, which in practice absolutely has no concern to this issue. Thus, although this requirement has been clearly stated since 1960, there is no program and no systematic effort, both at the central and regional levels, to form district regulation that will serve as legal basis for the existence of indigenous peoples;

- The issue has been left unclear intentionally, to date, making indigenous peoples lives in uncertainty, while at the same time various government agencies and large corporations with no doubt were able to utilize the vast areas of land which previously serve as customary land belonged to the indigenous peoples. It is understandable, that the condition create conflict between indigenous peoples, the Government and third parties who acquire rights to land with Government permit;

- As a result, since 1960 to this present, there has been a long-running conflict between indigenous peoples whose existence and rights are under threat and the government and various companies who have interest on customary land belonged to indigenous peoples. In fact the number of land conflicts have been increasing over the years;

- In terms of formation process of legislation there has been a striking oddity, which is seen in determining conditionality. Abolition of automatic recognition of indigenous peoples in Law No. 5 of 1960 on Agrarian Law, which inconsistent with Article 18 of the 1945 Constitution and its Elucidation, instead of correcting the inconsistency through law in the higher hierarcy ie Decree of the People's Legislative Assembly, it was re-affirmed in Article 41 of Decree of the People's Legislative Assembly of the Republic of Indonesia Number XVII/MPR/1998 concerning Human Rights;

- Moreover, by referring to Article 33 of 1945 Constitution, the state developed a new theoretical foundation to control customary land belonged to indigenous peoples through the construction of state control over land. If explored more thoroughly, both theoretical and practical, the state control over land is more likely as revocation of the customary rights from indigenous peoples, without any compensation. It is no exaggeration to say that the construction of the state control over is a worse form of *domein verklaring*, since *domein verklaring* still recognize the customary rights while the construction of state control over land deny the rights altogether;

- Supposedly, this deviation can be corrected during four times of amendment, which lasted between 1999 and 2002. But it was not. Abolishment of automatic recognition of indigenous peoples, along with its requirement was set forth in Article 18B paragraph (2) and Article 28I paragraph (3) of 1945 Constitution;

- In parable the whole process of stipulation of conditionality clause for indigenous peoples is like *hadith dhaif* (weak hadith) or even fake *hadith cq* the requirements stipulated in Law No. 5 of 1960 on Agrarian Law] was not revoked, but instead lifted/reaffirmed as new *surah* (chapter) or paragraph in *Al Quranulkarim* [read: Article 18B paragraph (2) and Article 28I paragraph (3) of the Constitution The 1945 Constitution]. *Naudzubillahi min zalik* (May Allah protects us from harm);

- From a historical perspective, it is an irony that the rights of indigenous peoples, which were respected and recognized unconditionally by the Dutch colonial government, then castrated by the national government of the Republic of Indonesia through various conditionalities. Contrary to the spirit of Article 33 paragraph (3) of the 1945 Constitution, customary land of indigenous peoples which later controlled by the State are not used for the maximum benefit of the people, but given to large private companies engaged in agriculture, plantation, or mining, which clearly aim to seek maximum profit;

- Thus, concession rights of the state, the government juridically (*de jure*) and factually (*de facto*) has revoked (*onteigening*) the rights of indigenous peoples,

with no compensation, and that is inconsistent with: a) the fourth paragraph of the Preamble of the 1945 Constitution 1945 which clearly states one out of four duties of the government to protect all the people of Indonesia and the entire homeland of Indonesia, and b) Article 33 paragraph (3) of the 1945 Constitution, which states that the land, water, and natural resources contained therein shall be controlled by the state and used for the maximum prosperity of the people;

3. Overview of Nation State Perspectives

- After placing indigenous peoples in the historical perspective, it's beneficial if we try to put this indigenous peoples in the context of national and state, referring to the Montevideo Convention 1933. According to the Montevideo Convention 1933, the "state" is the main subject of international law, which consists of three components, namely: a) a defined territory, b) permanent population, and c) the government who is able to fulfill its international obligations;

- Clearly there is a fundamental difference between the colonial state, which aimed to deliver benefits to the colony state and national state, which since early stage was designed for the benefit of the people who theoretically assumed to have the highest sovereignty in the state;

- The expert believes that the Court will agree that the philosophy, ideology, vision, and mission of the nation and [Unitary] State of the Republic of Indonesia has clearly summarized in the four paragraphs in the Preamble of the 1945 Constitution. The Preamble clearly states views on independence and colonialism, the objectives to be achieved by the state, dimensions of religiosity of declaration of independence, sovereignty, the five basic principles, and lastly the four duties of the Government. As we all know, based on the five principles of Pancasila, and refers to the principle of sovereignty, there are four constitutional duties of the government, namely: a) protect all the people of Indonesia and all the land of Indonesia, b) to improve public welfare, c) to educate the life of the people; and d) to participate toward the establishment of a world order based on freedom, perpetual peace and social justice;

- It is true that the state has made a variety of laws and regulations on the procedures that need to be taken to obtain recognition or affirmation of the existence of indigenous peoples, which basically conducted through district regulation, with the assumption that the district government shall know best on the existence of indigenous peoples in the region;

- Although it may be questioned why to date there are only two indigenous peoples have obtained regional regulations that confirm their existence and traditional rights, ie indigenous peoples of *Baduy* in Banten province and indigenous peoples of *Pasir* in East Kalimantan province. The fact that such small number of indigenous peoples are protected by district regulations can be interpreted as little political will to give legal protection to indigenous peoples, or the complexity of such process. Therefore, majority of these indigenous peoples, juridically, are threaten to lost their legal standing as indigenous peoples, particularly if such indigenous peoples intend defend their constitutional rights before the Constitutional Court;

- In accordance with the original intent of our founding fathers, even in accordance with the convention that has existed since the Dutch colonial era, in fact, or supposedly, no legal action is necessary to acknowledge or recognize the existence of indigenous peoples;

- In the context of a judicial review on this Forestry Law, it is necessary to review, whether the Forestry Law which made by the Government collectively with the House of Representatives is appropriate or in contrary to the four constitutional duties of the Government abovementioned;

- Exhibits presented by Petitioners indicate that despite the relevant Law and the testimony of representative of the Government during this hearing have recognized the existence and and the rights of indigenous peoples, the fact remains that their existence and their rights have been marginalized continuously. Thus, it can be said that violation against the existence and the rights of indigenous peoples was started in drafting of law and its implementing regulations;

- We should be grateful that recently there have been awareness and will, from indigenous peoples themselves, as well as from the Government and the House of Representatives, to correct the violation;

- There are three things indicating this effort. Firstly, the second point of the Jakarta Declaration on the Establishment of the National Secretariat for the Protection of Constitutional Rights of Indigenous peoples, at the commemoration of the first International Day of World's Indigenous peoples in Taman Mini Indonesia Indah, August 9, 2006, shows an awareness of the indigenous peoples of the problem and state interests cq Government interest on theland, and consciously offer a solution that consists of four principles as follows, "In the struggle for the restoration and protection of constitutional rights, indigenous peoples adopt four principles, namely a) in the framework of Unitary State of Republic of Indonesia; b) togetherness in solving the problems of indigenous peoples; c) efficient and effective manner; and d) equitable and enforceable*";*

- Secondly, statements and remarks from President Susilo Bambang Yudhoyono on Jakarta Declaration in 2006, as follows:

    a. "The law will regulate the traditional rights of indigenous peoples. As we understand, until now we do not have such law. I hope we can formulate the draft law in short time";

    b. "Responding to the declaration and expression of statement of indigenous peoples of Indonesia, I welcome and give full support. The first principal to put everything in the frame of the unitary sate of Republic of Indonesia is complete. Second principle togetherness in problem solving and to build a good institution is the best and noble way. Thirdly that all will be utilized efficiently to achieve the best possible result or the best result in taking effective measures, and lastly above the values of justice there are still many forms of justice while the presence of the rule of law to ensure that all volumes are implemented appropriately in accordance with the law and have good objectives";

- Thirdly, recently House of Regional Representatives of Indonesia has prepared a draft law on the recognition and protection of indigenous peoples's rights, and the Bill has been submitted to the House of Representatives to be enacted. The bill has been listed in the National Legislation Program 2012, and according to the Chairman of the House of Representatives this bill is attempted to be complete within this year;

- Thus, it can be said that the founding fathers of the Constitution in 1945 and state institutions in the reform era, as well as the organization of indigenous peoples themselves already have the intention and have gained common ground to straighten out deviation and violation that occurred during this time;

- The expert believes that the Constitutional Court, as the guardian of the constitution and the rights of citizens, will take historic steps to correct such deviation that have lasted for so long, by accepting the petition filed by the Petitioners;

4. Overview from the Perspective of International Law of Human Rights

- Marginalization and violation toward the existence and the rights of indigenous peoples are not only happen in Indonesia. Marginalization and the violation have occurred for hundreds of years all over the world, and it is clear that all indigenous peoples are in a helpless position in facing bigger power, both in the forms of state and non-state actors;

- Universal change occurred after the Second World War, with the establishment of the United Nations (UN) in 1945, which subsequently agreed on a very historic statement, the Universal Declaration of Human Rights (the Universal Declaration of Human Rights) in 1948. The presences of UN and this declaration have created a new atmosphere; giving places to newly independent states, and at the same time giving opportunities for the protection of vulnerable groups such as women, children, the elderly, and last but not least the indigenous peoples which is called as generic indigenous peoples

- Such atmosphere, which starts to be conducive toward human rights protection, cannot be validated immediately into instruments of international human rights law. It takes approximately 59 years (1948-2007) before the United Nations agreed to issue a United Nations Declaration on the Rights of Indigenous peoples, September 13, 2007. As a UN member state, the delegation of the Republic of Indonesia participated in signing the declaration, making the state morally bound to the substances contained therein;

- Before the year 2007, partially, on the international level, there have been efforts to protect the rights of indigenous peoples, including:

  a. ILO Convention No. 169/1989, concerning Indigenous and Tribal Peoples in Independent Countries, which entered into force on 5 September 1991 after ratification by the state members of the UN. This convention defends three rights of indigenous peoples, the right to land, right to education, and the right to health;

  b. The U.N. Declaration on the Rights of Persons Belonging to National or Ethnic, Reiligious and Linguistic Minorities, December 18, 1992;

  - Although relatively late, such conducive situation for human rights brought positive impact to Indonesia. In 1993 through a presidential decree the National Commission on Human Rights (Komnas HAM) was established; they were already doing their works while Law No. 39 on Human Rights has just been enacted in 1999. Recognition of indigenous peoples and their cultural identities is listed in Article 6 of this Law. However, not until 2004, almost a decade later, a commissioner was appointed to specifically deals with the rights of indigenous peoples;

  - In relation to recognition, respect, protection, advancement, and fulfillment of the rights of indigenous peoples, the Commission faced with an odd situation, ie the lack of harmonization between laws. Recognition, respect, protection, advancement, and fulfillment of the rights of indigenous peoples as contained in Law No. 39 of 1999 is not followed by a statement to waive all articles in other laws that violate the rights of indigenous peoples, but to work

concurrently with various law that indirectly allow such violation of the rights of the indigenous peoples;

- As a result, the indigenous peoples that are small, under-developed, and poor have to deal with the government, including the security forces that very often use a rifle, as well as large private companies that have activities in the area that previously was customary forest. Of course, in this unequal relationship indigenous peoples would always lose, either outside the court or in court. This striking inequality is obviously a concern when viewed from the perspective of human rights;

- Given such lack of state policy and scientific literature on the recognition, respect, protection, advancement and fulfillment of the rights of indigenous peoples in Indonesia, from 2004 to 2007 the Commission held a series of fundamental studies, in collaboration with various agencies in the country, including the Secretariat General of the Constitutional Court itself, as well as with various UN agencies, in particular with the United Nations Development program (UNDP) and the International Labor organizations (ILO), which have concerns and programs related to the empowerment of indigenous peoples;

- As a result of many studies, in 2005, the Plenary Session of the National Commission of Human Rights was able to certify a Position Paper on the Protection of the Rights of Indigenous peoples, which is used as a reference in the activities of the constitutional protection of indigenous peoples' rights in Indonesia;

- The legal basis for the protection of rights of indigenous peoples has slightly improved with the ratification of two UN covenants, namely the International Covenant on Civil and Political Rights by Law Number 11 of 2005 and the International Covenant on Economic, Social, and Cultural Rights by Law Number 12 in 2005. Both of these covenants recognize human rights of individuals, and also collective rights, including the rights of indigenous peoples;

- To create more favorable conditions for the efforts to respect, protection and fulfillment of the constitutional rights of the indigenous peoples, on August 9, 2006, in cooperation with the UNDP office in Bangkok and representatives of the ILO and with several relevant ministries, the National Commission of Human Rights held the first commemoration of International Day of World's Indigenous peoples, which was attended by around 1,000 participants from all over Indonesia, also attended by President Susilo Bambang Yudhoyono;

5. Conclusion and Recommendation

a. Conclusion.

1) From historical, nation state and international law perspectives, articles of Forestry Act petitioned for review by the Constitutional Court have long historical roots, that is, after the establishment of a higher political authority over the existing indigenous peoples;

2) During Dutch East Indies era, recognition of indigenous peoples and their customary forest, took place automatically and unconditionally;

3) The founding fathers of the Republic of Indonesia were also unconditionally recognized hereditary rights of the indigenous peoples, as stated in Article 18 of 1945 Constitution and its Elucidation;

4) Since 1960 to date, by including various requirements on the existence of indigenous peoples, and through the construction of land concession by the state which implemented by violating hereditary rights of indigenous peoples, in theory there have been three constitutional violation: 1) against the original intent of the founding fathers, 2) against the duties of government stipulated in the fourth paragraph of the Preamble of the 1945 Constitution; and 3) against Article 33 paragraph (3) of the 1945 Constitution;

5) Recently, although judicially (*de jure*), there are some articles in the legislation that legally formally respect, protect, advance, or fulfil hereditary rights of

indigenous peoples, but factually (*de facto*) there has been constant violation of the rights of indigenous peoples, resulting in vertical conflict between indigenous peoples and government institution in various regions

6) Recently, there has been political will from all parties, including indigenous peoples as well as Government, to seek the best possible solution of the vertical conflict on customary forests, among others, by formulating a Draft Law on Recognition and Protection of the Rights of Indigenous peoples which is already included in the National Legislation Program in 2012;

b. Recommendation

1) For the Constitutional Court to grant petition of the Petitioners;

2) Toward the enactment of the Law on Recognition and Protection of the Rights of Indigenous peoples which is being discussed at the House of Representatives, to decide that the articles petitioned in this judicial to be reviewed and harmonized with the original intent of the founding fathers, with the fourth paragraph of the Preamble of 1945, as well as with Article 33 paragraph (3) of the 1945 Constitution of 1945;

3) to decide that material on recognition on the existence of indigenous peoples to be separated from Law No. 41 of 1999 is, to be fully regulated by the Law Recognition and Protection of the Rights of Indigenous peoples;

2. Noer Fauzi Rachman

- Whereas the Expert entitled his testimony "Rectifying Statization of Customary Land". Statization is a process where land and customary land designated by the Government as a special categories of state land, state forest, which then on the basis of its legal authority, the Central Government grant concessions with assumption to business entities of conservation production and extraction;

- As a result, when business entities of conservation work in their field, the clashes occur. Conflicting claims between business entities with the local indigenous peoples. When the claim has reached measures trying to eliminate each other

claims, land conflict will occurred; the conflicts are structural, widespread, and chronic because they have lasted for years. In this context, the widespread impact is the inclusion of customary land into industrial plantation forest permit issued by the minister. Examples of cases include Bentian, Manggarai, Mesuji, and Padang Island.

- Whereas Petitioner petitioned to replace the conception of statization. In legal politics conception, there are hereditary rights, inherent rights, and government-given rights or government authority. Inherent rights is stated in Article 18 and 18B of the 1945 Constitution, in which the state recognizes and respects units of regional authorities that are special and distinct. In addition, a new category is included into the constitution; called indigenous peoples who have hereditary rights;

- Whereas government-given rights is under authority of the Central Government. When the central government has the authority to determine whether a customary forest is included in state forest, this is where the clash emerged between the use of the authority derived from of Law with inherent rights of the people. In this context it is questionable which one should come first;

- Whereas adoption of human rights to the constitution of the Republic of Indonesia prioritized hereditary rights. This should be a special category i.e. indigenous peoples. This special category should be a correction to the Forestry Law which include customary land to be part of a state forest;

- Whereas Forestry Law amended Law Number 5 of 1967, but the legal politics conception that forest is divided up based on the conception of ownership; inconsistent with Basic Agrarian Law which uses the concept of the control of the state. This inconsistency derived from *domein verklaring* conception, adopted by the Agrarian Law 1870. Conception of *domein verklaring* ruled that if a person does not have *eigendom* rights over his land, the land is state-owned;

- Whereas in 1872, the Forest Law for Java and Madura was enacted; establishing separate forest territories in Java and Madura. However the people in the forest

were criminalized. It was the beginning of the criminalization of customary access to the forest and the land in the forest, this is regarded as a criminal act;

- Whereas politically Indonesian government (Department of Forestry), forest is designated through gazettement by the minister through certain procedures. Once it became the territory of the forest, there is no people's ownership there;

- According to the expert, the problem arises when the forest is not defined as ecosystem function, but as the ecological function based on territorial function by public policy. Political forest creates victimisation. Therefore, the conception of political forest need to be reviewed and replaced by ecological ecosystem approach, where forest is defined as a function that links nutrient element, non-nutrient element, living element of flora and fauna, and human being;

- Whereas the citizenship transformation route of indigenous peoples needs to be fixed. This is not just a social justice issue, but also an issue of citizenship of indigenous peoples. When fundamental rights are eliminated, indigenous peoples will question the function of the Republic of Indonesia. Aspirations of liberation and independence of indigenous peoples whose land has been confiscated has grown in the feelings of indigenous peoples. Thus, it is necessary to rectify statization of customary land and to restore citizenship route of indigenous peoples;

3. Prof. Dr. Ir. Hariadi Kartodihardjo, M.S.

I. Scientific Forestry Doctrines and the contents of Law

The foundation of the doctrine of forestry scholars or forester is important to be known to understand how certain beliefs, which manifested through narratives of policies, affecting forestry scholars in Indonesian in general, in the way of thinking, team building, forming a corps spirit, maintaining a group and supporting existing ideas. Such matter is also related to the difficulty of accepting innovation of new policies or new ideas and narratives in the making process of legislations and policies;

Discrepancy of contents of legislation or policy narratives in forestry development, and when they were linked to the real issues in the field, has been reviewed by Peter Gluck

(1987). He cited Duerr and Duerr (1975) who stated sort of doctrines for forestry scholars, namely: timber primacy, sustained yield, the long term and absolute standard. The doctrine which derived from Europe grows in North America and spread throughout the world. The four doctrines form the basic framework for curriculum of forestry education and become contents of legislation in many states. Brief description of the doctrines and their implications are as follows:

a. doctrine of timber primacy found its ideological justification through what is called as "wake theory" (Gluck Gluck 1982 in 1987), which states that all goods and other services from the forest followed after the timber as the primary product. Conceptual content of this theory is considered inadequate and does not provide options for a variety of benefits as well as forest management practices. The theory was considered as not providing any explanation on various objectives of forest management, which means it does not appreciate the diversity of actors, whereas only provide an assessment on the existence of forest with timber on the first order;

b. doctrine of sustained yield is considered as the core of forestry science which is based on "forestry ethics" that helps avoiding maximization profit unilaterally and exclusively and appreciates the forest which is important for human life (Gluck and Pleschbeger, 1982 in Gluck 1987). This perception was influenced by early views of European society. For example, in France there is a sort of jargon: "A society without forest is a dead society ". Austrian poet Ottokar Kernstock called forest as "... the temple of God with foresters as priests" (Hufnagl, 1956 in Gluck H. 1987). The sustained yield doctrine obscures the forest that has benefits for the public (public goods and services) and which benefits must be preserved, with the forest that can be owned by individuals (private rights) or group (community rights), in which the decision to use the forests becomes their choice. As a result, forest conservation tends to be forced upon the owner of the forest with a variety of regulations, and for forest owners who refuse to preserve the forest; they will convert their forests into non-forests;

c. one of characteristics of forestry is the long rotation period. This forced forestry scholars to consider the long-term consequences of its activities. Therefore,

approach to forestry is done in rigid manner (and tend to be undynamic) and reluctant to accept other social interests in the forest. Long term thinking, the appreciation over what have been proven and mistrust of the present are parts of the ideology of conservatives. Conservative stance is related to search social values that are stable and institutionalized. They want long-lasting social conditions that are guaranteed by the social authorities as well as a strong state (Kalaora, B. 1981 Pleschberger, 1981 in Gluck W. 1987). Foresters generally want to refer to the "common welfare" or "public interest" with limitations which they already known. One of the results of the conservative attitude of foresters is their critical view on democracy and libertarianism. As a " realist anthropologist " they do not believe pluralism of interests. As a result, foresters tend to maintain capitalism (Pleschberger, W. Gluck 1981 in 1987);

d. doctrine of absolute standard means understanding the forest as an object of scientific knowledge, which is to study the natural laws of the jungle. This doctrine included the idea that science on the forest shall be the source of forest management. Forester or forestry scholars, who has the knowledge of the forest, act as a mediator between the forest and the owner or the public. Societies are considered as not having different interests on the forest, but the forest has a different function for the society (Gluck Gluck 1983 in 1987). By using the term "forest fuction", the person/society is construed from subject to object and forest is construed from object to subject. Interest to determine the function of forests based on people's choice is passed to technocratic level and conducted by forestry scholars. They are considered to know the most of the importance of forest functions and to allocate the highest value to the timber production function. As a result, forest policy tends to be reduced to silviculture (planting and managing forest stands). Based on conservative ideology, the state is expected to set knowledge into law. One forester once said: "Silviculture should be set legally" (Kalaora, 1981 in Gluck B. 1987);

Four doctrines abovementioned, briefly reinforce a discourse in forest management, as follows:

a. not knowing various objectives of forest management, which means it does not appreciate the diversity of actors, in contrary only provide an assessment on the existence of forest with timber on the first order;

b. strong stance of the conservative which relatively reluctant to accept other social interests in the forest, the search of social values that are stable and institutionalized, desires social conditions that are guaranteed by the social authorities as well as a strong role of state;

c. being used to study the natural laws of the jungle, the societies are considered as not having different interests on the forest, but the forest has a different function for the society, as a result the person/society is construed from subject to object and forest is construed from object to subject. Tend to have critical view on democracy and libertarianism, do not believe pluralism of interests and tend to maintain capitalism;

d. forest conservation is uniformed as forest functions for the public interest that should be available, so that decision to use the forests which is the choice of individuals or groups is ignored and forest conservation is forced upon the owner of the forest with a variety of regulations;

Such discourses are used and in line with the politics in colonial era or government system that tend to use repressive approach and/or social injustice. Along the way, the discourses are carried over into the Forestry Law, which among others, indicated by interpretation of definition of forest i.e. an ecosystem unit in term of a plot of land containing bio-natural resources dominated by vegetation in integrated unity of environment thereof [Article 1 paragraph (2)]. This definition directs an understanding that the forest is not related or construed socially;

Based on the Forestry Law, all forests including natural resources contained therein shall be controlled by State for the maximum prosperity of the people [Article 4 paragraph (1)]. Based on its status, forest is classified into state forests and title forest [Article 5 paragraph (1)], Customary forest is classified as state forest [Article 1 paragraph 6]. In other words, the state forests can be in the form of customary forests [Article 5 paragraph (2)] insofar still in existence and its existence is recognized [Article

5 paragraph (3)] and in case in its development indigenous peoples no longer exists the management right of customary forest shall return to the Government [Article 5, paragraph (4)];

In elucidation of Article 5 (1) states that State forests may be form in customary forest; a state forest given to be managed by indigenous peoples (rechtsgemeenschap). The customary forest formerly called customary forests, clan clan, seignorial forest, or other callings. Forest managed by the community is included in definition of state forest as a consequence of the rights of forest concession by the State, as an organization of power of all people at the highest hierarchy and the principles of the Unitary State of Republic of Indonesia [Article 4 paragraph (1)]. Inclusion of customary forest in the definition of state forest does not negate the rights of indigenous peoples insofar remain in existence and recognized, to perform management activities.

State forest managed by the village and utilized for the welfare of the village is called village forest. State forest which main utilization is targeted to empower community is called community forest. Title forest located on the land encumbered by proprietary is commonly called people's forest. In addition, the Government shall determine specially designated forest area (Article 8), for public interest such as research and development, education and training, as well as religion and culture. Briefly, status, allocation and forest concession are presented in **Table 1**;

Tabel 1. Summary of Status, Allocation and Forest Concession

	Status and Allocation of Forest	Forest Management	Controlled by the State
1.	STATE FOREST		All forests shall be controlled by State for the maximum prosperity of the people. Note: In Elucidation of Article 4 paragraph (1) the word "controlled" does not mean "owned", but a definition that contains obligation and authority in public law sector as
a.	State Forest, Customary forest	Manage according to the rights of indigenous peoples	
b.	State Forest, Rural Forest	For the welfare of the village	
c.	State Forest, Community Forest	For community empowerment	
d.	State Forest for Special Purpose	For research and development, education and training, religion and cultures	

e.	State Forest other than customary forest, village forest, community forest and special purpose	Economy, social, environment	referred to in Article 4 paragraph (2).
2.	TITLE FOREST	According to the purpose set by the owner	

Source: Forestry Law

Designated a customary forest as a state forest in the territory of indigenous peoples, thus, can be interpreted as a consequence of the right to control by the State (Elucidation of Article 5, paragraph 1), but the substance of the right to control construed in line with the doctrine of scientific forestry as described above. This construction can be tested, through following questions:

a. if conceptually or potential "customary forests as state forest" is construed as an effort to respect and to protect customary forest by the state, is the construction in line with the objectives of the 1945 Constitution and manifested in reality?

b. is restoring status of customary forest as inherent right/hereditary right/human rights of indigenous peoples (exclude it from the status of state forest) will enable contribution to reduce conflict, to create a sustainable forest management, or to reduce open access of forest area in Indonesia?

II. Facts on the Implementation of the Law

Figures of status and area of state forest function are obtained from Regulation of Minister of Forestry Number 49/Menhut-II/2011 on National Forest Plan (RKTN) 2011-2030 dated June 28, 2011 (**Table 2**). In addition, there are also data of area and potential estimates of people's forest (**Table 3**) as well as the utilization of data and the use of forest resources (**Table 4**). Various data can be interpreted as follows:

a. the existence of customary forest in all functions of forest (conservation, protection, production) has not been administered and in the field, the boundaries between customary forests and other allocation of state forests are unclear. This condition caused conflicts in which position of indigenous peoples is weaker than permit holder (in production forest) or forest manager (protection and conservation);

Tabel 2. Status and Area of Forest Function based on P49/Menhut-II/2011

Forest Function		State Forest, 2011		Title Forest	State Forest and Title Forest 2030
		Non-Customary forest	Customary forest		
		(Million Hectare)	(Million Hectare)	(Million Hectare)	(Million Hectare)
1.	**Conservation Forest**	26.82	Available	Available	26.82
2.	**Protection Forest**	28.86	Available	Available	27.67
3.	**Production Forest**	57.06	Available	Available	57.84
	a. Limited Production Forest	24.46	Available	Available	19.68
	b. Fixed Production Forest	32.60	Available	Available	38.16
5.	**Changed size of State Forest Area**	130.68	-	-	112.33
6.	**State forest area post gazettement (million hectare)**	14.24 (10.9%)	No program of determination of customary forest	-	Allocation for non-forestry = 18.35 million hectare
7.	**Current condition and future prediction**	Current condition is implication of designation = forest gazettement (null, Constitutional Court Decision No. 45/PUUIX/ 2011)	Current condition is customary/local community is competing with big companies	Title forest developed (there is certainty of rights): Indonesia 3.59 million hectare (**Table 3**), Dirjen BPDASPS, 2010	From 112.3 million hectare, 5.6 million hectare is allocated for People Plantation Forest, Community Forest and Rural Forest

Tabel 3. Area and Potential Estimates of People's Forest, 2010

Region	Area (Ha)	Potential (M3)	
		Standing Stock	Harvest Ready
Sumatera	220,404	7,714,143	1,285,690
Jawa – Madura	2,799,181	97,971,335	16,328,556
Bali – Nusra	191,189	6,691,612	1,115,269
Kalimantan	147,344	5,157,023	859,504
Sulawesi	208,511	7,297,892	1,216,315
Maluku	8,550	299,250	49,875
Papua	14,165	495,765	82,627
Jumlah	**3,589,343**	**125,627,018**	**20,937,836**

Source: Ditjen BPDASPS, Ministry of Forestry, 2010

b. Data in 2011 state forest is covering an area of 14.24 million Ha (post gazettement) and 126.44 million Ha (non-gazettement). Scenarios of forest area in 2030 will expand to 112.3 million Ha, in which 5.6 million Ha (5%) is allocated People's Forest, Community Forest and Village Forest. In this scenario of year 2030 there is no area of community forest expected to exist;

c. development of people's forest that is out of state forest, with relatively clearer status of land rights and free from government regulation and bureaucracy, grows faster (**Table 3**);

d. forest utilization by large enterprises (concessions in natural forest, plantation forest and ecosystem restoration), large business estates and mines, and for the transmigration program is covering an area of 41.01 million Ha or 99.49%, while forest utilization by local/indigenous peoples (people's forest, village forest and community forest) is covering an area of 0.21 million ha or 0.51% of the entire forest utilization (**Table 4**). This unfair allocation of forest utilization contributes to the conflicts arise and the weakening of the social capital of indigenous peoples;

Table 4. Forest Utilization and Use (million Ha)

1. Large Enterprise & Public Interest		
Type of Utilization and Use	Million Ha	%
a. IUPHHK – HA	24.88	
b. IUPHHK – HT	9.39	
c. IUPHHK – RE	0.19	
d. Released for plantation and transmigration	5.93	
e. IPPKH – Mining etc	0.62	
Total 1	41.01	99.49
2 Small Enterprise and Local/Indigenous peoples		
Type of Utilization	Million Ha	%
a. IUPHHK HTR	0.16	
b. Rural Forest	0.003	
c. Community Forest	0.04	
d. Total 2	0.21	0.51
Total 1 and 2	**41.69**	**100.00**

Source: Regulation of Minister of Forestry No 49/2011

e. no gazettement over area of customary forest and to be put in competition with permit holders in Production Forest and with forest manager in Protected Forest, also contribute to deforestation of state forest non-customary forest. In 1994, there were 555 units of permit holders in the natural forest (HPH/IUPHHKHA) covering an area of 64.29 million Hectares (PDBI, 1995), in 2011 decreased to 304 units covering an area of 24.88 million ha (MoF, 2011a). Similarly, out of the 50 identified conservation areas (National Parks) 27 locations are affected by conflicts of using forest that destruct conservation forest (MoF, 2011b);

III. Closing

Abomentioned facts indicate that the "customary forest as state forest" is not interpreted as an effort to respect and protection of customary forests by the state, because customary forests remain marginalized, left to compete with the permit holder and forest manager without certainty of the law;

The use of scientific forestry from the West narrowly tends to dismiss the diversed objectives of forest management and made the forest as the subject and community as the object. Such discourses struggled to accept and respect the rights of indigenous peoples, in contrast it became articulation and in use and in line with the politics during colonial era or system of government that tend to use repressive approach and/or social injustice. Thus, the lack of respect and protection of the rights of indigenous peoples in the management of customary forest is not just implications on the operational level but emboded in the norm, construction and thinking foundation in forest management;

Restoration of status of customary forest as inherent right/hereditary right/human rights will make customary forest equivalent to the forest that empirically proven capable to develop, as it has options in capturing a wide range of available incentives. Certainty of the rights of indigenous peoples in the management of customary forest is not only serves as social capital for sustainable management of customary forest, but also able to reduce conflicts and open access forests in Indonesia;

4. Prof. Dr. I Nyoman Nurjaya, S.H., M.H.

- Whereas the state has duties to protect all the people of Indonesia and the land that has been struggled for, and to improve public welfare, to educate the life of the people and to participate toward the establishment of a world order based on freedom, perpetual peace and social justice. This ideology is made concrete in Article 33 paragraph (3) of the 1945 Constitution, which states that the land, the waters and the natural resources within shall be controlled of the State and shall be used to the greatest benefit of the people. Two key words, i.e. "controlled by

the state" and " shall be used to the greatest benefit of the people" became important parts that should be understood as a whole;

- Whereas the 1945 Constitution explicitly recognize and respect indigenous peoples and their traditional rights, which is also described in Article 28 paragraph (3) of the 1945 Constitution on the identities and rights of traditional communities which shall be respected in accordance with the development of times and civilisations;

- Whereas there are several criteria of indigenous peoples. Firstly, a group of people who have genealogical or territorial ties, or a combination of genealogical, who lived for generations and many years, and regenerate in a certain area with clear boundaries according to their concept of boundaries (not using the concept/boundaries of National Land Agency). Secondly, indigenous peoples has their own customary governance system and dispute resolution institution. Thirdly, indigenous peoples have customary legal norms governing the lives their community members. Fourthly, they have a system of religion and belief, as well as certain sacred places;

- Whereas in development paradigm of economic growth development of, there are two important dimensions that must be taken into account and must be performed in-balanced, i.e. target dimension and process dimension. Results of national development are more oriented to physical development, but they are costly and the cost is never counted as the result of national development. In regard to this context, there are three classifications. First, the expensive cost of development but never counted as a result of development is an ecological degradation (environmental damage and degradation of natural resources). Both are economical lost, the sources of the economic life of the communities are decreased and vanished due to environmental degradation and pollution. Thirdly is related to the human factor, where social and cultural distractions were never counted. This point will lead to how the legal instruments support national development;

- Whereas from political view of national law development, the law is an instrument used to support the implementation of national development. There is a trend that can be observed from an academic perspective, the so-called political of indigenous ignorance. In the context of Indonesia, the indigenous peoples are called as indigenous peoples. Politics of national development (including development) have ignored, marginalized, and displaced indigenous peoples and their customary rights. In his book entitled "Victims of development", John Bodley stated that the implementation of development creates the victims of development;

- Whereas the Petitioner filed articles relating to reflection of political of ignorance concerning the rights of indigenous peoples on concession and utilization of natural resources. In concrete this matter relates it relates to the waiver of rights over concession of customary communal forest;

- Whereas the expert stated that customary forests is not recognized as an equal legal entity to the state forest and title forest. Because Article 5 states that forest by status is limited to state forest and title forest;

- Whereas in 1999, the expert and NGOs working in environment sector (Telapak Foundation, Elsam, Walhi, FKKM, etc) fought to include one legal entity related to the status of forests in draft Law which now is the Forestry Law, so that forests are not only consist of state forest and title forest but also customary communal forest. The fact suggests that the traditional communal forests still exist. But the expert questioned, where is the legal position of customary communal forest as an equal legal entity and equal status to title forest and state forest;

- The expert argued that, customary communal forest is co-opted as **state forest located within the living territory of indigenous peoples. Legal implications that arise include: 1) the status of customary forests is not as equal legal entitie to the state forest and title forest; 2) legal security uncertainty over customary forests; 3) the Government which translated unilaterally and narrowly as state representative, can be freely and arbitrarily take legal**

actions against customary forests based on authority granted by the law and this thing happens;

- **That normatively, from the perspective of the setting in the Forestry Law, the word "insofar still in existence and its existence is recognized " in its development reflects that if a indigenous peoples no longer exists, then the rights of forest management is returned to the Government. In that relation, the Expert strongly believes that the legislator has never come and lives with indigenous peoples in the region. The legislator cannot fully understand on how indigenous peoples lives with their norms, customary governance structures, and how indigenous peoples has the wisdom to preserve environment of a living space wisely and sustainably;**

- **The expert argued that Article 1 point 6 and other articles petitioned until Article 67 of Forestry Law explicitly reflect legal recognition that are not apparent, not merely formality, and not essential;**

- That the indegenous people deserve the right for genuine constitutional and legal recognition in the life of the people and of the nation;

- That in correlation with the relation of the Government and its citizen in natural resources management, there are two important principles. Firstly, *Precautionary principle*, or that the forest as one ecological and life system. Its management needs to be conducted carefully as it is regarded as a life system, not only does the forest consist of stones, sand, trees, flora, fauna, rivers, water, and lakes, but it also consists of human beings in it. Lynch Owen once expressed the tendency of forest developments in Asian countries and the Pacific Ocean, which tend to treat forests as mere *empty forest.* Forests are considered only as rows of wood measured from its economic value. Secondly, *free and prior informed consent*, which means that the indegenous people are legal entities that have equal position with other legal subjects. In this context, the indegenous people posses environmental wisdom. This has been proven with how those communities are adverse to damage the environment because they see the forests as source of lives. For the indegenous people, in addition to having

economic value, the forests also have social, religious and magical values. There are certain norms and beliefs used to safeguard and conserve the forests so that they could provide livelihood in the long run;

- That it is compulsory for the indegenous people to be informed and consulted. The indegenous people have the liberty to accept, approve, or reject any decisions of the Government which will be applied to their land. This principle has not been contained in the legal products or instruments that are related to the natural resources management, where there is a significant relation between the Government and its citizens. Nevertheless, experts have found that this principle in the UN Convention regarding that had been ratified into Law No. 5 Year 1994 regarding The Ratification of *United Nations Convention on Biological Diversity. This was also the global principle that was reflected in the* Stockholm Declaration of 1972 and the Rio de Janeiro Declaration of 1992;

- Experts have exposed the empirical facts or conditions that is happening to Indonesian forests. There used to be world-famous wet tropical forests, but now it has been reduced into dry shrubberies that are vulnerable to burning every dry season. This condition can be reviewed from several perspectives.

- Forestry scientists would conclude that the forest management has not met the forestry science principles. Economists would conclude that there has been a mismanagement in the forest management. Meanwhile, the legal experts would say that the legal factors and Government policy has major role to the damage to the environment, particularly forest resources;

- The experts suggested that in every dry season, there is a wildfire that occurs the old forest area which has lost all its trees. This happens also because of mining exploitaion. Therefore, the protection and respect of the living rights and traditional rights of the indegenous people is considered an obligation;

5. Dr. Maruarar Siahaan, S.H.

- That the state recognizes and respects the indegenous people and their traditional rights for as long as they live and in accordance with the development of the society and the principles of the Republic of Indonesia as stated in the legislation;
- That the benchmark of the Constitutional Court regarding the community-based customary law consists of four requirements: 1) alive; 2) in accordance with the development of society; 3) in accordance with the principles of a unitary state; and 4) there are regulations based on the law. In correlation with the above contexts, there are a number of interpretation. First, regarding societies which members have communal beliefs. This should cause no problems, but there is some issues that involve the application of tribal laws which would cause some difficulties as it develops from time to time. Second, regarding the assesment of the indegenous people's suitability with the society's development and its criterias. The problem lies in the indegenous communities that are recognized by the law, yet is their existence within the law considered as a requirement for recognition, or had there always been indegenious communities all along?
- The substance of those traditional rights is recognized and respected by both the respective members of the unified indegenous people communities and also by the general society, and it is not against the human rights. This second parameter is indeed not a major problem;
- Regarding the conformity of the indegenous people with the country, its existence are not threatening the nation's sovereignity and integrity, the substance of the traditional legal norms is in accordance and is not conflicting with the applied law and legislation.
- Regarding to Fuller, the constitution is only juridical document, yet it is not the case with modern constitution as it contains aspirations, ideals of the declaration of rights, political goals, and objectives of the Government that can not be reduced to the rule of law. The constitution also embodies the values and outlook of a nation that can be of reference in determining the legal norms and the country's policies;
- There is also an unwritten constitution that contains basic principles and moral values that are ideal in statehood. These values have become norms of life as the

material source and the basis for the more concrete and written norms that are applied. These values are something that is known, and have become the *staats fundamental norm*. But the contemplation of whether the political law and the policies that are being implemented, especially regarding the indegenous people in the interpretation of Article 18B paragraph (2) of 1945 Constitution, executed based on the visions that are contained in the constitution and is consistent with the highest law. The search for the meaning of constitution norm that is not limited to textual elaboration, but that also involve the meanings from the aspects of spirit and morality that is included in the ideals of the law as stated in the preambule of The Constitution of the Republic of Indonesia of 1945, encouraging the search for the real meaning of the constitutional protection that is intended in Article 18B paragraph (2) of The 1945 Constitution that can be elaborated in the lndonesian laws and regulations.

- The rights of the indegenous people as a cultural identity that needs to be respected is an interpretation that is not final, yet still in the process of interpretation discovery that is suitable with the functions of protection, honouring, progression, establishment, and fulfilment as the country's responsibilty, as stated in Article 28I paragraph (4) The 1945 Constitution.According to the experts, those reinterpretations are related with :1) the existence of the traditional (tribal) government instution; 2) its existence is recognized by the applied laws and regulations, this is considered as a very urgent thing;
- The indegenous people as an anthropological community have inhabited the same area from generation to generation, and have existed long before the conception of the Republic of Indonesia. These indegenous people in its history has the rights and public authority in managing its people in terms of traditional law, social, cultural and economy that is still part of sovereign Indonesia. This matter must be positioned correctly in correlation with the country's authority which holds the mandate of its sovereign citizens;
- The existence of indegenous people which have territorial traditional rights with an authority that is juridicial, prescriptive, ajudicative, or any law enforcements

such as those can be found in South East Maluku can result in a conflict with state authority if there is not clear regulation;

- That any political law that was a result of a constitutuon which instates the country's acknowledgement towards the indegenious people along with their rights that are acknowledged in the internation convetion must be conceptually determined for them to be protected effectively. The international juridical acknowledgement that can be found in the ILO convention No. 169 Year 1989 regarding *Indigenous and Tribal Peoples in Independent Countries* is a comparison that needs to be seriously considered;

- Seen from the spirit to protect the weak people related to investor relation which is oftenly related to the weak, the mentioned protection is very relevant to the protection of indigenous legal community. This should elevate the spirit to re-discover the meaning of Article 18B paragraph (2) 1945 Constitution, hence the objective of the state formation to protect the whole society can be realized;
- The understanding always involves text application so it is understood based on situation. This text application is an integral part of hermeneutics as the explanation and understanding. Several principals of hermeneutics were mentioned by Gadamer, which stated that responsibilities, which involve impossible things to do, should not be formulized;
- Public wealth is the highest law and there should not be any construction opposing that;
- The weak party should get benefit from the doubtful stipulation without violating the general objective;
- Based on morality and constitutional spirit, the new paradigm to realize protection, respect, and human rights function from the indigenous peoples, SME opines that the change in a law, which existence is dependent to acknowledgement based on positive law;
- Indigenous governance infrastructure is measured from indigenous peoples criteria, which has traditional rights on the space with the authority in the jurisdiction, perspective, adjudicative, and legal enforcement relations, can be

positioned in the concept of sovereign state;

- Based on the above paradigm, SME thinks that Article 1 number 6 of Forestry Law which says: "Customary forest is the state forest inside the indigenous peoples area," this should be understood that "*Customary forests is the forest inside the indigenous peoples area and the state authority upon the forest should regard the rights of indigenous peoples,"*

Petitioner Witness

1. Lirin Colen Dingit

- The witness comes from Bentian Indigenous peoples Community in East Kalimantan, West Kutai District, which stated several witness experiences and forest-related conflict inside the community between the company and the community;

- Bentian indigenous area geographically is Kampung Jelmu Sibak or Bentian Besar, located inside the Central Mahakam, West Kutai District with traveling distance of 630 km from Samarinda, the capital of East Kalimantan;

- Jelmu Sibak-Bentian Besar Kampung is one of the eight kampongs inside the Bantian Besar sub-district administration, West Kutai District. This kampung is located on the rim of Lawa River on the north, bordering with Central Kalimantan Province, and the west bordering with Paser District, East Kalimantan Province;

- The history of JATO REMPANGAN Bentian was originated from Tayun Ruang Datai Lino, Teweh sub-district, North Barito District, Cnetral Kalimantan Province. Then, in generations it was divided into several sub Dayak tribes, consists of Dayak Teboyan, Dayak Luangan, Dayak Pejajuq, and Dayak Jato Rempangan;

- The society farms for their daily activity and still holds on their belief to the ancestor. Bentian indigenous area is very rich with natural resources, some of

them is the forest which keeps on conflicting until now. Many kinds of wood is the life source, included in it, but indigenous peoples does not get the proper attention in managing natural resources;

- The conflict history that happens inside the community has been going on for ages and became a national issue several years ago when President Soeharto and Bob Hasan were still in power. The conflict in Bentian Besar Jelmu Sibak was between the forest concession rights and industrial plantation. In the Jelmu Sibak kampong or Bantian Besar, the Witness area was squeezed between two big concession companies, which are PT Roda Mas, which got into Bantian Besar area and covering around 40,000 hectare of it, and PT Timber Dana, which was previously managed by PT Kalhold Utama, which had a concession based on the Ministrial Decision Number 80, for around 161.000 hectare with the active period until 2023;

- In the beginning, the activity of PT Kalhoid Utama creates sufferings. Since it operated in 1982, President Soeharto had a strong position, then, the activity was contracted or conducted by PT Timber Dana owned by the Forestry Department Pension fund Foundation. PT Timber Dana already got the fee from PT Kalhold Utama, which holds the concession right to enter East Kalimantan, through Georgia Pacific, one of the biggest timber companies from the US;

- Based on the Presidential decision year 1989, every Forest Concession right holder should build Industrial Plantation Forest. At that time, PT Hutan Mahligai, which was owned by rich families in Jakarta and built the plantation forest, moved around 72 families, who were the location owners or the protected forest;

- The industrial plantation forest had eliminated transmigration activity. For the HTI Trans employees, the company chopped of the forest, both the timber and non-timber, cleared for the company's need. Meanwhile, timber and noon-timber is a deposit and livelihood source of indigenous peoples. That created suffering due to policies which were not siding to the community, hence the socitey felt they

were abandoned and alienated;

- The location of HTI trans PT Hutan Mahligai which was in Jelmu Sibak Kampong has been changed, hence the location name had been turned to Anan Jaya Trans location. Witness did not mean to be anti other parties, anti establishment, anti to all that had been done by the past and present government;

- In several years ago until now, Witness was labeled as primitive tribe, nomadic farmer, even there was one minister who said, the Witness was forest utilizing settlement. Since the Witness was labeled as primitive, the were deemed not useful for the society, although the Witness is the front liner of this unified state;

- The existence of Forest Concession Rights or Industrial Plantation Forest created loss for generations and there is no space to utilize natural resources as what stated in the constitution. The constitution has never been implemented.

- That the economic loss is insurmountable since 1970. Had PT Roda Mas operated, gave a small amount and set aside the profit, the Witness may have been wealthy;

- That the Witness came to the Court with high effort, walking from West Kutai to the center of East Kalimantan. Meanwhile the natural resources have kept exploited, it occurs that damages happen everywhere;

- That the destructed forest happened due to the greed to the forest, due to human interference, the forest cannot destruct itself. The witness as a part of remote and marginalized civilian, could not possibly, destroy, evicted, and excessively extracted natural resources especially forest products;

- That millions of unshared cubic that is loss is due to policy. The witness could not estimate it, but for 30 (thirty) years that was the greatest loss, so the witness felt marginalized. The other loss was the blocked river due to the company's activities.

2 Yoseph Danur

- That the Witness comes from Biting Village, Ulu Wae Village, Poco Ranaka sub-district, District of East Manggarai NTT province;

- That the history of the Colol indigenous peoples was estimated started in 1800s year, the ancestor of the Witness named Ranggarok came from the Northern Manggarai and settled in Colol. On the beginning the Colol indigenous peoples only stayed in the one indigenous village area or *gendang*. Along with the growth of population, Colol Village, expanded to four villages. The four area of the village were Colol Village (main village), Biting Village, Welu Village, and Tangkul Village;

- That the Manggarai philosophy (*Gendang one, lingko pe'ang*) has become the fundament of the indigenous peoples existence and the indigenous territorial power. *Gendang* means village. *Lingko* means field, communally owned under the supervision of Tu'a Golo and Tu'a Teno. *Gendang one, lingko pe'ang* explains that meaning of unity between the people and the land. It means, there is no society without field or land, vice versa. *Gendang* means traditional house, but in general could also means traditional village.

- That the local wisdom explains the relation of the indigenous peoples with the indigenous land. *Natas Bate Labar* (playground) usually in the central of the village. *Compang Takung* (sacrificial place to God almighty through the spirits of ancestors) is located in the middle of the village yard. *Wae Bate Teku* is the water spring which reflects the source of life. After that, *Uma bate duat*, the field to maintain. In the customs of Colol indigenous peoples, the indigenous land, communal land is communally owned;

- That the Colol indigenous land territory is consists of 64 *lingko*. The villagers do not use the unit hectare but *lingko*. It is estimated that 64 *lingko reaches 1,270 hectares.* The territorial borders are: East borders with *Wae (*river*) Ngkeling* and *danau rana (*small lake*) Galang;* West is borders with *Wae Nggorang*, *Sorok Wangka;* South is sided with the forest, that borders with Golo Mese, Golo

Tunggal Lewang, Golo Sai, Golo Lalong, Golo Wore, Golo Lobo Wai, and Golo Poco Nembu; the North borders with Ncucang Dange (*Ncucang* is waterfall), *Rana Lempe, Wae Rae, Watu Tokol, Liang Buka, Wejang Wuas, Watu Gak, Watu Ninto, Watu Tenda Gereng, Golo Rana, Golo Rakas*, and Liang Lor.;

- That the description of the indigenous institution structure is the following:

  1) *Tua Golo (*Head of Village*),* whose function and role as the leader of the indigenous peoples in his territorial power, as well as problem solver if a problem occurs in the indigenous peoples live;

  2) *Tua Teno,* who has specific role (to distribute the indigenous land that is owned collegially) and to establish traditional ritual with *Tua Golo;*

  3) *Tua Panga,* the clan leader who has the same family line or the head of the tribe;

  4) *Tua kilo,* head of the family;

  5) *Ro'eng,* member of the indigenous peoples;

- That the *lingko* land distribution is conducted by *Tua Teno* that ha been witnessed by *Tua Golo, Tua Panga,* and indigenous peoples. If there is matter occur related with the land, *Tua Teno, Tua Golo, Tua-tua Panga,* and parties who are in dispute will settle this through traditional deliberation in th Gendang House. In this process, *Tua Teno* acts as the judge, meanwhile *Tua Golo* and *Tua Panga* provided input and opinion;

- That the type of cases which often occur and can be settled through *lonto leok* is the border dispute and *lingko* fight between one and other *gendang.* In the *lingko* conflict between *gendang* or village, *Tua Golo* from each *gendang* will sit together (*lonto leok*). To avoid *lingko* confict, there is common understanding that one *gendang* and another in the distribution of one of the *lingo* land in a *gendang*, the indigenous peoples from other *gendang* will also get their part;

- That the traditional ritual related with the land is as the following:

- *Racang Cola* and *Racang Kope* ritual. In this ritual, the indigenous peoples will sharpen their axe and scythe as the sign of the initial time to work the *lingko*land. The chicken is used as the sacrifice to be sacrificed for God through the ancestors' spirits. This ritual is conducted in the *Gendang House*;

- *Tente teno Lengge Ose,* it is conducted when they stake the central stake (it is in the central of the *lingko* and in the form of topspin) and it will be the reference for the land distribution. A swine will be used as part of the sacrifices in this ritual. *Lingko* land is in the form of round like spider web, its central is middle and the outer the wider;

- *Weri Woja ritual,* conducted when the rice or corn seedlings are planted. The sacrifice will be a swine;

- *Randang Wela Woja,* is a ritual in the form of procession of harvesting in the field and to be brought to the village. In this procession, the rice is half part from each of the field owner, so not all of the rice harvest is brought, but it will be stored in the central point. At the right time, there will be procession to take and deliver the rice harvest to the village;

- *Penti* ritual, the utmost ritual that is conducted to show gratitude for the harvest. Different with the one in the field, *Penti* is conducted in the village. The sacrifice is an ox and a swine. This ritual is also filled with many traditional dances, such as *caci, sae, raga sanda, mbata,* and *danding;*

- *Cikat Ela Cepa,* the ritual conducted a day after the *Penti* ritual. This ritual is the mark of the end of the annual traditional ritual;

- That in each process of the ritual, there will be traditional prayer filled with the plea for enormous harvest and that it will be far from pest, conflict, and land management issue. The main message of the prayer is to avoid any disaster and danger;

- That the indigenous land conflict happened since the Dutch colonization, where the border between forest and indigenous territory authority was one-sided without notification to the head of villages and indigenous peoples. Meanwhile the distribution of the indigenous land had been done far before the border had been decided. It means, the border conducted above the field owned by indigenous peoples without the acknowledgement of the indigenous peoples;

- That as the decision of the border, some of the *lingko* from the four *gendang* of the Colol indigenous peoples was made as forest territory. The most saddening and hurtful was, one of the *gendang* or the village of the Colol indigenous peoples, *Gendang* Tangkul was being enclaved, whereby it is called as *Pal Oka* by the people. This means that the largest part of the *lingko* of the Tangkul society is becoming the forest area;

- That the physical conflict occurred in 2004. In 1937, it has been decided that it became RTK 118 forest area. On this era, the society did not do any struggle because the Dutch colony did not do any direct harm to the society and did not forbid the people to use the land in the forest in that area.

- That the *lingkos* claimed by the Dutch Colony are:

- That the conflict in the 1950s happened when there were new borders started by the team from Bogor and involved the society. The borders were never acknowledged by the District Government of Manggarai until today. Instead the evidences in the form of piles of rocks are still there until today. The government is still stand in its opinion that the *lingkos* decided by the Dutch borders as the protection forest. If the District Government of Manggarai admitted the borders, it means that the *lingko* land is not forest area decided by the Dutch colony;

- That in the 1960s, the District Government of Manggarai conducted arrest for 3 (three) times. The first arrest was 10 (ten) indigenous peoples leaders of Colol (Benjamin Jaik, Yosef Daus, Petrus Manggar, Anton Kurut, Daniel Unggur, Dominikus Nangir, Filipus Dulung, Fidelis Tarus, Frans Nahur, and Fidelis Runggung, who are all passed away). They were punished in the correction facility for 1 (one) month without provided right to defend themselves. The

second arrest was to the community leaders, there were 3 (three) people (Donatus Dasur, Mateus Lahur, Mikael Awur). The three people were members of *Gendang Tangkul*, who were fined each IDR 500.00 by the Ruteng State Court. After the judicial decision, they still worked their ancestral inheritance;

- That in the 1970s until 1980s period, the policy of District Government of Manggarai was creating a system for the yields of the land utilization with the percentage 60% (sixty percent) for the government, 40% (forty percent) for the indigenous peoples;

- That in the 1977, a young community leader of the Colol indigenous peoples named Norbertus Jerabu (passed away) reported the policy of the District Government of Manggarai to the central government in Jakarta concerning the policy of yield sharing. In the process, the District Government of Manggarai was stated as conducting illegitimate retribution collection, causing the revocation of the policy and after that the indigenous peoples of Colol were no longer paying 60% (sixty percent) of the yield set by the government;

- That based on the Minutes of Border in 1980s, basically it emphasized the the Dutch version border. The Minutes was signed by the former Regent of Manggarai, Frans Dula Burhan, S.H., the head of sub-districts, and head of villages located around the forest area. The event was not known by the indigenous peoples leaders and indigenous peoples of Colol;

- That in 1993, pursuant to the Decree of Ministry of Forestry of 1993, there was border reconstruction conducted by the Natural Resources Conservation Service (BKSDA) by planting concrete pillars, one more time planting them in the border points set by the Dutch in 1930s. The planting was without the knowledge of the leaders and people of Colol;

- That in February 2001, the collaboration team (Forestry Service, BKSDA, police apparatus) conducted arrest to 6 (six) members of the indigenous peoples of Colol (Fabianus Quin, Lorens Ndawas, Domi Dahus, Yohanes Dahus, Rikardus Sumin, and Philipus Hagus) from *Gendang Tangkul*. The arrest was without showing warrant, the appropriate act when they conducted police procedure.

After facing unjust and dishonest court process, Ruteng State Court gave them time for 1 (one) year and 8 (eight) months;

- That in 28 August 2003, the Regent of Manggarai issued Decision Number Pb 118.45/22/VIII/2003 concerning the Establishment of Integrated Forest Security Team in the District Level to create Forest Order and Security in the Manggarai District in Fiscal Year 2003. In 3 October 2003, The then Manggarai Regent (Anthony Bagul Dagur) issued Letter of Assignment Number DK.522.11/973/IX/2013 concerning the Order to the Integrated Forest Security Team in Manggarai District. On 14 until 17 October 2003, The District Government of Manggarai by cutting away the coffee and all productive plants of the farmers in *Gendang Tangkul*. The cutting was continued in 21 October 2003 in the three area of other gendang. The cutting was also continued on 11 until 14 November 2003;

- That in 6 December 2003, the indigenous peoples of Colol filed claim to Administrative Court of of Kupang upon the decision of Regent of Manggarai Number BB.118.45/22/VIII/2003. On 9 March 2004, the personnel of District Government of Manggarai captured 5 people from Gendang Tangkul and 2 from Tangon Molas Village without clear warrant. They were arrested in the Ruteng Resort Police Office;

- That in 10 March 2004, 120 (one hundred and twenty) of the indigenous peoples of Colol visited Ruteng Resort Police Office to ask for the 5 (give) arrested citizens. But the truck rode by the citizens were shot by the police, caused dead victims. This incident was considered as the culmination of of the Colol issue. The economical damage was 29 (twenty nine) *lingko* of coffee plants and other productions, cut away by the District Government of Manggarai. Average width of 1 *lingko* is 25 (twenty five) hectares, whereas 1 (one) hectare yielded average of 2,000 (two thousands) kg of coffee. It means, 1 *lingko* yielded total of 50 (fifty) ton of coffee;

- That the incident in 10 March 2004 which killed 6 (six) people of the Colol indigenous peoples. After that, besides dead victims, the shooting caused permanent disabilitiest to some of the victims;

3. Jilung

- ***That the Talang Mamak is grouped as the proto Malayan who were the native tribe of Indragiri. They also named themselves "Tuha Tribe". The name means the first tribe coming and has more right to the resources in Upstream Indragiri. According to the myth, Talang Mamak tribe is the third descendant of Adam who was from heaven descending to earth, to be precise the Limau River and stayed in Tunu River*** *(Durian Cacar, place of pati*). This shows in the saying *"kandal tanah makkah, merapung di Sungai Limau, menjeram di sungai tunu".* That was the first human in Indragiri went bu the name of Patih;

- Talang Mamak community admitted that they were originated from Pagaruyung. Datuk Patih Nan Sabatang came down from Pagaruyung and walked through Tiga Laras river: Serene River (now Batang Hari river), Murky river (now Kuantan/Indragiri river), and Torrent river, now Kampar river. In each river, he made settlement (kampong). In Batang Hari river, he made three kampongs or villages: Dusun Tua, Tanjung Bunga, and Pasir Mayang. Meanwhile, ini kuantan river he made three villages as well: Negara Tua, Cerenti Tanah Kerajaan and Pangiang Tepian Raja. In Kampar River he also made three villages: Kuok, Bangkinang, and Air Tiris;

- In Kuantan River in Limau River Estuary, Datuk Patih met with his uncle, whose title was Datuk Bandara Jati. The Datuk had 3 children, that were sibesi, kelopak, and bunga. Datuk Patih gave them the land to settle and live. Sibesi on the land given to him, was made into trench, hence until now we call it trench chamfer. The sheath on the ground given to him was made into a well. This is the origin of Talang Parigi. Meanwhile, flower was given the land near Lakat Kecik River, Lakat Gadang, and Black Water Yellow Cthi splace was naed Durian Cacar orner. This flower was given three seeds by Datuk Patih. These three durian seeds were planted parallel to each other. That is why this place was named Durian Cacar

Chamfer, from the phrase durian berjajar or aligned durian. These three signs: aligned trench, well, and durian still exist until today;

- Due to another version, Talang Mamak was originated from pagaruyung. Talang Mamak was a cornered tribe in a culture and religious conflict in pagaruyung. This conflict was called “Padri” war. Since they were cornered, they moved to Indragiri upstream, Riau;

- Talang Mamak tribe was distributed in four sub districts: Batang Bangsal, Ceneku, Kelayang, and Rengat Barat in Indragiri district. Hulu Riau. One group of people was in Semarantihan, Suo Suo Village, Sumai Sub District, Tebo Distric, Jambi;

- In year of 2000, Talang Mamak was considerably consisted of 1341 head of families or +/_ 6418 people;

- Talang Mamak tribe in Riau is located in Indragiri Upstream District, and consists of four sub districts: Kelayang, Batang, Cenaku, Batang Gansal, and Seberida. The two sub districts consist of 17 special villages in Talang Mamak in two communities, which are: 1) Talang Mamak tiga balai community area in Kelayang District 2) Malay Community area in Batang Cenaku, Batang Cenaku district;

- With area expansion, Talang Mamak tribe has been distributed to many villages and new sub districts such as Rakit Kulim;

- The majority of people’s income comes from gardening and un-irrigated field. Rubber is their main commodity. In making rubber plantation, the people use tumpang sari or intercropping system. Before planting big rubber tree, they planted rice and other one-season plantations in between the rubber plants. Now, with the palm oil trend, some of the communities had also planted palm oil. Only on a small scale due to their limited knowledge and capital;

- Talang Mamak community believe in God and Prophet Muhammad whom they call *"Islam langkah lama"* or “Islam with old foodsteps”, and small portion of the people are Catholics, especially the communities in Siambul and Talang Lakat. They call themselves “langkah lama” people, which means customs people . They

differentiate themselves with Malay race based on religions. Once a Talang Mamak person converts to Islam, then their identity change into Malay. Talang Mamak people show their identity clearly as customs people. They still inherit their ancestor's culture such as long hair, wearing turban/songkok (Malay traditional hat), and black teeth because they eat areca nut). In the life cycle, they still practice cultural rites such as giving birth with the help of shaman, baby weighing, circumcision, marriage (gawai), medicine, entertaining people who underwent unfortunate event, and Batambak rite (respecting dead spirit and tidying up the cemetery to increase their social status);

- Folklore, myth, knowledge, values, norms, ethics, social interaction, social structure, space management, social model, social potential, social conflict, organization, customs government, settlement pattern, equipment and technology; Talang Durian Cacar custom community especially and Talang Mamak in general have the belief that they call Old Steps Islam. And as the characteristic of custom community, Talang Mamak also has myths that they believe in generations. The unique thing is, these myths become the source of knowledge, values, norms, and ethics for them in their daily lives. In their daily lives, they always refer to what has been inherited by their ancestor. The inheritance that they call the customary law regulates all aspects of their lives, starting from marriage party, paddy planting, opening a farmland, death rite, choosing the right seed, and determining good days to conduct activities;

- Until now, most of Talang Mamak customs people still conduct the tradition of mengilir or paying respect to the king /datok in holiday. This is related to Indragiri kingdom system. They think that if they violate the tradition, then they will get this in return: *"ke atas ndak bepucuk, ke bawah ndak beurat, di tengah dilarik kumbang", which means useless.* They have a lot of art that they show in parties or gawai, usually in martial art event, accompanied by percussion, gambus, balai terbang dance, ketabung instrument, and taxi bulian. A lot of illnesses can be cured with traditional rites, which are always be connected to supernatural nature and help from shaman;

- Although they live traditionally, however they are still reliable in giving medicine. Biota Medika expedition result (1998) shows that Talang Mamak tribe uses 110 types of plants to cure 56 illnesses and recognizes 22 types of medicinal mushroom;

- The history of Talang Mamak and Malay leadership around Kuantan, Cenaku, and Gangsal rivers.Talang Mamak leadership is reflected from the saying *"sembilan batang gangsal, sepuluh jan denalah, denalah pasak melintang; sembilan batin cenaku, sepuluh jan anak Talang, anak Talang Tagas Binting Aduan; beserta ranting cawang, berinduk ke tiga balai, beribu ke pagaruyung, berbapa ke indragiri, beraja ke sultan rengat".* This means Talang Mamak has an important role in the Indragiri Kingdom structure, which politically also wants legitimation and support from Pagaruyung Kingdom:

- There are 33 types of customary laws: high and low. The highest one is 7 tahils, the lowest *tau tahil sepaha*;

Customary laws:

1. Setahil sepaha means the lowest one
2. Dua tahil sepaha means medium
3. Tiga tahil means regular law
4. Empat tahil means *sepedua emas-sepedua ramban* law
5. Tujuh tahil means law is already enforced

- Talang Mamak decision making system is through indigenous village meeting. This is used to draw general decision, such as lubuk larangan or river management, indigenous land management regarding management and harvesting time;
- Principally they hold on indigenous strongly and inclince to reject external custom, this is reflected from the saying*"biar mati anak asal jangan mati indigenous "* or we'd rather lose our children than see our customs perish. People in tigabalai and inside the national park still hold on to the customs, unlike those on the east route because they already gotten influences from outside;

- Land and forest for Talang Mamak tribe cannot be detached from their lives. Since hundreds of year ago, they have lived peacefully with the nature. They live by collecting products from forests and nomadic plantation. Since long time ago, they have had an important role in providing the world market supply. Since the 19th century, forest product hunt has been increasing. Increased supply on dragon's blood, jelutong, red or white balam, agarwood or gaharu, and rattan. However, ini the 20th century forest product was decreasing. However, there is another alternative which is adapting rubber nomadic plantation with rubber planting. Rubber planting make them settle and also a tool to defend their land and forest;
- Customary law regarding natural resources including forest consists of:

  1) forest is an area with communal ownership;

  2) settlement and plantation are areas with personal ownership based on descendants;

  3) river is an area which ownership is in group;
- Individual land ownership is being seen from other communities that if someone takes care of a land with no owner, then the person has the right of the land, and will be inherited to the next generation. If someone wants to takes care of land which previously had been managed by other people, they could do so with the permit from previous owner, and the status is lease for use, no trading process between communities;
- There are several unidentified customary laws, which are lubuk larangan river management regulation, land and forest management regulation, such as customary forests. However, some things stay and there are still some customary laws which had changed. There are several unidentified indigenous regulations, which are regulation for lubuk larangan or river, and land and forest management regulation such as customary forests. Several laws are still exists although some modified. River management regulation include moratorium of fish catching for unlimited time, until there is a decision from the whole community to open lubuk larangan or river for fish catching for one day, and they will close it again. The collected fish will be auctioned. This auction is participated by the communities in the surrounding including people from

outside. Result from lubuk larangan will be put into indigenous , youth organization, and village government petty cash;

- Talang Mamak area is a flat one and Talang Mamak indigenous community often uses the land for rubber plantation, fishery, Meanwhile, there is too few farmland that can be used for plantation. With local wisdom, usually the land used for plantation is the easily reached area, usually near the river;
- Regarding local wisdom knowledge that is related to PPLH or Environment Education Center (water, forest, river, beach, and the sea, land/space use, etc). In Talang Durian Cacara there are several local knowledge that is still used until now;
- In terms of land ownership, land is owned by the indigenous leader. When someone gets married, they will be given some land for farming and become the property of that person. Talang Durian Cacar community also recognizes area fragmentation based on the functions: customary law, sacred forest, sacred land, field, cemetery (for the community) and cemetery for the indigenous or non formal leaders;
- In Talang Mamak there are seven sacred lands based on indigenous history and regulation. This sacred land cannot be intruded. If it is intruded, the perpetrator would get customary sanction and based on the belief, those who snatch the sacred land will get karma or disaster. Those seven sacred lands of Tulang Mamak tribe are: Kuala Sungai Tunu, Tiang Raya, Kuala Sungai Limau, Kuala Penyabungan, Benuawan, Pulau Sijaram, and Lampu-Lampu Negri Aceh;
- Talang Mamak community has started to feel disturbed and torn apart with the existence of HPH (Forest Concession Right), transmigrant settlement, deforestation by companies and the rest of it is being owned by migrants. Currently, almost all of their forest becomes palm oil plantation, owned by other parties. The narrowing Talang Mamak environment has an impact, which is difficulty to farm correctly, people have to adapt. Unless they do so, their livelihood will be threatened. Hence, Talang Mamak tribe in tigabali under the leadership of Patih Laman defends their forest wholeheartedly;
- To defend the customary forests, he rejects all kinds of development and corporations and willing to die to protect the forest. This fight of the “old illiterate

man" was proposed to be nominated as *"WWF International Award for Conservation Merit 1999"* from the grassroot level. He also promotes the name of Riau and Indonesia in terms of conservation, which he received Kinabalu, Malaysia with two other names from Malaysia and India. In 2003, Patih Laman received Kalpataru Award from the President of the Republic of Indonesia;

- Talang Mamak community is the ingenious people of Indragiri Hulu (Upstream) with the name of "Tuha Tribe" which literally means the first tribe who came and has the right on the natural resources;
- Talang Mamak origin is hard to tell because there are two versions. First version, based on the research of a residence assistant in Indragiri Hulu in time of Dutch colonialization, it mentioned that Talang Mamak Tribe is originated from Pagaruyung, West Suamtra, which was cornered due to indigenous and religious conflict. The second version, is a familiar story in the indigenous community which is told from generation to generation. The story is, Talang Mamak is the third lineage of Prophet Adam. The story was strengthened by the evidence of human footprints in the Tunu River area, Rakit Kulim sub-district, Indragiri Hulu. Those footsteps are believed to be the informal leaders of Talang Mamak;
- Talang Mamak existence since the past has been very dependent to the forest. The environment where they lives is regulated by the customary law and the management decision is by a Patih, the highest power symbol in Talang Mamak under the Indragiri kingdom. There is one old saying in Talang Mamak community *"lebih baik mati anak, daripada mati indigenous "* or we'd rather lose our children than see our customs perish. This shows Talang Mamak identity, which cannot be detached from the forest, managed by customary law;
- The government appreciated the local knowledge. Laman received Kalpataru, the highest award in environmental protection, in the era of President Megawati Soekarnoputri in the year of 2003. Laman, the then Patih, was successful in conserving rimba pusaka or sacred forest in Rakit Kulim sub-district, for about 1,813 hectare. The international community also admits Talang Mamak local knowledge, and laman got "WWF Award" in 1999 in Kinibalu, Malaysia;
- Talang Mamak sacred forest has been torn down, this condition makes Patih Laman and the community powerless. Patih Laman explained, deforestation

started to happen in the forest one year after he received Kalpataru. The then thick forest is now gone, replaced by palm oil plantation. Patih Laman admitted that he is no longer proud when seeing Talang Mamak customary forests, it is now own by other people and catastrophic. If it is not for the lack of funding, Patih Laman must have had returned Kapaltaru to the President. "*Kalpataru is like the price that we have to pay in return for our forest. It is better to return it to the government,"* said Laman. He said, deforestation does not only happen on the Panyabungan and Panguangan sacred forest;

- In Talang Mamak area, which is distributed in Rakit Kulim sub district and Rengat Barat, actually there are four sacred forests: Tunu River Forest,104,933 hectare, Durian Cacar Forest, 98.577 hectare, and Kelumbuk Tinggi Baner Forest, 21.901 hectare. "All of them are gone," said Patih Laman;
- Tunu River exploration also threats Talang Mamak heritage, especially the ancestor footprints. The area is now palm oil plantation owned by PT. Selantai Agro Lestari (PT. SAL). Although the heritage is not banished by the corporation, Talang Mamak community still feels offended and has rejected PT. SAL since 2007. However, the protest did not change oil plantation condition. It is sprouting replacing natural forest, "*when the forest is gone, customs/culture perishes,"* said Patih Laman.
- Gading (30), the successor of Patih in Talang Mamak community, admitted that the deforestated forest was orchestrated by the previous Patih of Talang Mamak. Together with Durian Cacar Head of Village, the previous chief sold the sacred forest for migrants and corporations. This person had been taken away from his title is one of the patih in Talang Mamak and the punishment was solitary condition;
- The indigenous community's fight to take away the sacred forest right has never worked, although they have taken legal action. Gading explained, Talang Mamak community once sued PT. Inekda to the court but failed. "The judge admitted the customary forests, but we still lost the motion. It was as if we were admitted but not protected," said Gading;
- Gading, who is now Sungai Ekok Head of Village, said, Talang Mamak community is now at the lowest point of Indonesia development wheel. The connecting road in

the seven villages where Talang Mamak community lives in Rakit Kulim, Indragiri Hulu, until now is still in the form of land which turns into mud pond every time it rains. There is no electric cable pole to connect electrical cable to the houses, which majority are in the form of stage houses (rumah panggung, houses built on stilts) with wood walls. To find warong or market is as difficult as finding a Puskesmas (Community Health Center). It is easier to find men and women without shirts. "*We are not primitive tribe, but we the government consciously leaves us behind,"* uttered Gading;

- Based on his testimony, Talang Mamak actually is a community with abundant natural resources due to the broad forest. Talang Mamak forest area reaches around 48 thousand hectare and had already been acknowledged since the Dutch occupation by the Indragiri Residents in 1925;
- At that time, Talang Mamak community could live wealthily from rubbers and planting paddies on the nomadic fields. However, right now the situation is drastically different, because Talang Mamak community is forced to sell rubber paste through four middlemen, which makes the selling price very low. The abundant rubber harvest only costs Rp. 3.000,00 to Rp. 4.000,00 per kg. Meanwhile, the price in the plantation is Rp. 14.000,00 per kg.;
- Gading stated, around 1,800 heads of family in Talang Mamak indigenous community, which spreads in eight villages in Rakit Kulim and Rengat Barat sub-district, majority still love poorly and has low education. The existence of tens of palm oil companies and industrial plantation forest has not increased the Talang Mamak's livelihood.
- Talang Mamak community are tired with promises of the heads of region who oftenly visited them before the general election. In each general election, they preached promises, they measured the roads that they were going to fixed, but no practices at all. Talang Mamak is only needed for general election, after that, it will be left behind.
- Historically, Talang Mamak indigenous community already had the basic natural resources management, which could prosper them to generations. Talang Mamak, which is included in Old Malay tribe, places sacred forest as a forbidden forest, which cannot be sold, deforestated, or used for animal hunting. Sacred forest

(rimba puaka) functions as sources for natural medicine, and important support for the longevity of their field and plantation ecosyste. Indigenous community has been slaughtered since the new order era with the village infrastructure concept and Forest Concession Rights license issuance, which destroys social construct and rights to the customary forests. Although, the Malay indigenous community already had the world lung concept in the past, before it was destroyed by the government;

- Indigenous figures such as Laman and Gading, are now in a difficult position to defend their indigenous law. Supposedly, the government does not need to be ashamed to learn from Dutch colonial stipulation Riau residents stipulated through Regulation Number 82, March 20 1919, admitted 26 forbidden wilderness and animal herding field in kuantan Senggigi and was given to the indigenous leaders to be conserved. Even, the indigenous community was once labelled as primitive tribe.;
- Most of the Talang Mamak communities are illiterate. This is caused by several factors and challenges. The main factor is the absence of education infrastructure by the government. The fact is, schools were just built in Talang Mamak in 2007. Then, with the application of Village Government Law Number 5 Year 1979, village government becomes centralistic and does not admit indigenous leadership. Hence, Talang Mamak leadership was shattered. Patih position was filled by three people with fanatical supporters, as well as conflict on natural resources ownership. Although there is regional autonomy, leadership conflict in Tulang Mamak is hard to be solved;
- Investor and many parties despise the community with prosperity as the mask. They lured the community to give their land to be managed. Id the community does not want to give it to the investors, personal approach will be made through indigenous leaders and village chiefs, hence there is fragmentation in the community. Then, the investors will be able to get permission from indigenous leaders and village chiefs easily.
- With this base, the investors would elevate it to ask for government license by saying that they have been permitted by the community. Meanwhile, the meant permission came from indigenous leaders and village chief only without village

meeting (musyawarah);

- Several companies that operate in Talang Mamak claim they have received permission from Talang Mamak indigenous community, however on the road, this company committed fraud;
- In 2003, PT. Bukit Batabuh Sei Indah (PT. BBSI) did a forest concession by making deal with Patih Laman, the agreement was:

    - 468 ha managed with partnership system;
    - wood from the land, the chip fee is Rp. 1.500,- per ton, for log, Rp. 5.000,- per cubic;
    - based on the community agreement, the wood fee is used to built community field; However until now the promised has not been realized by PT. BSSI. Community plant was moved. Community said, PT. BSSI is the sub company of PT. Riau Andalan Pulp and Paper (PT. RAPP);

- In 2008, PT. Kharisma Riau Sentosa Prima managed the indigenous community land of Talang Perigi, Talang Durian Cacar, Talang Gedabu, and Talang Sungai Limau. The size of the managed area reached 7000 hectare.
- The community did not permit this management and they sued to revoke the company's license. The end of this rejection, a clash happened and a villager named SUPIR, member of Talang Sungai Limau indigenous community was beaten and jailed for three days. There is no solution for the beating until now. After the forest and forest product is gone, PT. Kharisma Riau Sentosa Prima took off and changed into the new name PT. Mega. With new approaching style, PT. Mega was successful to lure the community with 40/60 partnership system, forest that was managed was 600 hectare;
- In 2008, PT SAL made an agreement with three village chiefs: Talang Durian Cacar, Selantai, and Talang Parigi. Based on this agreement, PT. SAL got a location permission letter from Indragiri Hulu District Land Service with the letter number 12.a./il-dpt/ii/2007. The area that was going to be managed reached 1000 hectare. Therefore, the community rejected it since it did not suitable with the first agreement with the community. Three months after the rejection, the community

was lured to sell their land at rocketing price. The community competed to sell their land. This is a part of the company's trick. Ampang delapan indigenous community rejected it, the company lured them back with 40/60 partnership style. However, until now the promise has never been realized;

4. Jamaludin

- Semunyung word was taken from a river name, which estuary is Kumba River, which is a DAS (River Flowing Area) from Sambas River. Semunying Jaya is one of the villages, 18.000 Hectare with 100 families with around 385 people. It is located on the border with neighboring country, which is Malaysia with the borders: a) West, bordering with Sentimu kampong or Aruk Village in Sajingan sub district; b) the East is bordering with Belidak hamlet, Skeida village (after the extension with Saparan hamlet, Kumba); c) the South is bordering with Kalon Village, Seluas Sub-District; and, d) the north is bordering with Sarawak, Malaysia. This village is one of the six villages (Sekida, Kumba, Gersik, Semunying Jaya, Jagoi Babang, and Sinar Baru) in Jagoi Babang Sub-District, Bengkayang District, which had been expanded since 2004;
- Historically, Semunying Jaya village is an indigenous area, which is populated by Dayak Iban community from Lubuk Antu, Sermak kampong. They have settled there since 1938. Sermak kampong is now a part of Malaysia. However, during the indigenous community exodus from that area to the new one, which is Semunying Jaya, the area between two countries had never been separated. At that time, the location of two countries (Indonesia-Malaysia) was splitted, the indigenous community who did the exodus was given a choice by the then president Soekarno. The choice was: *"do they want to become Malaysian or Indonesian citizen?".* At that time, they stated that they wanted to be Indonesian citizen;
- Historically, the first person to open Seunying Jaya area were seven brothers: Jampung with his six brothers. In Bejuan area which was also known as Tembawang Pangkalan Acan, which is now on the km 31 Semunying Jaya became their first location to stay and opened a settlement. Then, as time went by, they moved to several places like under the Kalimau Mountain, then to another and then to Pareh (now Pareh is a paddyfield), then to upper Semunying and

Semunying area, then to the center of the village, known as Pareh kampong;

- To reach Semunying Jaya village, one can go through land or river, however most of the people use river since the roads are not in good condition. Traveling by river takes two hours by using 15 PK machine from Seluas. Meanwhile, from the capital of district, the travel by land takes 2.5 hours using public transportation (bus);
- Generally, the community that lives in Semunying village dwelling rely their life on the surrounding nature. Working on the field, rubber tapping, hunting and looking for all kinds of family need in the forest, also catching fish in the river. Most of the indigenous community, in Semunying Jaya acknowledges the presence of customary forests, cultural site and rite. However, with the massive expansion of big farm through palm oil in their area, the mentioned activities are declining.
- Community of Semunying Bugkang, for example, cannot farm and look for the family need in the forest because most of the area has been converted into palm oil plantation. Even, the clean water source is difficult and their village is on the brink of extinction since it is already cultivated by the company to be made into plantation area;
- Based on the belief, most of Semunying Jaya are Christians, small percentage are Catholics, Islam, and Budha. However, Semunying jaya community still practice rituals of culture that has been rooted in their life, which most of them came from Dayak Iban. In the Dayak Iban Community, there is a structure or indigenous organizational infrastructure. Dayak Iban indigenous community area also covers tribes. The nomenclatures in indigenous management (ketemanggungan) is structured into: Temanggung, Patih, Tuai, Rumah, Pengakak, and the villagers. The rites are usually related to human development process since they are born, death, the farming process, gratitude events, asking for safety, etc;
- At the end of farming season, Semunying Jaya community conducts Gawai Batu event, this is a rite to deliver gratitude to the Maker, usually the collect stones (Asah), blade, and other farming utensils, and pray upon them. This is led by the indigenous leader, local mantra will be spelled in this rite. The farming equipment will be collected and animal blood (pig) is smeared in the rite. This activity is conducted every beginning of June for two days. The first day is gratitude and gathering event for the community. The second day marks the new farming

season, After this event, usually will be continued by Manggul, a part from the early stage to open location to farm, by looking at the area. Usually the community makes offerings which will be prayed through mantra reading, asking for blessing to the forest spirit so they are prevented from danger while farming, and then through Manggul, they would only mark the location and will not open by felling the farm (menebas) yet. After Manggul, then comes penebasan (felling) and penebangan (Chopping), baler, and nugal (usually by working together and involve many people). The last part in harvesting or matah padi (plucking the paddies);

- PT Yamaker entrance to Semunying started in 1988, their initial objective is to open the road for wood production transportation from the company. By opening road that abandoned the existence of society (did not ask for indigenous leaders' permission), they got a sanction in the form of indigenous law because of their impermissible act. By the indigenous (customary) law application to PT. Yamaker, then there is no tree-chopping nor destroying int Semunying customary forests area;
- After PT. Yamaker did and implemented the Forest Concession Right above, the concession area on the rim of Semunying village were deforestated, after that, Perum Perhutani (General Company for Indonesian Forestry) started reboisation in 1998. But on the road, Perum Perhutani did not only do reboization but also chopped and took the wood inside Semunying community customary forests. Because of this act, an indigenous process gave a santion to Perum Perhutani which had moved the customary forests;
- At the beginning, the existence of PT. Ledo Lestari palm oil plantation will open the way. However, the development showed, the company kept on extending their cultivation land by taking away community management area without permission thus reaching several pivotal community areas. PT. Ledo Lestari is the sub company of Group Duta Palma Nusantara which has plantation business permission based on Bengkayang Regent Letter, Number 525/1270/HB/2004 and issued on December 17 2004. And then, it was stipulated through Bengkayang Regent decision Number 13/IL- BPN/BKY/2004, dated December 20th 2004 regarding location permission issuance for 20,000 hectare palm oil plantation;
- The community rejection upon PT. Ledo Lestari palm oil plantation started in

2005. The indigenous community did not accept the company whose main bullet is the permission from the government without asking for permission from indigenous community. The company was initially trying to open the way, but then branched out to important areas of community management without permission. This was responded by rejection from the community. The figured several ways to stop the company activity: from village meeting on the village level, securing heavy infrastructure, enforcing customary law, and report to several parties. However, those did not generate result. In 2006, two indigenous community members who were also village chiefs (Momonus) and member of Village Meeting Center (Jamaludin) was blamed by the company through the report to Bengkayang Police Resort. These two citizens were accused for sxtortion and violence, hence they were jailed for 9 and 10 days, becoming the city detainee. Meanwhile, the fight by these community with other Semunying Jaya village members was only to fight for their rights and dignity which had been taken by the company. The company act without permission also destroyed the customary forests area and other area which was resulted in social and environmental disorder of indigenous community on the border;

- The fight for justice by the indigenous community in Semunying Jaya had gone through a long process even on all levels, on the region, province, and central government. Even to international level through testimonial and complaints by the community. The failure of regional government and beyond in giving justice to Semunying Jaya indigenous community is a form of weak commitment, seriousness, and state's siding. The companies acted out of line and trespassing Semunying Jaya community's right;
- The government seems conquered by the capital owner. The non-existent bold action from the government was also reflected to the government's soft behavior when PT. Ledo Lestari permission ended in 2007. The regional government issued a new permission to add more land for PT. Ledo Lestari, 9.000 hectare through Decision Letter or SK Number 382 C, June 20 2010. This has a potential to be a time bomb in the future;
- In April 2012, Semunying Jaya community occupied PT. Ledo Lestari offices and confiscated several heavy infrastructures as an accumulation of disappointment

that they had gone through. The indigenous land that had been occupied by the residents and stipulated since December 15 2009 by Bengkayang Regent, was just being stipulated in a Decision Number 30A, Year 2010 regarding customary forests of Semunying Jaya Village as the protected forest with the width of 1,420 hectare but still it becomes occupied by the company. It means that the action conducted by the citizen is not mutually exclusive, there was expropriation and neglect of the rights of the citizens who never acquire solution;

- That the action done by indigenous peoples should be considered as a form of pure rights struggle which they firmly hold their commitment since the beginning, which is to restore the rights taken away from them. This implies the problem faced by indigenous peoples deserved an attention/sympathy and empathy from various parties and hence should be positioned in its proper place, meaning a restoration of rights of customary forests and its right to live;
- That the action done by society through heavy equipments security and occupation over company's office told the public that the Regional Government is nothing before the company. Moreover with the brutal company's action, until now there are no strict action and concrete solution made by the Government;
- That the facilitating action made by the Regional Government subsequent to the occupation over company's office until now has not provided a clear solution to the society. Even the expansion of land clearing by the company continues without any firm actions made by relevant authorities;
- That PT. Ledo Lestari also has taken timbers illegally in the region because it does not own a timber utilization permit (IPK). Company whose permit has lapsef since 2007 also put officers (cross border army) to guard their business. Illegal logging in border area also becomes a part of palm oil plantation business.

- That the existence of PT. Ledo Lestari palm oil plantation has caused conflict and influenced the social, cultural and environmental order within society. There are several aspects of violation that happened due to the expansion of palm oil plantation by PT. Ledo Lestari in Semunying Jaya, among others are:
  1. Socio-cultural aspect

That the livelihood order of community in Semunying Jaya, far before the existence of palm oil plantation was very rich in the spirit of togetherness and mutual cooperation, hence sense of family is always puts forward before every problems. Sense of family is always maintained and preserved by Semunying Jaya community since ages. However along with the existence of palm oil plantation in Semunying Jaya Village has changed the socio-cultural order within the society. PT. Ledo Lestari in Semunying Jaya Village has created negative repercussion to the changes of social and cultural order of Semunying Jaya Village, among others are:

a. Conflict in a community

That the existence of the company did not provide welfare to the community, but has created social conflict in the community. Segregation happened among indigenous peoples who are in favor to and against palm oil plantation, suspicion and negative prejudice among members of indigenous community were the impact of PT. Ledo Lestari. Other effects of the social conflict that happened in Semunying Jaya are majority indigenous peoples were marginalized from their community and tried to separate themselves to avoid clashes between their own. Indigenous peoples in Pareh kampong for example, currently is preparing a new settlement in Metang Abe Area. At this time, the early steps have been done by the indigenous peoples which are to create fields/cultivation.

b. Relocation of indigenous peoples of Semunying Bungkang village

That the company did not respect the existance of indigenous peoples. Company has ousted the lands owned by society in Semunying Bungkang village (forest area, rubber plantation, food farming land) hence became very difficult to perform activities to support their livelihood, particularly in having access to natural resources. This condition seemed systematic whereby the society's land acquisition was regarded with low value and the land acquisition was done through eviction without notice and compensated later on. The impact of provision and acquisition of

plantation land was 22 family in Semunying Bungkang village was relocated by PT. Ledo Lestari to a new settlement. In the new location, they were only provided with 1 house, meanwhile other facilities such as electricity, water and land for cultivation were not provided by the company.

c. Eviction of cemetary and cultural sites

That the Local Law of Bengkayang Regency in 2008 in Article 14 paragraph (3), "The exercise of Land Acquisition is prohibited from damaging, contaminating places considered as holy, burial land/graves, inclaf, trespassing the allowable boundaries, and must obey the local customs." PT. Ledo Lestari in its land acquisiton has evicted at least 16 old burials of Semunying Jaya community, the company also has evicted burial land of Semunying Bungkang community in Munggu Suding area, approximately 800 meters from local settlement. Even the company almost bulldozed the burial land, however it was managed to be avoided because a resident reported the company's brutal action to the Bengkayang Resort Police. At that time, the burial land was restricted with police line surrounding the community's waqf land. Eviction of cultural sites is something that threatens the existence of local indigenous peoples;

d. Loss of source of traditional medicine

That aside from having economical value, biodiversity that lives in forest area also has medical value to the people living in the forest area. The natural potentials which contain medical values existed in the forest can mostly be utilized as traditional medicines by community and has been practised for years from generation to generation. The transformation of forest utilization function to become palm oil plantation by cutting down forests and leaving nothing behind has indirectly caused loss of medical potential or traditional medicines that live in the forest area;

e. Society Criminalization

That in every activities of a corporation, it is desired to ensure a peaceful, convenient and secure social condition for the community who lives in the surrounding corporation's surrounding area, so that the aim to improve community welfare can be implemented well. But that did not happen in Semunying Jaya Village. Society was often intimidated and even the worst was the arrest and detention against 2 Semunying Jaya residents (Head of Village, Mr. Momunus dan Deputy BPD, Mr. Jamaludin) on 30 January-7 February 2006 (for 9 days) in the Bengkayang Resort Police's detention house and then made as house arrest for 20 days. Both were charged with the accusation of duress, blackmail and stealing of heavy equipment. Both of them, along with other people, were securing the heavy equipments so that the palm oil plantation of PT. Ledo Lestari did not continue the eviction over customary forests;

2. Environmental Aspect

That the environment is one of the most important factor in maintaining human livelihood and its sustainability. If environmental condition was damaged, then the livelihood chain will be compromised. Economic activity should pay attention to environmental preservation especially the environmental condition in the surrounding area of which the economic activity takes place. The opening of palm oil plantation in Semunying Jaya Village conducted by PT. Ledo Lestari has disregarded the environmental aspects;

a. Loss of forest area

That amidst global community's great interest to save forests, at the same time the palm oil plantation of PT. Ledo Lestari applied massive forest conversion from tropical forest to become palm oil plantation. The effect is not only eliminating many trees but also removing the function of forest as buffer area. This is clearly a contradiction because on one side some parties are advocating for the importance to save forest. The reduction of forest area in the world becomes a concern for various parties that deserves attention. Because the forest contributes significantly to

neutralize greenhouse gas produced by humans in planet Earth. Such forest destruction will obviously become a serious concern of various parties, especially Governments all over who have commited to reduce the effect of global warming against livelihood. Furthermore, it should be the concern of Bengkayang Government too. Land clearing in the border area in a major scale by Duta Palma Group palm oil company becomes a threat to the availability of water and other resources for the residents of West Kalimantan. Land clearing for palm oil plantation conducted by PT. Ledo Lestari has evicted the primary forest area and customary forests of Semunying Jaya community. The evicted primary forest was at least 7.105 ha and the customary forests was about 1.410 ha, based on the participatory mapping result in Semunying Jaya village administration area in November 2009;

b. Loss of Semunying Jaya Village customary forest area

That the land acquisition of palm oil plantation done by PT. Ledo Lestari also has removed customary forests area of Semunying Jaya community. Over 2.000 ha of customary forests area owned by Semunying Jaya was evicted and transformed into palm oil plantation. With this action, PT. Ledo Lestari often is subject to customs sanction. At least 3 times, the company was punished with customs by the people of Semunying Jaya. Aside from the customs sanction, the company also agreed to no longer manage and evict customary forests area, but PT. Ledo Lestari often denied and broke the deal as agreed upon.

c. Clean water crisis

That inline with the general stipulation of the United Nations Number 15, Indonesia is obliged to respect, protect and fulfill the rights to water. In this regard, the fulfillment of rights to water for every citizens, State ensures everybody's right to get water for minimum daily use to fulfill their healthy, clean and productive livelihood. The other impact felt by the people of Semunying Jaya due to the opening of palm oil plantation is lack

of clean water. This is due to majority buffer area forest has lost its function as ground water, also the use of poisonous pesticides for plants' maintenance would also influence water quality. The opening of palm oil plantation by PT. Ledo Lestari has damaged the Semunying River as the clean water source for community in Semunying Bungkang village. It is proven by the low debit of water due to loss of forest area, low quality of water (murky) due to land erosion from the palm oil plantation;

3. Economic Aspect

That natural resources are society's source of livelihood especially those whose lives depend on the nature. Natural potentials can be managed to become an economic source for the community such as timber, daman rattan and many more. From a forest area and then converted to palm oil plantation in Semunying Jaya Village, it has dimished several natural resources which previously were the source of community's economy. Some missing natural resources potentials due to the expansion of palm oil plantation in Semunying Jaya among others are:

a. Loss of rattan as the source of economy for community in forest sector

That long before palm oil came in, the society could still rely on forest potentials available in Semunying Jaya Village. Rattan for example, for a long time the society of Semunying Jaya utilized it as one of forest potentials that could produce cash income. In a day, the people can earn money from collecting rattan of IDR50.000 – IDR75.000/day, even considering the potential of natural rattan available in the forest area was quite significant in amount hence making Semunying Jaya Village one of the biggest supplier of rattan in 2 Districts (Jagoi Babang and Seluas). However along with the loss of forest area after the opening of palm oil plantation, it has eliminated natural resources potentials which were the leading source of economy for local community.

b. Loss of trees/crops (*tanam tumbuh*) and *tembawang*

That in Article 9 paragraph (2) Law on Plantation Number 18 Year 2004 and Local Law of Bengkayang Regency Number 12 Year 2008 also emphasized that: "*In an event where the lands required are the customary rights of indigenous community which according to the fact still exist, it shall recede the granting of rights as stipulated in Article 1, the right petitioner/applicant is obliged to deliberate with the indigenous peoples who holds the customary rights and the people who owns the right over the land, to reach an agreement regarding land handover and the rewards."* Land clearing activity in the concession area of PT. Ledo Lestari palm oil plantation has evicted several trees/crops lands in form of rubber plantation and fruits crops and *tembawang* land. Rubber plantation and *tembawang* by society are the primary sources of livelihood for community in Semunying Jaya and rubber plantation is the economic activity performed by Semunying Jaya community to gain direct cash income. In practice, land clearing for palm oil plantation purpose by PT. Ledo Lestari primarily the eviction of rubber plantation area and community lands still left some problems, especially regarding the compensation of damage for Semunying Jaya community;

c. Crisis of agricultural land as community's source of food

That the right to food means everyone has right over food and not to be starving. A healthy, safe and affordable foods should always be available for everyone. Foods should also be available during disaster, harvest failure or other special circumstances. This is the main principle of right to food. As food producer, supposedly the people and in this case the farmers should not suffer from food insecurity. In reality, farmers and their families become the poor people who are prone to hunger and poor nutrition. Right to food, especially for farmers, is often violated by State who supposedly protect them. This happens because aside from the institution has failed to implement policy that protects farmers, but also due to government's policy on food and agriculture which favors the market. The policy on large scale palm oil plantation also has potentials to

create several social impacts on the concern on the availability of foods in villages, especially when the forest area and management area as the source of livelihood were taken over by the investors. The eviction of management area which also serves as a area to produce foods for Semunying Jaya community and the surrounding area is the form of intervention and restriction of access to produce their own foods. The eviction of community's source of production in form of rubber plantation, agricultural land (rice field) and cultivation area, has restricted the right of society to food;

- That Semunying Jaya Village was occupied by majority people from the indigenous community of Dayak Iban who have inhabited and settled in that region. Community of people who have relied on forest, land and water as the source of living. With all the local wisdom they possessed and became part of community which supported the value system in life system, such as in most indigenous peoples, the residents of this area have rights to get protection, both collective and individually owned;
- That the collective rights mentioned above, such as the right to self determination, right to land, space, and natural resources, right to cultural identity and intellectual property, right of free, prior, and informed consent and right to the determination of model and type of construction suitable for them. In regards to right to land, Article 25 of the United Nations Declaration on the Rights of Indigenous peoples emphasized that "*Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard*". Furthermore, Article 26 paragraph (1) stipulated that "*Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.";*
- That in the same Article (paragraph 3), it was emphasized regarding State responsibility: "States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect

to the customs, traditions and land tenure systems of the indigenous peoples concerned.";

- That by looking at some actions the company has done that caused the loss of cultural sites (burial land, sacred site), customary forests, *tembawang* and local plantation, then it would directly have impact to the existence of indigenous peoples. Especially with the "forced reallocation" in a subtle way done by the company against the community in Semunying Bungkang kampong. Protection over several sacred sites towards the impact of the opening of palm oild plantation was also stressed in the Local Law Number 12 Year 2008 on Implementation of Plantation Business, Article 14 paragraph (3): "*The exercise of Land Acquisition is prohibited from damaging, contaminating places considered as holy, burial land/graves, inclaf, trespassing the allowable boundaries, and must obey the local customs."*
- That in Article 9 paragraph (2) Law Number 18 Year 2004 on Plantation also stressed that: "*In an event where the lands required are the customary rights of indigenous community which according to the fact still exist, it shall recede the granting of rights as stipulated in Article 1, the right petitioner/applicant is obliged to deliberate with the indigenous peoples who holds the customary rights and the people who owns the right over the land, to reach an agreement regarding land handover and the rewards*."
- That the existence of PT. Ledo Lestari that never received permission from Semunying Jaya villagers has automatically disregarded the existence of local community as well as the social norms in a society. To enter without permission is an unethical action done by the company as part of a violation against the norms aforementioned. It also has disregarded the obligation that should have been done in practising plantation out of indigenous peoples's land, as stipulated in Article 9 paragraph (2) of Law Number 18 Year 2004 on Plantation regarding compulsary consent/permission from the community. This was also emphasized in Local Law of Bengkayang Number 12 Year 2008 on Plantation in Article 14 paragraph (2): "*In an event where the lands required are the customary rights of indigenous community, the right petitioner/applicant is obliged to deliberate with the indigenous peoples who holds the customary rights and the people who owns*

the right over the land, to reach an agreement regarding land handover and the rewards."

- That since 2007, PT. Ledo Lestari palm oil company's license has been declared as expired by Bengkayang Local Government. This was stressed through a letter dated on 12 June 2009 issued by Bengkayang Regency Local Government Number 400/0528/BPN/VI/2009. The letter explained that the extension of location permit of PT. Ledo Lestari is no longer applicable since 21 December 2007. Furthermore, this company in reality also did not have Timber Utilization Permit (IPK) as mandated in the Decree of Minister of Forestry Number SK.382/Menhut-II/2004 regarding Timber Utilization Permit. There has been a violation against the Standard of Timber Legality Verification (SVLK) as stipulated in Decree of Minister of Forestry Number 38 Year 2009 particularly in the licensing phase, whereby PT. Ledo Lestari did not own a Timber Utilization Permit during the land clearing of natural forest for palm oil plantation. Local Law Number 12 Year 2008 regarding the Implementation of Plantation Business on Article 28 paragraph (2) also stated the importance of Timber Utilization Permit in the development of plantation business. Furthermore, the Law on Forestry in Article 50 paragraph (3) stipulated: "(e) *Every person is prohibited from cutting down trees or harvesting or collecting forest products inside a forest without right or license from authorized agency." and clearly indicates the importance of timber utilization permit.*
- That against the indication of legal violation committed by this company, there has been no efforts or concrete legal actions performed by relevant authorities. Even during the midst of Semunying Jaya case, the Local Government of Bengkayang issued a new permit to expand the area of palm oil plantation for PT. Ledo Lestari of 9.000 ha. The company has ignored the letter issued by Local Government of Bengkayang regarding the end of license period, moreover the Local Government did not perform legal actions to enforce the letter. The issuance of warning letter in 2009 has indicated the slow response from Bengkayang Local Government which seemed like an sign of ignorance. Hence, the land use for plantation from 2007 until now has no legal basis or illegal;

- That during palm oil plantation clearing activity, the society found stacks of processed timber in the land clearing area of PT. Ledo Lestari. These timbers were taken to Malaysia through several routes in the border of Indonesia and Malaysia. First, via route kilometer 31 bordering the palm oil plantation of PT. Rimbunan Hijau – Malaysia. Second, via route kilometer 42 which is logging route to Mujur Sawmil owned by Malaysian businessman. Third route is in kilometer 45. This road was built by division III of PT. Ledo Lestari, passing through Cakra palm oil plantation in Malaysian zone which eventually reached Kuching. Illegal logging in PT. Ledo Lestari area happened in coordinate point I (49 N.UTM 363995 -156652) and timbers that have been cut into rectangular blocks and piled in used cut areas were found. Also in the next coordinate point (49N.UTM 363275-156597), canals built by the company in the rice fields of the customary forests area to irrigate the plantation were found;
- That these activities shown that the company has committed logging and facilitated illegal logging in the border are of Indonesia and Malaysia. Moreover, with the expiry of location permit owned by PT. Ledo Lestari since 22 December 2007 until now, supposedly illegal activities should not happen again. In the illegal logging, the officers were involved. The officers who supposed to provide protection were actually part of the game to gain benefit of the exploitation of forest area in the border;
- That prohibition of military presence in Article 30 paragraph (1) of the United Nations Declaration of the Rights of Indigenous peoples has also stressed that: "*Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.";*
- That arson is an illegitimate way and against the law in regards to land clearing for large scale plantation. Nevertheless, this illegal activity was done by PT. Ledo Lestari in their effort to clear the plantation land. This sort of activity is indeed more beneficial for company, because by burning it will be cost effective and efficient. The fact that we found is PT. Ledo Lestari has committed land clearing and burning in the customary forests area at the size of 2.190 ha. At least there

were several provisions that they violated and also contradicted the efforts the company did through burning to clearing land for palm oil plantation:

a. Regulation of Minister of Agriculture Number 26/Permentan/OT.140/2/2007 regarding Guidelines for Plantation Business Licensing in Article 34 has stipulated that: "*Plantation companies that already obtained IUP, IUP-B or IUP-P are obliged to: (c) own property, facility and system for land clearing without burning and control over burning; and (d) open land without burning and manage natural resouces in a sustainable manner";*

b. Article 26 of Law Number 18 Year 2004 on Plantation stipulated that: "*Every plantation business actors are prohibited from opening and/or managing land by burning which can cause pollution and environmental damage.";*

c. Article 50 paragraph (3) of Law on Forestry stipulated that: "Every Person is prohibited from (d) committing forest burning.";

d. Regulation of Minister of Agriculture Number 14/Permentan/PL.110/2009 on Guidelines on the Utilization of Peat Lands for Palm Oil Cultivation in the Appendix in section III regarding land utilization in Point 2 explained that: "*Land clearing is performed without burning and should apply good water management norms.";*

e. Local Law of Bengkayang Government Number 12 Year 2008 on the Implementation of Plantation Business on Article 14 paragraph (4) has stipulated that: "*Land clearing and land clearing should not be done by burning.";*

- That based on the field observation of West Kalimantan's WALHI in 2009, it was proven that the company has committed arson in land clearing. The following are the locations as observed:

Fire Point Coordinatres in PT. Ledo Lestari land

Number	**Name of Location**	**Coordinate Point**
1	Sawah Besar	49 N 365432 / 159035
2	Km 31 Bejuan	49 N 368855 /158683

3	Semunying Bungkang	49 N 367097 /154925
4	Semunying Bungkang	49 N 366063 /159264

- That the status of forest area in the land owned by PT. Ledo Lestari was a production forest area which supposedly in every economic activity which will be executed in the production forest area is subject to Forest Release License from the relevant Minister which in this case is the Minister of Forestry and has previously obtained an application letter from the Regent/Mayor to file for changes in area status. Nevertheless, in reality up until now, the activity that has cut down production forest area done by PT. Ledo Lestari never obtained Forest Release License from the Ministry of Forestry;
- That the important thing of having a large scale business is the significance of complete analysis document regarding the big and small impact of it to the environment. PT. Ledo Lestari in practice as far as concerned, has no AMDAL documents. Absence of AMDAL documents was also stressed by an employee of Environmental Agency of Bengkayang Regency;

5. Kaharudin

- **That witness originated from Punan tribe, Jolok mountain, East Kalimantan, particularly Sekatak district, Bulungan regency, East Kalimantan. Witness was relocated by the Local Government of Bulungan Regency in 1970 through residents resettlement to Sekatak District in Tidung area, Sekatak Buji Village. The land provided by the Government was less than 2 hectares;**
- **That the customary rules employed by Witness until now is Punan leadership (*kapitan pemimpinan Punan*). If there was an outsider/stranger who secretly entered into the Witness's village/customary forests area without the knowledge of indigenous peoples, he/she would be subject to customary law sanction. A customary law sanction usually will be adjudicated by the *Kapitan* according to the mistakes, referred to as "*deda*"**

which is a jar or crock. It is also called as "*mendilak*" which in nominal value is equivalent to IDR3.000.000,-;

- **That the situation and condition of customary forests, especially Punan Dulau in East Kalimantan is very heartbreaking. Forest was damaged by corporations, rivers were shut down, and river water was murky. Even pigs, brackish, and hedgehogs' holes were displaced by the companies. Furthermore, there are less fish in the river. The Witness's ritual could not be performed because the ritual usually happens during fruit season or honey season. The signs of fruit season or honey season are drought for about one month. After drought, Witness would hold a "*lemali*" ceremony which is performed together by all family or neighbors. However that ritual can no longer be performed because the *meranti* wood and the flowering roots, whose essence of honey can be extracted, have all been displaced and cut down;**
- Whereas a forest is a mother's breast milk. When a forest cleared and demolished by investors, the Punan peoples will die;
- Whereas to date, customary law still applies, i.e. for those who cut down or take a tree for example, climbing honey tree, larger fine will be imposed due to the damage and it will be imposed with fine that called "sulok lulung" which valued IDR 10,000,000 or two jars (*tempayan*);
- Whereas in Sekatak District, there are two companies, i.e. PT. Adindo Hutani Lestari and PT. Intracawood Manufacturing. The two companies obtained their permits from the Government, i.e Minister of Forestry. However, based on those permits, the witness does not aware of any companies' basis of working in the area of customary forests where the Witness lives;
- Where the conditions of customary forests where Witness lives is very concerning;
- Whereas the *kapitan* (captain) of indigenous peoples has had a deliberation with the company. However the company stated that the indigenous peoples has no permit from the Minister of Forestry, therefore the witness cannot have any activities within the forest, while in fact the forest is the right of the witness;

- Whereas the witness had once received a letter concerning Minutes of Cooperation from PT. Intraca. The Minutes was made by the company. The said cooperation was requested previously by *Kapitan* Bungai, who supposedly should testify before the Court. However, due to his ill condition, the Witness is testifying to represent Punan;
- Whereas since 2001, not only Punan Dulau; the entire part of Sekatak Distruct are also affected. In 2001, the witness joined a demonstration against the company, but no result came out of it except four people were imprisoned;
- Whereas since 1880 to date, the witness never met with the Government to socialize the company presence in customary forests within the Witness' region;
- Whereas Witness' forest is covering an area of 23,190 hectares. The said data was obtained from witness of Spatial Office. Punan Dulau is surrounded by neighboring villages, i.e. Mangkuasar Village, Punan Mangkuasar of Malinau District, Seputuk Village of Tana Tidung District, Mendupo Viillage of Tana Tidung District, Bambang Village of Bulungan District, Bekiliu Village of Bulungan District and Ujang Village of Bulungan District;
- Whereas from the forest, Witness earned his income from resin, honey, forest sago, meat (pork), and fish. But now witness has no income because large logs in the forest have been depleted. What left are only small woods inedible by animals;
- Whereas the witness has its own rules for preserving forests, i.e. ritual with egg white. In addition, the witness is also doing farming and not arbitrarily cutting down trees;

6. Jailan

- Whereas witness comes from Pagaruyung. In ancient times, his ancestors earned their living until Jambi, before finally settled in the area. Currently, the witness lives in Bukit Duabelas which surrounded by many villages;

- Whereas Bukit Duabelas is an area of Bukit Duabelas Natinal Park located in Jambi region;

- Whereas the witness did not receive any explanation of the creation of the national park;

[2.3] Considering that in regard to Petitioners' petition, the Government delivered its opening statement on the hearing on May 23, 2012, which then completed with a written statement, which received in the Registrar's Office of the Court on May 29, 2012, which principally states the followings:

I. POINT OF PETITION OF THE PETITIONERS

Referring to the Petitioners' Petition which essentially states that Article 1 point 6 on the word "state", juncto Article 4 paragraph (3) on the phrase "if any (read: indigenous peoples) still in existence and their existence is acknowledged as well as consistent with the national interest", juncto Article 5 paragraph (1), paragraph (2), paragraph (3) on the phrase "and (2); and customary forests shall be stipulated if any (read: indigenous peoples) still in existence and their existence is acknowledged" and and paragraph (4) , and Article 67 paragraph (1) on the phrase "if any (read: indigenous peoples) still in existence and their existence is acknowledged", paragraph (2), and paragraph (3) on the phrase "and paragraph (2)", of Forestry Law are inconsistent with 1945 Constitution in particular this following Articles:

a Article 1 paragraph (3) stating that *Indonesia is a state based on the rule of law*;

b Article 28D paragraph (1) stating that every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law;

c Article 28C paragraph (1) and Article 28G paragraph (1) stating that every person shall have the right to develop him/herself through the fulfilment of his/her basic needs, the right to feel secure, and the right to feel free from fear;

d Article 18B paragraph (2) and Article 28I paragraph (3) stating that the State recognises and respects indigenous peoples along with their traditional customary rights;

II. LEGAL STANDING OF PETITIONERS

Petitioners state that articles petitioned to be judicially reviewed directly or indirectly, may cause loss or harm to their constitutional rights including:

1. loss of access of Petitioner I to conduct efforts for the advancement, mentoring, and to struggle for the rights of indigenous peoples;

2. loss of customary rights over forest, access to utilization, and management of customary forests of Petitioner I and Petitioner II , and

3. criminalization to Petitioner III because they were entering the forest area;

In regard to Petitioners' claims abovementioned, the Government delivered its stand that no articles, paragraphs, chapters or phrases in the Law petitioned to be review has causal relationship (*causal verband*) nor causing any harm or loss either potentially or actual losses, directly or indirectly to their constitutional rights, with following reasons:

1. potential or actual loss, directly or indirectly to Petitioners' constitutional rights will occur if the articles of the Forestry Law, specifically those requested for judicial review, explicitly or implicitly intend to destroy or eliminate customary forests; The normative fact says the opposite, i.e. Article 1 point 6 and Article 5 paragraph (1) and (2) of Forestry Law include customary forests as one of categories. This implies that Forestry Law recognizes the existence of customary forests; therefore petitioners' constitutional rights are still recognized in line with the recognition on the existence of the customary forests;

2. Although customary forests is included as part of state forest, this should not diminish the existence and sustainability of customary forests. Such conclusion will be strengthened if phrases in Article 1 point 6 and Article 5 which includes categories of customary forests understood comprehensively with Article 4 paragraph (3) *junctis* Article 5 paragraph (3) and paragraph (4), and Article 67 of the Forestry Law which recognizes the existence of community customary with certain requirements;

   Meaning, if the existence of indigenous peoples has been recognized by Forestry Law, customary forests as one of the main elements and integral part of the

indigenous peoples is automatically recognized. Therefore, the articles petitioned for judicial review are unlikely to cause harm to Petitioners' constitutional rights;

3. Inclusion of requirement of recognition for existing indigenous peoples is not intended to cause and will not cause the loss of existence of indigenous peoples and customary forests;

Such requirements are intended so that the existence of indigenous peoples and customary forests will not weaken the commitment and national bond, which have been institutionalized within the framework of the Unitary State of the Republic of Indonesia as mandated by the constitution. Therefore, the requirements will not cause any harm to Petitioners' constitutional rights.

Based on abovementioned reasons, it can be concluded that the articles petitioned for judicial review is not appropriate and untrue if considered to cause harm or loss to the Petitioners, in contrary, these articles provide protection and strengthening to constitutional rights of indigenous peoples including Petitioners;

In regard to the harms or losses argued by Petitioner II and Petitioner III, the Government argued that there is quad non, however the loss cannot be qualified as constitutional rights, because:

a. Decree of the Minister of Forestry No. 137/Kpts-II/1997 on the Granting of Forest concessions to PT. Mainstay Riau Pulp and Paper, and

b. Decree of the Minister of Forestry No. 282/Kpts-II/1992 *juncto* No. 175/Kpts-II/2003 on Expansion on Designation of Mount Halimun Salak National Park and Change of Function of Protected Forest; are *beschiking* in nature and not due to inconsistency of articles of Forestry Law against 1945 Constitution;

Therefore, the Government plead to the Panel of Judges of the Constitutional Court to declare that:

1. there is no causal relationship between substances of articles petitioned for judicial review with the potential or actual losses of Petitioners' constitutional rights, and

2. Petitioners do not have legal standing to file petition for judicial review of Forestry Law;

III. GOVERNMENT'S STATEMENT ON MATERIALS PETITIONED FOR REVIEW

A. General

Substances of judicial review petition on Article 1 point 6 on the word "state", juncto Article 4 paragraph (3) on the phrase "if any (read: indigenous peoples) still in existence and their existence is acknowledged as well as consistent with the national interest", juncto Article 5 paragraph (1), paragraph (2), paragraph (3) on the phrase "and (2); and customary forests shall be stipulated if any (read: indigenous peoples) still in existence and their existence is acknowledged" and and paragraph (4) , and Article 67 paragraph (1) on the phrase "if any (read: indigenous peoples) still in existence and their existence is acknowledged", paragraph (2), and paragraph (3) on the phrase "and paragraph (2)", of Forestry Law indicate:

1. Whereas Petitioners developed partial and textual understandings on these articles ie customary forests only positioned as part of state forest. Such partial and textual understanding will lead to inaccurate conclusion that the existence of customary forest is not recognized independently as it subordinated to the state forest. However, if the articles are understood in a comprehensive and contextual, vice versa understanding will be gained: that although customary forests is positioned as part of the state forest, not only exist and ongoing, the status of customary forests will remain independent. Such understandings is gained if Article 1 paragraph 6 and Article 5 paragraph (1) and paragraph (2) which regulates "**positioning customary forests as part of the state forest**" combined with Article 4 paragraph (3) and Article 5 paragraph (3) and (4) which regulates "**determination on the existence of customary forests related to recognition on the existence of indigenous peoples as the subject of management**". It means customary forests management according to the articles of the Forestry Law will remain independent as it conducted directly by indigenous peoples as subject of management. However, if the indigenous peoples as the subject of management no longer exists, customary

forests management will be returned to the Government [vide Article 5 paragraph (4) of the Forestry Law];

2. Whereas Petitioners filed a judicial review on articles of Forestry Law on the basis of understanding that customary forests of indigenous peoples had existed prior to Indonesia's independence making recognition by the state to be in full and without any conditions. Setting certain requirements on the recognition of customary forests and indigenous peoples as the subjects of management is interpreted as an effort to negate and to interpret existence of customary forests and indigenous peoples;

Such basis of understanding is incorrect, may also lead to following consequences:

a. emergence of demand toward exclusive recognition of customary forests and indigenous peoples i.e. revert to condition prior Indonesia's independence where each indigenous peoples managing its customary land including customary forests; more dominant on the interests or rights of its member of community (insider) but not open to equal rights of the other (outsider). In the original condition, customary law that manage its customary land including customary forests already contain exploitative nature that is against the objectives of independent Indonesia;

b. demands of recognition as originally, as prior to Indonesia's independence and without any conditions can weaken the bond of the nation and state which already become the commitment of every component of the nation, including indigenous peoples as outlined in the Preamble of the 1945 Constitution. Requirement of recognition of the existence of customary forests and indigenous peoples is still required; that serves as: **Firstly**, on one side is intended to eliminate exploitative nature and negative conditions that exist in customary law, which can weaken commitment of nation and state bonds. **Secondly**, on other side, the requirement does not lead to elimination or denial of the existence of indigenous peoples and customary forests, instead it should be aimed at strengthening its existence which still in existence not to revive those no longer exist;

Requirement of the recognition of indigenous peoples and customary forests set forth in Article 4 paragraph (3), Article 5 paragraph (3) and paragraph (4), and Article 67

of the Forestry Act must be construed and understood as a whole (comprehensively) from both sides abovementioned;

B. Elucidation on Articles Petitioned for Judicial Review

The Government delivers its statement on judicial review of articles of Forestry Law petitioned as follow:

1. The Petitioners argued that Article 1 point 6, Article 4 paragraph (3), Article 5 paragraph (1), paragraph (2), paragraph (3), and paragraph (4) of Forestry Law are inconsistent with Article 1 paragraph (3) of 1945 Constitution that states bahwa "Indonesia is a state based on the rule of law";

The petitioners argued that the in the life of the state and the nation, a state based on the rule of law must be based, on the principles of equality before the law, the principle of non-discriminatory, the principle of legality and transparency and predictability. Articles of the Forestry Act petitioned are deemed to violate or in contrary to the principles of the rule of law;

The Government disagrees with Petitioners' view because Forestry Law particularly the articles petitioned contain consistency and even strengthen the rule of law adopted by the 1945 Constitution.

The existence of consistency is explained as follows:

a. Articles of Forestry Law abovementioned essentially regulate 2 (two) matters, namely:

1) recognition of the existence of customary forests by position it as a part of a state forest [vide Article 1 paragraph 6 and Article 5 paragraph (1), paragraph (2) of the Forestry Law];

2) management of customary forests by indigenous peoples as the forest owner is cunducted with requirements [vide Article 4 paragraph (3) and Article 5 paragraph (3) and paragraph (4) of the Forestry Law], namely:

a) insofar indigenous peoples still in existence;

To determine the existence by fact we can use instrument/criteria set forth by the legal doctrine and related legislation, namely: (1) the existence of a group of people who live together on the basis of similarities of territory or genealogy or a mixture of both, (2) having their own resources in the form of natural resources that are collectively owned, (3) having clear boundaries, (4) having certain authority carried out by a person mandated with leadership authority, and (5) existence of customary law governing the lives of their peoples and obeyed (vide Regulation of the Minister of Agrarian/Head of National Land Agency Number 5 Year 1999; see Maria SW Sumardjono, 2001:56);

b) The existence of indigenous peoples is recognized;

recognition is conducted through a decree or affirmation in Regional Regulation. If referring to the Regulation of Minister of Agrarian/Head of National Land Agency No. 5 of 1999, the process began with the formation of a research team consists of expert of customary law, member of indigenous peoples concerned, non governmental organization, and agencies managing natural resources. Result of the research will be outlined in the map that will be used as the basis to set and establish the existence of indigenous peoples through Regional Regulation;

c) Implementation of community forest management by indigenous peoples is not in contrary to the national interest;

national interests are the interests of the "nation" in the form of improvement of welfare of the members of indigenous peoples themselves and members of other communities as component part of the nation;

b. By examining elucidation on substances of the articles of Forestry Law abovementioned, contents of the provisions clearly provide directives to recognize existence of customary forest as well to let indigenous peoples as the subject managing the forest; the requirements are very clear and not multi-interpreted. The process of determination is transparent; involving all stakeholders and clear objectives intended to improve the welfare of members of indigenous peoples and other community members. Based on these elucidations, it can be concluded that Article 1 paragraph 6, Article 4 paragraph (3), Article 5 paragraph (1), paragraph (2), paragraph (3), and paragraph (4)

of the Forestry Law contains consistency with the principle of equality before the law, the principle of non- discriminatory, the principle of legality and the predictability and transparency as the pillars of the rule of law;

2. The petitioners argued that Article 1 paragraph 6, Article 4 paragraph (3), Article 5 paragraph (1), paragraph (2), paragraph (3), and paragraph (4) of the Forestry Law are inconsistent with Article 28D paragraph (1) of the 1945 Constitution, which contains the principle of legal certainty for every person;

According to the Petitioners, legal certainty exists and guaranteed if: (a) the laws are clear, well-understood, and fairly enforced; (b) there must be consistency between provisions or does not contradict each other; (c) the laws mus be firm and not change rapidly;

With such understandings, the Petitioners considered that the provisions in articles petitioned contain inconsistency with three elements of legal certainty abovementioned;

The Government disagrees with the views of the Petitioners. Provisions in articles of the Forestry Act have met the three elements of legal certainty. This can be explained as follows:

a. Article 1 point 6 states: "*a customary forest is a state forest located in indigenous peoples area*", and Article 5 paragraph (1) and (2) state: "*forest by status, consists of state forest and title forest and state forest can be in form of customary forest*";

Article 1 point 6 juncto Article 5 paragraph (1) and paragraph (2) abovementioned contain clear provisions and one meaning/interpretation i.e. although customary forest is included as part of state forest yet its existence is still recognized in indigenous peoples. It means **the state does not intend to take over customary forest from indigenous peoples and place the said forest as direct part of state forest**. Customary forest **remains in authority of indigenous peoples**;

The clarity of the provision and its meaning/interpretation is customary forest remains within the authority of indigenous peoples is reinforced by the provisions of Article 4 paragraph (3) which states that: " *Forest concession by the state shall remain taking into*

account rights of indigenous peoples if any and its existence is acknowledged and not contradictory to national interest "and Article 5 paragraph (3) which states:" ..... *and forest shall be stipulated if any still in existence and their existence is acknowledged* ";

Reinforcement of Article 4 paragraph (3) *juncto* Article 5 paragraph (3) toward provision and meaning that customary forest are placed in the authority of indigenous peoples can be observed from: **Firstly**, forest concession by the state shall remain taking into account rights of indigenous peoples [vide Article 4 (3)]. This means control over customary forest is given to authority (rights) of indigenous peoples. **Secondly**, the existence of customary forests is associated directly with the existence of indigenous peoples [vide Article 5 paragraph (3)]. The existence of customary forest will be established if indigenous peoples as the subject still exists. It means insofar the existence of indigenous peoples is still exists, the existence of customary forest should be established and the authority of indigenous peoples over their customary forest shall remain within the period of existence. **Thirdly**, management of customary forest is given to the indigenous peoples insofar they still in existence. Such understanding is based on *a contrario* interpretation of Article 5, paragraph (4) which states: " *In case in its development indigenous peoples no longer exists the management right of indigenous law shall return to the Government* ". *A contrario* to the article will reads insofar they still in existence, management of customary forest will be conducted by the relevant indigenous peoples;

b. Elucidation in point a abovementioned indicates the nature of articles petitioned that are clear in understanding and not multi interpreted, and also indicates an internal consistency within the articles. One article and/or paragraph support another in regard to the existence of customary forest whose control and management are under the authority of indigenous peoples. and management are under the authority of indigenous peoples;

c. With clarity and internal consistency, provisions in the articles of the Forestry Law surely can be implemented in a fair and rule out the possibility of changes in its development;

Based on elucidations abovementioned, it can be concluded that those articles of Forestry Law provide legal certainty for the existence of customary forest to remain under the authority of indigenous peoples;

3. The petitioners argued that Article 1 point 6, Article 4 paragraph (3), Article 5 paragraph (1), paragraph (2), paragraph (3), and paragraph (4) of Forestry Law are inconsistent with Article 28C Paragraph (1) and Article 28G (1) of the 1945 Constitution. Petitioners' considerations are as follows:

a. The articles of the Forestry Law have limited constitutional rights of the citizens, in particular members of indigenous peoples to develop themselves in order to meet the basic needs of their life as guaranteed by Article 28C (1) of the 1945 Constitution;

b. The articles of the Forestry Law have limited the constitutional rights of citizens, in particular members of indigenous peoples; the right to feel safe and free from fear which is guaranteed by Article 28G (1) of the 1945 Constitution;

The Government disagrees with Petitioners because the articles are in accordance with the principles of Article 28C (1) and Article 28G (1) of the 1945 Constitution. This can be explained as a consideration the following:

a. Article 1 point 6 and Article 5 paragraph (1) and paragraph (2) *junctis* Article 4 paragraph (3) and Article 5 paragraph (3) and (4) contains the principle where the state does not intend to take over customary forest from indigenous peoples; the community forest shall remains within the authority of indigenous peoples, including its management. With such principles, the articles of Forestry Law have opened an access and support the granting of constitutional rights for members of indigenous peoples to develop themselves to meet their basic needs from the natural resources therein through forest management by indigenous peoples;

b. With abovementioned principles, articles of the Forestry Law have also give assurance of not taking away customary forest to be managed directly by the state and give full authority to indigenous peoples; consequently, the provision provides legal protection and security for indigenous peoples;

4. The petitioners argued that Article 1 point 6, Article 4 paragraph (3), Article 5 paragraph (1), paragraph (2), paragraph (3), and paragraph 4), and Article 67 of the Forestry Law are inconsistent with Article 18B Paragraph (2) and Article 28 paragraph (3) of the 1945 Constitution. Petitioners' considerationS are as follow:

a. Articles of Forestry Law abovementioned have led to deprivation and destruction of indigenous peoples and their territories and rights, as guaranteed in Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution;

b. Articles of Forestry Law abovementioned in particular Article 67 that which set procedures of recognition of existence or extinction of indigenous peoples which governed by Local Regulation is inconstitutional; inconsistent with the provisions of Article 18B Paragraph (2) and Article 28 paragraph (3) the 1945 Constitution;

The Government disagrees with the Petitioners' views. Articles of Forestry Law related to recognition of indigenous peoples and its traditional rights is not inconsistent with Article 18B Paragraph (2) and Article 28 paragraph (3) of the 1945 Constitution with following explanations:

a. Although different wordings are used as the basis of formulation of norms, articles of the Forestry Law, Article 18B Paragraph (2) and Article 28 paragraph (3) of the 1945 Constitution share the same spirit; the spirit of recognition of the rights of indigenous peoples and its traditional rights, as stated in point 2 customary forest **as a part of customary land remains under the control, authority, and managed by indigenous peoples as the subject of ownership**. Such spirit of the Forestry Law is clearly in line with the spirit of Article 18B Paragraph (2) and Article 28 paragraph (3) of the 1945 Constitution;

b. Both 1945 Constitution and Forestry Law give recognition with requirements, decribed as follow:

1) 1945 Constitution uses the formula: "***insofar remain in existence and are in accordance with the societal development*** " while the Forestry Act using the formula: " **if any still in existence and their existence is acknowledged** ". Such requirements are also in line with Article 3 of Law No. 5 of 1960 on Basic Agrarian lAW;

There are two (2) substances that need to be explained, namely:

a) The two phrases; ***insofar remain in existence and are in accordance with the societal development*** " and " **if any still in existence and their existence is acknowledged** " share the same meaning; that both 1945 Constitution and the Forestry Law require that indigenous peoples and its traditional rights to be in existence;

b) The phrase "their existence to be recognized" is a logical consequence of the ongoing conditions of indigenous peoples and their traditional rights. The phrase " their existence to be recognized " demands a process: Firstly, the identification whether indigenous peoples and their traditional rights aare still in existence on the basis of criteria a group of people who share similarities of genealogy and/or territory, having their own resources in the form of natural resources, having clear boundaries, having authority carried out by the leader and governing customary law.

If these criteria are met, indigenous peoples will be recognized and vice versa the criteria are not met it must be declared as no longer exist. Secondly, the process of affirmation of the existence of indigenous peoples based on the result of identification, to be set forth in Regional Regulation [vide Article 67 paragraph (2) and paragraph (3) of the Forestry Law]; Recognition or affirmation of the existence of indigenous peoples through regional regulation means there is a transfer of authority to lregional government. This is in line with the spirit of decentralization that underlies formation of Forestry Law in 1999 as sociologically the Regional Government has better understanding and more authorized to conduct process of identification and recognition/affirmation;

In addition, the granting of authority to the Regional Government also intended to maintain consistency with legislation in land sector i.e. Regulation of State Minister of Agrarian/Head of National Land Agency No. 5 of 1999 which already set that affirmation and recognition of the existence of indigenous peoples is conducted through Regional Regulation;

2) The second requirement is in accordance with the principles of the Unitary State of the Republic of Indonesia (1945) or consistent with the national interest (Forestry Law); Although both use different wordings, they share the same spirit to maintain the

bond of unity of the state and the nation of Indonesia. It means, the recognition of indigenous peoples and the implementation of authority by the customary leaders in particular related to the management of natural resources including customary forest does not disrupt the bond of the nation and Unitary State which had become commitments of the founding fathers who represents all groups, tribes, and indigenous peoples. This requirement is intended to avoid reverse to condition prior Indonesia's independence where indigenous peoples were fragmented. Without such requirement, recognition of indigenous peoples will create exclusivism that is not in accordance with national commitment in the framework of the Unitary State of the Republic of Indonesia as mandated by the constitution. However, the requirement cannot be interpreted and understood as a mean to eliminate the existence of indigenous peoples;

3) Article 18B Paragraph (2) of the 1945 Constitution requires that the recognition and respect for indigenous peoples and their traditional rights to be regulated by law, while Article 67 paragraph (1) point b of Forestry Law requires the exercise of authority in conducting customary forest management shall be based on customary law and in accordance to the law;

There are two (2) matters that need to be observed and understood from the substances of Article 67 paragraph (1) point b of the Forestry Law, namely:

a) The authority to manage customary forest i.e. forest governance, forest management planning, forest utilization and forest use, forest rehabilitation and reclamation, as well as forest protection and nature conservation [vide Article 21 of the Forestry Law) by indigenous peoples must be based on customary law. This provision implies the recognition of customary law as a guide for managing customary forest, and also as requirement where wisdom value contained in customary law will bring positive impact to the management of customary forest;

b) Implementation of the authority as stated in paragraph a) shall be in accordance to the Law. The word "law" does not specifically refer to the Forestry Law, but to the law that will govern the recognition and respect for indigenous peoples and their traditional rights as mandated by Article 18B Paragraph (2) of the 1945 Constitution;

However, provisions of the Forestry Law can be used as guidelines particularly in customary forest management by indigenous peoples. The use of the Forestry Law as a guidelines shall not be construed to reduce or to negate the authority held by indigenous peoples, but create synergy between government/local government and indigenous peoples in managing customary forest;

Between the government/local gocernemtn with the indigenous peoples in managing the customary forest;

IV. CONCLUSION

Based on descriptions and arguments abovementioned, the Government plead to the Panel of Justices of Constitutional Court to examine, to decide and to adjudicate judicial review petition on articles of Forestry Law against 1945 Constitution, to pass the following decisions:

1. to declare that the Petitioners do not have legal standing;

2. to reject the petition in its entirety or at least to declare that Petitioners' petition can not be accepted *(niet onvankelijk verklaard)*;

3. to accept Government's statement in its entirety;

4. to declare that following provisions in Article 1 point 6 on the word *"state",* Article 4 paragraph (3) on the phrase *"if any (read: indigenous peoples) still in existence and their existence is acknowledged as well as consistent with the national interest",* Article 5 paragraph (1), paragraph (2), paragraph (3) on the phrase *"and (2); and customary forest shall be stipulated if any (read: indigenous peoples) still in existence and their existence is acknowledged", and paragraph (4) , and Article 67 paragraph (1) on the phrase "if any (read: indigenous peoples) still in existence and their existence is acknowledged", paragraph (2), and paragraph (3) on the phrase "and paragraph (2)",* Of Forestry Law ***are not inconsistent*** to Article 1 paragraph (3), Article 28D paragraph (1), Article 28C paragraph (1) and Article 28G paragraph (1), Article 28I paragraph (3), and Article 18B of 1945 Constitution;

However if the Panel of Justices of the Constitutional Court of the Republic of Indonesia has a different opinion, decisions shall be made by principles of what is fair and just *(ex aequo et bono);*

[2.4] Considering that to proof its statement, the Government submit two experts who have been heard under oath by the Court on June 5, 2012, June 14, 2012 and June 17, 2012, as follow:

1. Prof. Dr. Nurhasan Ismail, S.H.,M.Si.

- Whereas there are two perspectives to the articles of Forestry Law under judicial review. Firstly, Article 1 paragraph 6 and Article 5 paragraph (1) and paragraph (2) Forestry Law which state that in principle, customary forest is part of state forest, thus, partially and textually construed to negate customary forest. Secondly, concerning the existence of indigenous peoples, that construed textually and partially, that with requirements specified in Article 4 paragraph (3), Article 5 paragraph (3) and paragraph (4), and Article 67 of the Forestry Law considered to negate the existence of indigenous peoples;

- Whereas Article 1 point 6 of Forestry Law states that customary forest is part of the state forest located within the indigenous peoples area. If related to Article 5 paragraph (3) and paragraph (4) of Forestry Law, the customary forest will be established if the indigenous peoples as the subject, right holder of customary forest is recognized. When using *a contrario* interpretation, the customary forest management shall be returned to the government if the said indigenous peoples is no longer exists;

- Whereas by understanding comprehensively Article 1 paragraph 6 and Article 5 paragraph (3) and paragraph (4) of Forestry Law, it is clear that the existence of customary forests continues to be recognized and that recognition is given when indigenous peoples exists. Management of the forest will also given to the existing indigenous peoples;

- Whereas requirement of existence of indigenous peoples is set forth in Article 18B paragraph (2) of the 1945 Constitution, Article 3 of Law No. 5 of 1960 on

Basic Agrarian Law, and Article 4 paragraph (3) and Article 67 of Forestry Law. Such requirement is a consequence of the concept of nation-state, which means recognizing the existence of communities, groups, and indigenous peoples as forming components of the nation. However, the unity commitment should also need to be understood, which means the existence of indigenous peoples should not be exclusive as it was in the past prior to Indonesia's independence;

- Whereas the Law concerning recognition and respect for indigenous peoples is required. Related to the context of the Forestry Law; the law does not violate the 1945 Constitution. The problem is the spirit contained in the Forestry Law was not internalized to sectoral institutions; that is why more concrete implementing rules have never been developed; resulting in violations toward the rights of indigenous peoples. Sectoral institutions waits on each other to declare which indigenous peoples exists;

2. Prof. Dr. Satya Arinanto, S.H.,M.H.

- Whereas Second Amendment of the 1945 Constitution, amended chapter on Regional Government. Before amendment, provisions on Regional Government are set in one article, i.e. Article 18 (without paragraphs), and after amendment the provisions are set into 3 (three) articles, i.e. Article 18, Article 18A and Article 18B. Amendment in this chapter and also other chapters set a new approach in managing the state. On one hand Unitary State of the Republic of Indonesia (NKRI) as the form of the state is confirmed and in other hand the nation's diversity is accommodated in line with the principle of *Bhinneka Tunggal Ika* (Unity in Diversity);

- Whereas the inclusion of Regional Government in the amendment of 1945 Constitution is motivated by the desire to accommodate the spirit of regional autonomy for the welfare of local communities. This was done after learning of constitutional practice in the previous era that tends to be centralized, the presence of uniform system of government as regulated inLaw No. 5 of 1974 on Basic Provisions on Regional Government and Law No. 5 of 1979 on Village Governance, and neglect on regional interests. Due to the centralized policy, the

central government became very dominant in regulating and controlling the regions, regions were treated as objects, not as subjects who regulate and manage their own regions in accordance with the potential and its objective conditions;

- Whereas amendment in Article 18 of 1945 Constitution became the legal basis for the implementation of regional autonomy, which during reform era became the national agenda. Implementation of the chapter on Regional Government was expected to accelerate the realization of the region's development and welfare of the people in the area, as well as improving the quality of democracy in the region. Definition of "people" in this context includes indigenous peoples;

- Whereas all of these provisions formulated within the framework to guarantee and to strengthen NKRI and thus, formulation on relationship of authority between the central government and the regional governments with respect specialities and diversities of the regions;

- Whereas provisions of Article 18, Article 18A and Article 18B are related to the provisions of Article 1 paragraph (1) which states that Indonesia is a unitary republic; Article 4 paragraph (1) which states the president holds the power of government, and Article 25A of the state territory; which become the base and limit of implementation of Article 18, Article 18A and Article 18B;

- Whereas the attribution of provisions of Article 18, Article 18A and Article 18B to provisions of Article 1 paragraph (1), Article 4 paragraph (1), and Article 25A of the 1945 Constitution in the context of amendment of articles related to the chapter on Regional Government in Second Amendment of 1945 Constitution strengthened the authority of "the state" is much disputed by the petitioners, and also in the context of the relationship between "the state" (which is represented by the "Central Government") and the "region" (which is represented by the "Regional Government");

- Whereas, as stated in the beginning, as one of results of the Second Amendment of the 1945 Constitution, Article 18B paragraph (2) was formulated to reads as follows:

- 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;

Whereas in the official elucidation on the Article and paragraph the MPR as the agency authorized to amend and enact the 1945 Constitution explained as follows:

- Unit of government at the village level such as *gampong* (in NAD), *nagari* (in West Sumatra), *dukuh* (in Java), *desa* and *banjar* (in Bali) as well as various communities in the regions lives according to their customs and rights, such as *ulayat* (customary) rights, but with on condition: that indigenous peoples actually exist and alive, not forced to be existed; and not made alive. Therefore, in practice, the group should be further regulated in regional legislation by Regional Parliament. In addition, such affirmation should apply with a restriction, shall not be in conflict with the principles of the unitary state.

Although the post-amendment the 1945 Constitution no longer have Elucidation as the original 1945 Constitution, paragraph abovementioned can be considered as a kind of authentic interpretation of the substance of Article 18B paragraph (2) of the 1945 Constitution, because the description is part of Guide of Socialization of the 1945 Constitution and Decree of MPR;

The description also provides an understanding that on the phrase stating " *if any still in existence and their existence is acknowledged as well as consistent with the national interest* " is clearly in line with the substance of Article 18B paragraph (2) of the 1945 Constitution;

Furthermore it can be argued that the emergence of the losses as claimed by the Petitioner II and Petitioner III in connection with the issuance of some decrees of the Minister of Forestry, the Expert argue that such losses can not be qualified as constitutional rights because decisions because such Ministerial Decree is *beschiking* (decree) in nature, and not derived from articles and paragraphs of Forestry Law which considered to be inconsistent with the 1945 Constitution. Thus there is **no constitutional issue** in the issuance of Decree of the Minister of Forestry;

The Expert argued that Article 1 point 6 on the word "state", Article 4 paragraph (3) on the phrase “if any (read: indigenous peoples) still in existence and their existence is acknowledged as well as consistent with the national interest”, Article 5 paragraph (1), paragraph (2), paragraph (3) on the phrase “and (2); and customary forest shall be stipulated if any (read: indigenous peoples) still in existence and their existence is acknowledged”, and paragraph (4), and Article 67 paragraph (1) on the phrase “if any (read: indigenous peoples) still in existence and their existence is acknowledged”, paragraph (2), and paragraph (3) on the phrase “and paragraph (2)”, of Forestry Law as stated in the part of Petitum of Petitioners’ petition, both on formulation or material, in part or entirely, **are not inconsistent with 1945 Constitution**;

[2.5] Considering that in regard to Petitioners’ petition, House of Representatives (DPR) has submitted its written statement which received at the Registrar's Office of the Court on July 25, 2012, as follows:

A. PROVISIONS OF FORESTRY LAW PETITIONED TO BE REVIEWED AGAINST 1945 CONSTITUTION

In their petition, the Petitioners filed review on Article 1 point 6, Article 4 paragraph (3), Article 5, Article 67 of Forestry Law;

- Whereas provision of Article 1 point 6 of Forestry Law reads:

“Customary forest is a state forest situated in indigenous peoples area“;

- Whereas Article 4 paragraph (3) of Forestry Law reads:

“Forest concession by the state shall remain taking into account rights of indigenous peoples if any and its existence is acknowledged and not contradictory to national interest”;

- Whereas provision of Article 5 of Forestry Law, reads:

(1) *“Forest shall by status consist of:*

c. state forest, and

d. title forest”;

(2) *"State forest as referred to in paragraph (1) item a, can be in form of customary forest.";*

(3) "The Government shall stipulate status of forest as referred to paragraphs (1) and (2); and Customary forest shall be stipulated if any and its existence acknowledged";

(4) "In case in its development indigenous peoples no longer exists the management right of indigenous law shall return to the Government";

- Whereas provision of Article 67 Forestry Law, reads:

(1) *"Indigenous peoples shall if any and still acknowledged shall be entitled to:*

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

(2) *"Recognition of existence and extinction of indigenous law - community as referred to in paragraph (1) shall be stipulated by Regional Regulation";*

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

B. CONSTITUTIONAL RIGHTS AND/OR AUTHORITIES CONSIDERED AS IMPAIRED BY PETITIONERS FOLLOWING PROMULGATION OF FORESTRY LAW

Petitioners in the petition *a quo* stated that their constitutional rights have been impaired and violated or at least potentially according to reasonable reasoning can ascertained to cause loss by the enforcement of Article 1 point 6, Article 4 paragraph (3), Article 5, dan Article 67 Forestry Law which principally described as follow:

1. The Petitioner argued that for more than 10 years of enactment, the Forestry Act has been used as a tool by the state to take over the rights of indigenous peoples over their customary forest areas to become state forest, which then on behalf of the state were given/or handed over to capital owners, through various licensing schemes to be exploited without consideration to the rights and local wisdom of

indigenous peoples in the region, this has led to conflict between indigenous peoples with enterpreneurs exploiting their customary forest. Such practices occur in most parts of the Republic of Indonesia, which ultimately led to the rejection of the enforcement of the Forestry Law (vide petition page 3);

2. The inclusion of customary forest as part of the state forest as set forth in Article 1 Point 6, Article 4 paragraph (3) and Article 5 paragraph (2) of Forestry Law is the main issue in this case. This provision indicates that the Forestry Law has an inaccurate perspective on the existence and the rights of indigenous peoples over their customary forest area. This is because Forestry Law does not regard the historical aspects of indigenous peoples' claims over their customary lands. Indigenous peoples have existed long before the birth of the Republic of Indonesia. (vide petition page 5);
3. The Petitioner argued that Forestry Law has evicted indigenous peoples from their customary forest, which is an integral part of their lives, on the basis of these ideas. Therefore indigenous peoples reject the existence and validity of Article 1 point 6 on the word "state", Article 4 paragraph (3) on the phrase “if any (read: indigenous peoples) still in existence and their existence is acknowledged as well as consistent with the national interest”, Article 5 paragraph (1), paragraph (2), paragraph (3) on the phrase “and (2); and customary forest shall be stipulated if any (read: indigenous peoples) still in existence and their existence is acknowledged”, and paragraph (4) , and Article 67 paragraph (1) on the phrase “if any (read: indigenous peoples) still in existence and their existence is acknowledged”, paragraph (2), and paragraph (3) on the phrase “and paragraph (2)”, of Forestry Law (vide petition page 6-7);
4. The Petitioner argued that provisions in Article 1 point (6) on the phrase "state", Article 5 paragraph (1) and paragraph (2) of the Law *quo*, have given the consequences that all land and natural resources of the forest area in Indonesia is owned by the state. This policy allows state to provide concession of rights over customary land rights that are not/not yet processed without consent from indigenous peoples concerned and without triggering a legal obligation to pay "adequate" compensation to the indigenous peoples holding customary rights over the land. (vide petition page 24);

5. The Petitioner argued that the existence of provisions of articles in the Law *a quo* has limit constitutional rights of Petitioners to develop themselves, in order to meet their basic needs in indigenous peoples simply because the area turned as National Park and/or given to the company as mining, palm oil or insdustrial forest concessions (vide petition page 27);
6. The Petitioner argued that provisions of articles in on the Law *a quo* has created a sense of fear and take away the sense of convenient, wholeness, authority to manage and exploit all potential and existing natural resources within area Petitioners' area as indigenous peoples in order to meet their needs (vide petition page 27);
7. The Petitioner argued that provisions in the Forestry Law have hindered Petitioners' rights to recognition, security, protection, and fair legal certainty and equal treatment before the law and therefore the provisions of the Act Forestry is considered inconsistent with Article 28D paragraph (1) of the 1945 Constitution (vide petition page 33);

The Petitioners argued that Article 5 paragraph (1) of the Forestry Law is inconsistent with Article 1 paragraph (3), Article 28C paragraph (1), Article 28D paragraph (1), Article 28G paragraph (1), and Article 33 paragraph (3) of 1945 Constitution.

- **Whereas Article 1 paragraph (3) of 1945 Constitution reads:**
  (3) "*Indonesia is a state based on the rule of law*";
- **Whereas Article 18B paragraph (2) of 1945 Constitution reads:**
  (2) "*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*";
- **Whereas Article 28C paragraph (1) of 1945 Constitution reads:**
  (1) "*Every person shall have the right to develop him/herself through the fulfilment of his/her basic needs, in order to improve the quality of his/her life and for the welfare of human race*";
- **Whereas Article 28D paragraph (1) of 1945 Constitution reads:**

(1) "Every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law";

- **Whereas Article 28G paragraph (1) of 1945 Constitution reads:**
  (1) "*Every person shall have the right to protection of his/herself, family, honour, dignity, and property, and shall have the right to feel secure against and receive protection from the threat of fear to do or not do something that is a human right*"
- **Whereas Article 28I paragraph (3) of 1945 Constitution reads:**
  ("*The cultural identities and rights of traditional communities shall be respected in accordance with the development of times and civilisations*";
- **Whereas Article 33 paragraph (3) of 1945 Constitution reads:**
  "The land, water, and natural resources contained therein shall be controlled by the state and used for the maximum prosperity of the people";

C. STATEMENT OF THE HOUSE OF REPRESENTATIVES (*DEWAN PERWAKILAN RAKYAT*, DPR)

In regard to Petitioners' argument as described in the petition *a quo*, DPR in delivering its statement will first describe legal standing as follows:

1. Legal Standing of the Petitioners

Qualifications that must be met by the Petitioner as a party have been regulated in Article 51 paragraph (1) of Law No. 24 of 2003 on the Constitutional Court (hereinafter referred to as the Constitutional Court Law), which states that *"the Petitioner shall be the party who considers that his constitutional rights and/or authority is impaired by the coming into effect of the Law, namely as follows:*

e. individual Indonesian citizens;
f. community-based customary law groups insofar as they are still in existence and in accordance with the development of the community and the principle of the Unitary State of the Republic of Indonesia regulated in law;
g. public or private legal entities;
h. state institutions;

Constitutional rights and/or authority referred to in Article 51 paragraph (1) is reinforced in its elucidation, stating that "constitutional right" shall be the rights provided for by the 1945 Constitution. Elucidation of Article 51 paragraph (1) asserts that "constitutional right" shall be the rights explicitly provided for by the 1945 Constitution;

Therefore, according to Constitutional Court Law, for a person or a party to be accepted as a petitioner having legal standing in a petition of judicial review against 1945 Constitution, the person/the party should explain and prove the followings:

a. Their qualification as Petitioners in the petition *a quo* as referred in to Article 51 paragraph (1) Law Number 24 of 2003 on Constitutional Court;

b. the constitutional rights and/or authority as referred to in Elucidation of Article 51 paragraph (1) are considered to have been impaired by the coming into effect of the Law;

In regard to parameter of loss or impairment of constitutional rights, the Constitutional Court has given the meaning and limits on constitutional loss arising from the enactment of a Law which have to meet 5 (five) following requirements (vide Decision of the Constitutional Court Number 006/PUU-III/2005 and Decision Number 010/PUU-III/2007):

a. the existence of constitutional rights and/or authority granted by the 1945 Constitution;
b. the constitutional rights and/or authority are considered to have been impaired by the coming into effect of the Law petitioned for review;
c. the impairment of such constitutional rights and/or authority must be specific and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring;
d. there is a causal relationship (causal verband) between the impairment of constitutional rights and/or authority and the Law petitioned for review; and,
e. the possibility that with the granting of the petition, the argued impairment of the constitutional rights and/or authority will no longer occur;

If all five requirements are not met by the the Petitioner in the case of judicial review *a quo*, then the the Petitioner does not have legal standing as the Petitioner;

Responding to the Petitioners' petition a quo, DPR argued that the petitioner must firstly prove if it is true that the Petitioner is a party considering that his/her constitutional rights and/or authority have been impaired over provisions petitioned for, especially in constructing the presence of loss of constitutional rights and/or authority as a result of of the enactment of provisions petitioned for;

In regard to legal standing, the DPR fully devolved to the judges to assess whether the Petitioner has legal standing as required by Article 51 paragraph (1) of Constitutional Court Law and based on Constitutional Court Decision on Case No. 006 / PUU-III/2005 and Case Number 011/PUU-V/2007;

2. REVIEW ON FORESTRY LAW

On petition to review Article 1 point 6, Article 4 paragraph (3), Article 5, and Article 67 Forestry Law, the House delivers the following statement:

1) The fourth paragraph of the Preamble of the 1945 Constitution states the objectives of the establishment of the Unitary State of Republic of Indonesia is "to protect all the people of Indonesia and all the independence and the land that has been struggled for, and to improve public welfare, to educate the life of the people and to participate toward the establishment of a world order based on freedom, perpetual peace and social justice ". To Achieve those aims, in main / body text of the 1945 Constitution, Article 33 paragraph (3) of 1945 Constitution mandates the state to use the land, the waters and the natural resources within for the greatest benefit of the people;

2) The state is given with freedom to organize, to make policy, to manage and to control the use of land, water, and natural resources contained therein with constitutional measures, i.e. "for the greatest benefit of the people." Therefore, all legislations governing the land, water and all natural resources in Indonesia should refer to the objective stated through Article 33 of the 1945 Constitution. Thus, this also applies to the regulation of forestry as stipulated in the Forestry Law;

3) Based on the mandate of Article 33 paragraph (3) of the 1945 Constitution, the forest management in the territory of the Republic of Indonesia, including the natural riches contained therein shall be controlled by the state for the greatest benefit of the people. Forest control by the state authorizes the government to regulate and administer anything related to the forest, forest area and forest products; to determine the status of a particular area as forest area or non-forest area, and to rule and establish legal relations between a person and the forest, and regulate legal actions related to forestry, the latter the government is given the authority to grant permit and rights to other parties to undertake activities in the field of forestry. However, for certain important matter, large-scaled and wide-ranging impact and strategically valued, the Government must taking into account aspirations of the people through the approval of the House of Representatives;

4) In the Forestry Law, forest in Indonesia is classified into state forest and title forest;

a. State forest is the forest located on land that is not encumbered according to Law No. 5 of 1960 includes forests that were previously controlled by indigenous peoples i.e. customary forest, clan forest, or other callings. The inclusion of forests controlled by indigenous peoples in terms of state forest, is a consequence of the right to control, to regulate, and to manage by the state as an organization of power of all the people in the principles of the Unitary State of the Republic of Indonesia. Thus, insofar still in existence and recognized, indigenous peoples can conduct forest management activities and collection of forest products;

b. Title forest is a forest located on the land encumbered according to Law No. 5 of 1960 on Basic Agrarian Regulation, such as ownership rights, land use rights and right of use;

5) The existence of indigenous peoples is characterized by 3 (three) factors, namely:

a. existence of community groups who are traditionally bound in a specific region;

b. existence of institutional along with leadership, and

c. the existence of law that is binding and adhered to, particularly on customary court;

6) Forestry Law has accommodated related interests and indigenous peoples, this can be seen in a separated chapter in the Forestry Law, Chapter IX on Indigenous peoples, in which regulates the rights, affirmation and abolition of existence, and delegation related to existence, affirmation and abolition of indigenous peoples;

7) Article 1 point 6 of Forestry Law, states that customary forest is a state forest located in indigenous peoples ares. The concept of customary forest is a state forest apart as a consequence of the enactment of Article 33 paragraph (3) of the 1945 Constitution, it is also because the state forest can not be equated with title forest in this case is the customary forest, because if the status of customary forests equated with title forest and indigenous peoples no longer exists, status of concession of customary forest become unclear. Vice versa, if the status remains as state forest managed by indigenous peoples if later indigenous peoples no longer exists, status of concession will remain a state forest;

8) Article 4 paragraph (1) and paragraph (2) of Forestry Law states that state forest may be in form of customary forest; i.e. state forest given to be managed by indigenous peoples (*rechtsgemeenschap*). The customary forest formerly called customary forests, clan clan, seignorial forest, or other callings. Forest managed by the community is included in definition of state forest as a consequence of the rights of forest concession by the State, as an organization of power of all people at the highest hierarchy and the principles of the Unitary State of Republic of Indonesia. Inclusion of customary forest in the definition of state forest does not negate the rights of indigenous peoples insofar remain in existence and recognized, to perform management activities;

9) description on the status and determination of customary forests as set forth in Article 1 Paragraph 6, Article 4 paragraph (1) and paragraph (2), and Article5 paragraph (1) and paragraph (2) Forestry Law as described above are in line with the constitutional values as stated in Article 1 paragraph (3), Article 28C paragraph (1), Article 28D paragraph (1), Article 28G paragraph (1), and Article 33 paragraph (3) of the 1945 Constitution;

10) That forest concession by state did not hinder the right of indigenous peoples to manage customary forest is guaranteed in following provisions of Forestry Law:

a. Article 34 jo. Article 8, paragraph (2) and paragraph (3) states indigenous peoples can perform forest management for the specific purpose of research and development, education and training, and religion and culture by not changing the basic function, forest area;

b. Article 37 regulating the use of customary forest by indigenous peoples shall be in accordance with its function. Customary forest with protection and conservation functions can be utilized provided not disturbing its function;

c. Article 67 paragraph (1) regulates, indigenous peoples shall if any and still acknowledged shall be entitled to collect forest produce to fulfill daily needs of relevant community-based customary law, manage forest according to the prevailing indigenous law and not in-contravention of the law and obtain empowerment for welfare improvement;

11) Elucidation of Article 67 paragraph (1) Forestry Law, states indigenous peoples is recognized, if, by fact, meet the following elements: the community still in the form of association (*rechsgemeenschap*); existence of institutional in the form of customary authorities; existence of clear customary jurisdiction ; existence of institutions and legal instruments, particularly customary court, which is still adhered to, and still collect forest product to fulfill the daily needs;

12) The protection of indigenous peoples on their rights to forests are also regulated in Article 67 paragraph (2) Forestry Law that regulates the affirmation and abolishment of indigenous peoples through Regional Regulation taking into account the results of research of customary laws expert, the aspirations of the local community, and customary figures community in the region, as well as the agency or other parties related according to Elucidation of Article 67 paragraph (2) of law *a quo*;

13) Whereas the indigenous peoples only exist in certain locations, therefore it is necessary for recognition process from the government. In this case the relevant government is a Regional Government i.e. regent or mayor. Recognition is needed because not in all places indigenous peoples still exists, and in places where indigenous peoples still exists it will further strengthen the legal status of the indigenous peoples.

This arrangement was intended to avoid claim arised from community who no longer has criteria for indigenous peoples;

14) Whereas further provisions regarding the existence and recognition of indigenous peoples and affirmation and the abolishment of indigenous peoples in Regional Regulation as defined in Article 67 paragraph (1) and paragraph (2) law *a quo* is regulated by the Government Regulation in which material contains procedures for research; parties included; materials of research, and the criteria, assessment on the existence of indigenous peoples, so that abovementioned arrangement is not solely based on the decision of the Government absolutely, but through the measured parameters;

15) Whereas based on the description on forms and procedures for the recognition of indigenous peoples as described abovementined therefore provisions in Article 4 paragraph (3) on the phrase *"if any (read: indigenous peoples) still in existence and their existence is acknowledged as well as consistent with the national interest",* Article 5 paragraph (1), paragraph (2), paragraph (3) on the phrase *"and (2); and customary forest shall be stipulated if any (read: indigenous peoples) still in existence and their existence is acknowledged", and paragraph (4) , and Article 67 paragraph (1) on the phrase "if any (read: indigenous peoples) still in existence and their existence is acknowledged", paragraph (2), and paragraph (3) on the phrase "and paragraph (2) shall be regulated in Regional Regulation"* are consistent with Article 1 paragraph (3), Article 18B paragraph (2), Article 28D paragraph (1), dan Article 28I paragraph (3) of 1945 Constitution.

Thus the statement of DPR is submitted to be taken into consideration for the panel of judges of the Constitutional Court to examine, decide, and adjudicate the case a quo and pass the following decisions:

1. To reject the petition a quo in its entirety or at least petition a quo is not accepted;

2. To declare Article 1 paragraph 6, Article 4 paragraph (3), Article 5, and Article 67 of Law Forestry as consistent with Article 1 paragraph (3), Article 18B paragraph (2), Article 28C paragraph (1), Article 28D paragraph (1), Article 28G paragraph (1), Article 28I paragraph (3), and Article 33 paragraph (3), 1945;

3. To declare Article 1 paragraph 6, Article 4 paragraph (3), Article 5, and Article 67 of Forestry Law to remains legally binding;

[2.6] Considering that Petitioner and the Government submit written conclusion the Court received in the Registrar's Office on July 12, 2012 and July 10, 2012, each of which essentially states remained in his stance;

[2.7] Considering that to summarise description in this decision, everything that happened in the hearing sufficiently referred to in the minutes of hearing, which is an integral part of this decision;

3. LEGAL CONSIDERATION

[3.1] Considering the purpose and objective of the Petitioners' petition to request judicial review on Article 1 point 6, Article 4 paragraph (3), Article 5 paragraph (1), paragraph (2), paragraph (3), and paragraph (4), serta Article 67 paragraph (1), paragraph (2), and paragraph (3) Law Number 41 of 1999 on Forestry (State Gazette of the Republic of Indonesia Year 1999 Number 167, Supplement to the State Gazette of the Republic of Indonesia Number 3888, hereafter referred to as Forestry Law) against Article 1 paragraph (3), Article 18B paragraph (2), Article 28C paragraph (1), Article 28D paragraph (1), Article 28G paragraph (1), Article 28I paragraph (3), and Article 33 paragraph (3) of 1945 Constitution of the Republic of Indonesia (hereafter referred to as 1945 Constitution);

[3.2] Considering that prior consideration of the substances of the petition, the Constitutional Court (hereinafter the Court) shall first consider:

a. authority of the Court to hear the petition a quo;

b. legal standing of the petitioner to file a petition a quo;

On both matters, the Court has following arguments:

Authority of the Court

[3.3] Considering that based on Article 24C paragraph (1) UUD 1945, Article 10 paragraph (1) point a Number 24 Year 2003 concerning the Constitutional Court as

amended by Law Number 8 Year 2011 concerning the Amendment to Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2011 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 5226, hereafter referred to as Constitutional Court Law), and Article 29 paragraph (1) point a of Law Number 48 Year 2009 on Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076, hereafter referred to as Law 48/2009), one of the Court authorities is to hear cases at the first and final levels the decisions of which shall be final to conduct review on laws under the 1945 Constitution;

[3.4] Considering that Petitioners' petition is judicial review on Legal norms, *in casu* Article 1 point 6, Article 4 paragraph (3), Article 5 paragraph (1), paragraph (2), paragraph (3), and paragraph (4), and Article 67 paragraph (1), paragraph (2), and paragraph (3) of Forestry Law against Article 1 paragraph (3), Article 18B paragraph (2), Article 28C paragraph (1), Article 28D paragraph (1), Article 28G paragraph (1), Article 28I paragraph (3), dan Article 33 paragraph (3) UUD 1945 which became one of the authorities of the Court, then the Court has the authority to adjudicate the petition a quo*;*

Legal Standing of Petitioners

[3.5] Considering that under Article 51 paragraph (1) of Constitutional Court Law and its Elucidation , the Petitioner shall be the party who considers that his constitutional rights and/or authority is impaired by the coming into effect of the Law, namely as follows:

a. individual Indonesian citizens;
b. community-based customary law groups insofar as they are still in existence and in accordance with the development of the community and the principle of the Unitary State of the Republic of Indonesia regulated in law;
c. public or private legal entities;
d. state institutions

Therefore, Petitioner in judicial review against 1945 Constitution should firstly explain and prove the followings:

a. Their qualification as Petitioners in the petition *a quo* as referred in to Article 51 paragraph (1) Law Number 24 of 2003 on Constitutional Court;

b. the existence of constitutional rights and/or authority given by 1945 Constitution that have been impaired by the coming into effect of the Law;

[3.6] Considering also that the Court since the Court Decision Number 006/PUU-III/2005 Constitutional Court dated May 31, 2005 and the Decision of the Constitutional Court No. 11/PUU-V/2007 dated 20 September 2007, and the subsequent decisions that stands that the impairment of constitutional rights and/or authority referred to in Article 51 paragraph (1) of the must meet five requirements, namely:

a. the existence of constitutional rights and/or authority granted by the 1945 Constitution;
b. the constitutional rights and/or authority are considered to have been impaired by the coming into effect of the Law petitioned for review;
c. the impairment of such constitutional rights and/or authority must be specific and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring;
d. there is a causal relationship (causal verband) between the impairment of constitutional rights and/or authority and the Law petitioned for review; and,
e. the possibility that with the granting of the petition, the argued impairment of the constitutional rights and/or authority will no longer occur;

[3.7] Considering that based on the description as mentioned in paragraph [3.5] and paragraph [3.6] above, the Court will next consider the legal standing Petitioner in the petition a quo as follows:

[3.7.1] That Petitioner I argues himself/herself as private legal entity, meanwhile Petitioner II and Petitioner III argue himself/herself as unit of indigenous peoples. The Petitioners in principle argue that they have constitutional rights stated in Article 1 paragraph (3), Article 18B paragraph (2), Article 28C paragraph (1), Article 28D paragraph (1), Article 28 I paragraph (3), and Article 33 paragraph (3) 1945 Constitution which stated:

1. **Article 1 paragraph (3) 1945 Constitution:**

   State of Indonesia is a rule of law

2. **Article 18B paragraph (2) 1945 Constitution:**

   The State acknowledge and respect the indigenous law unit along with its traditional rights for lifelong and in accordance with the development of the society and principle of Unitary State of Republic of Indonesia, which will be regulated by law.

3. **Article 28C paragraph (1) 1945 Constitution:**

   Every people has the right of self-development through fulfillment of his/her basic needs, the right of education and gain benefit from science and technology, art and culture, for improving his/her life quality and for the welfare of human race.

4. **Article 28D paragraph (1) 1945 Constitution:**

   Every people has right of legal recognition, guarantee, protection, and certainty that is fair and to treated equally before the law.

5. **Article 28G paragraph (1) 1945 Constitution:**

   Every people has the right of protection of self, family, honor, dignity, and properties under his/her authority, as well as right of security and protection from threat from doing or not doing something as human rights.

6. **Article 28I paragraph (3) 1945 Constitution:**

   Cultural identity and rights of indigenous peoples is respected in line with the development of the era and civilization.

7. **Article 33 paragraph (3) 1945 Constitution:**

   Earth and water and any wealth therein are governed by the state and utilized as far as possible for the welfare of the people.

According to the Petitioners the constitutional rights has been harmed by the existence of articles in the Forestry law:

1. **Article 1 paragraph 6 Forestry law** for the word "*state*", which in full paragraph stated:

   *Customary forest is the **state** forest under the territory of indigenous peoples*.

2. **Article 4 paragraph (3) Forestry law** which in full phrase "*as long as it exists and its existence is recognized, as well as not against the national interest*", which is stated in complete paragraph:
   The authority of the forest by the state still bear in mind the right of indigenous peoples, as long as it exists and its existence is recognized, as well as not against the national interest.

3. **Article 5 paragraph (1) Forestry law**, which stated the following:
   The forest based on its status consists of:
   a. state forest, and
   b. forest under rights.

4. **Article 5 paragraph (2) Forestry law**, which stated the following:
   The state as mentioned in paragraph (1) letter a, may be in the form of customary forest.

5. **Article 5 paragraph (3) Forestry law** in the phrase "*and paragraph (2; and customary forest is stated as long as according to reality the indigenous peoples still exist and recognized for its existence",* which stated in the following:
   The government stated the forest status as mentioned in paragraph (1) and paragraph (2; and customary forest is governed as long as according to reality the indigenous peoples still exist and recognized for its existence

6. **Article 5 paragraph (4) Forestry law**, which stated in the following:
   If in its development the respective indigenous peoples is no longer exist, the right of customary forest management will be returned to the government.
7. **Article 67 paragraph (1) Forestry law** in the phrase "as long as in reality still exist and its existence is recognized, which stated in the following:
   The indigenous peoples as long as in reality still exist and its existence is recognized has the right to:

- *collect forest product for fulfilling daily needs of the indigenous peoples;*

- *conduct forest management activity based on the prevailing indigenous law and not against the law; and*
- *acquire empowerment in order to improve its welfare.*

8. **Article 67 paragraph (2) Forestry law**, which stated the following:
   Confirmation of the existence and extinction of the indigenous peoples as mentioned in paragraph (1) is governed by the Regional Regulation.

9. **Article 67 paragraph (3) Forestry law** in the phrase "*and paragraph (2) is regulated by Government Regulation,* which stated the following:
   The further regulation as mentioned in paragraph (1) and paragraph (2) is regulated by the Government Regulation.

With the basic reasons, as the following:

1. That the Petitioner I experiences obstacle in doing the task and role to fight for indigenous right;
2. That Petitioner II and Petitioner III lost the customary forest territory and have no longer access to utilize and manage the customary forest which causes the lost of source of work and livelihood;

[3.7.2] That pursuant to Article 51 paragraph (1) Law of Constitution Court and the judicial decisions of the Court on the legal standing as well as related to the loss experienced by the Petitioners, the Court consider the legal standing of the Petitioners is the following:

1. Petitioner I is private legal entity in the form of unit confirmed by Notarial Act H. Abu Jusuf, S.H. Number 26 dated 24 April 2001 concerning the establishment of Unit of Aliance of Nusantara Indigenous peoples (see exhibit P.8). This organization in the form of alliance is the unit of indigenous peoples who gather and cooperate to fight for the rights of indigenous peoples;
2. Petitioner II is the unit of indigenous peoples of Kenegerian Kuntu which located in Kampar District, Riau Province. The indigenous land right of indigenous peoples in

the Kampar District is regulated in the Regional Law of Kampar District Number 12 of 1999 on The Indigenous Land Right (see exhibit P.15);

3. Petitioner III is the unit of indigenous peoples of Kasepuhan Cisitu Unit of Indigenous Leader Cisitu Banten Kidul in Lebak District (see exhibit P.17);

[3.7.3] That in accordance to the abovementioned consideration, according to the Court, Petitioner I is a private legal entity who care about the rights of indigenous peoples, meanwhile Petitioner II and Petitioner III is the unit of indigenous peoples who potentially harmed by the stipulation of articles in the Forestry law which asked for judicial review, and if the granted the constitutional loss as argued will never or will no longer happen. Therefore, according to the Court, the Petitioners has legal standing to propose a quo;

[3.8] In consideration of the Constitutional Court has the authority to hear the a quo petition, and the Petitioners has the legal standing to petition an a quo petition, heretofore the Court will consider the point of petition;

Point of Petition

[3.9] Considering that the Petitioners in the petition argued that the provision of Article 1 number 6 in the word "state", Article 4 paragraph (3) in the phrase "as long as it exists and its existence is recognized, as well as not against the national interest", Article 5 paragraph (1), paragraph (2), paragraph (3) in the phrase *and paragraph (2; and customary forest is stated as long as according to reality the indigenous peoples still exist and recognized for its existence",* and paragraph (4), as well as Article 67 paragraph (1) in the phrase "as long as in reality still exist and its existence is recognized", paragraph (2) and paragraph (3) in the phrase "and paragraph (2) is regulated by Government Regulation" Forestry law, have violated the equality before the law principle as one of the characters of rule of law because against the legality, predictability, and transparency principles that are acknowledged and regulated in the constitution, which becomes one of the main principles of enforcing the rule of law pursuant to Article 1 paragraph (3) 1945 Constitution. Recognition and respect to the indigenous peoples as the autonomous social group is acknowledged by the world

which is proven by the provision in the Article 3 and Article 4 Declaration of United Nations on the Rights of Indigenous peoples. The Indigenous peoples have the right to determine their own lives and in doing their rights on determining their lives, have the right of autonomy or self-governance in the matters related with internal and local matters, as well as means as well as facility and infrastructure to fund their own autonomous functions;

To prove their arguments, the Petitioners propose written evidences that has been signified by exhibit P-1 until P-36 as well as expert Dr. Saafroedin Bahar, Noer Fauzi Rachman, Prof. Dr. Ir. Hariadi Kartodihardjo, M.S., Prof. Dr. I Nyoman Nurjaya, S.H., M.H., and Dr. Maruarar Siahaan, S.H., who in principle stated that the indigenous peoples have the special characteristics of group of society living in the area for generations and continually within a cultural system and unique cultural law which bind variety of social groups inside it. The indigenous peoples is one of the citizen group which directly become victims and suffered due to the mining concession, forestry, and plantation which occurred since the New Order regime since 1967. The indigenous law as the "living law" has been subordinated by the Law on Agrarian Principles of 1960 which becomes the Basic Regulation of Agrarian Principles. Ideologically and on legal basis, the recognition of local society to the natural resources and rights of land has become basic question whether it is "genuine" right or "pseudo legal recognition". The public authority in giving forest clearing license, agricultural location, fisheries, found in Southeast Maluku, is the character in the history of indigenous law governance. In the condition after independence, constitution has to confirm the state recognition to the indigenous peoples on the rights known as the international convention, should also able to be conceptually determined, and effectively protected. The international juridical recognition is based in the International Labor Organization (ILO) Convention of 1969 on Indigenous and Tribal Peoples in Independent Countries;

Besides proposing written evidences and experts, the Petitioners are also proposing witnesses, Lirin Colen Dingit, Yoseph Danur, Jilung, Jamaludin, Kaharudin, and Jailani who basically conveyed that indigenous land conflict had been occurred since the Netherland East Indies era. According to the witness, the existence of Forestry

Concession (HPH) has really harmed the people because the witness as member of indigenous peoples could not enjoy the natural resources;

[3.10] Considering that the Government has rejected the arguments of the Petitioners and stated that the articles had been reviewed for their constitutionality as the articles that are not against the constitution. That has been proven by the expert witness statement from the Government, i.e. Prof. Dr. Nurhasan Ismail, S.H., M.Si. who stated that the Petitioners understood the articles of Forestry law that has been materially reviewed in partial and contextual manner resulting improper conclusion. Other expert, Prof. Dr. Satya Arinanto, S.H., M.H., stated, i.e., that from the perspective of Administrative Law, the articles and paragraphs of Forestry law that has been reviewed has followed the spirit of change of articles and paragraphs of 1945 Constitution which relates with the Chapter Local Government, especially which regulates the indigenous peoples;

[3.11] Considering that the statement of House of Representative in principle is the same with the Government. The House of Representative, i.e., stated that the forest managed by the indigenous peoples is included in the definition of state forest as the consequence of controlling power of the state as the people power organization on the highest level in the principle of the Unitary State of Republic of Indonesia. As well as the existence of indigenous peoples still protected in the Article 67 Law a quo. The complete statement of the Government, House of Representative, and other statements had been explained completely in the Facts of the Case.

Opinion of the Court

[3.12] Considering, after the Court listen and read carefully the petition of the Petitioners, the government information, written information from the House of Representative, expert witness and testimony of the Petitioners, as mentioned in the Facts of the Case, the Court consider the followings:

[3.12.1] That before considering the point of petition, the Court firstly needs to state the followings:

When the people who live in the archipelago territory bound themselves to be a nation and later form this country, Unitary State of Republic of Indonesia (NKRI), they chose the welfare state as explained in the Preamble of 1945 Constitution paragraph IV which stated, "*Subsequent thereto, to form a government of the state of Indonesia which shall protect all the people of Indonesia and all the independence and the land that has been struggled for, and to improve public welfare, to educate the life of the people and to participate toward the establishment of a world order based on freedom, perpetual peace and social justice, therefore the independence of Indonesia shall be formulated into a constitution of the Republic of Indonesia which shall be built into a sovereign state based on a belief in the One and Only God, just and civilized humanity, the unity of Indonesia, and democratic life led by wisdom of thoughts in deliberation amongst representative of the people, and achieving social justice for all the people of Indonesia".*

In the Preamble of 1945 Constitution, there are two important matters in the forming of a state with the choice of welfare state. ***Firstly,*** on the objective of the state, i.e. protection to the nation and territory, public welfare, education of life of the people, and the participation in establishment of a world order based on freedom, perpetual peace and social justice. ***Secondly****,* concerning the principle of the state, The Five Principles (Pancasila), belief in the One and Only God, just and civilized humanity, the unity of Indonesia, and democratic life led by wisdom of thoughts in deliberation amongst representative of the people, and achieving social justice for all the people of Indonesia. Based on the objective and the fundament of the state, the state through the state governor should work hard to create the welfare, Who should be supported to have welfare, in the state objective it is called as "*public wefare*", specifically in the state fundament it is mentioned, "*achieving social justice for all the people of Indonesia".* Therefore, public welfare means welfare for all Indonesian people. The people who bound themselves to be Indonesian Nation as reflected in the motto in The national coat of arms the Pancasila Eagle "Unity in Diversity" (*Bhinneka Tunggal Ika*) [see Article 36A 1945 Constitution], are the people who comprises of many groups, types of groups, and ethnicity with many religions, culture, and their own customs, but they are united bound themselves as nation in establishing sovereign country to protect and gave them

welfare. The people who comprises of many groups and ethnicities with many religions, customs, and their own customs, which existed before the establishment of NKRI, moreover that has been established as a unit of legal society, still acknowledged and respected its existence and traditional rights as constitutional rights, especially after the amendment of 1945 Constitution. This has been stated in Article 18B paragraph (2) "*The State recognizes and respects traditional communities along with their traditional customary rights as long as these remain in the 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".*

In the constitutional provision, there is one important and fundamental matter in the legal relation traffic. The important and fundamental matter is the indigenous peoples is constitutionally recognized and respected as the "right owner" which of course could be embedded with obligation. As the legal subject in the society within the state, the indigenous peoples should receive concern as other legal subject when the law would like to rule, especially ruling in allocating the source of life. In relation to that, 1945 Constitution has determined the constitutional principles, as mentioned in the Article 33 paragraph (2), paragraph (3), paragraph (4) 1945 Constitution which stated, (2) *Sectors of production which are important for the country and affect the life of the people shall be under the powers of the State; (3) The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people; (4) The organization of the national economy shall be conducted on the basis of economic democracy upholding the principles of togetherness, efficiency with justice, continuity, environmental perspective, self-sufficiency, and keeping a balance in the progress and unity of the national economy;*

In the constitutional provision as the regulating principles in allocation the source of nation's life for the welfare, including within it the natural resources, such as forest, there are critical and fundamental matters. ***Firstly*****,** the power of state on the sectors of production which are important for the country and affect the life of the people. ***Secondly*****,** the power of the state on the land, the waters, and the natural resources. ***Thirdly,*** the powers of state on the resources, including the natural

resources, intended so that the state could regulate the management of life resources to the greatest benefit for the public welfare, both the individual and people as member of indigenous peoples.

[3.12.3] With the different treatment, the indigenous peoples, potentially, and even in certain factual cases, lost their rights for the forest as natural resources for their lives, including the traditional rights, so that the indigenous peoples has the difficulty in fulfilling their daily needs from the forest as the source of livelihood. Often, the lost of indigenous peoples rights were unjust, so those were not rare where the conflicts between the people and right owners;

[3.12.4] The abovementioned circumstances as the repercussion of the norms did not guarantee the legal certainty and could result the injustice to the indigenous peoples in relation with the forest as their source of life, because the other legal source in the a quo Law provide explanation of rights on the forest. The indigenous peoples are in weak position because their rights are not recognized clearly and boldly when facing the state with very powerful control rights. It is wise that the state power upon the forest is used to allocate the natural resources fairly for the greatest benefit of the people;

[3.13] Considering the abovementioned considerations, the Court will furthermore consider whether the argued articles by the Petitioners are against the 1945 Constitution, as the following:

[3. 13.1] The petitioners argued in the argued that Article 1 letter 6 Forestry law in the word "*state"* is against Article 1 paragraph (3), Article 28C paragraph (1), Article 28D paragraph (1), Article 28G paragraph (1), and Article 33 paragraph (3) 1945 Constitution.

According to the Petitioner, the customary forest is directly defined as state forest located in the land inside the territory of indigenous peoples area. Instead, a forest is called as state forest if the forest is above the land, which has no right of land. This enables the state to give the rights on indigenous land to certain legal subjects without acquiring approval from the indigenous peoples and without the legal

obligation to provide compensation to the indigenous peoples who own the indigenous land right upon the land. The effect is the Petitioners cannot manage and utilize the potential of natural resources, which located in the territory of the Petitioners as indigenous peoples for fulfilling their daily needs.

On the argument by the Petitioners, according to the Court, the existence of the customary forest in its unity with the territory of the indigenous land rights from indigenous peoples is the consequence of the recognition of the indigenous law as "living laws". That had started at least since the Netherland East Indies until now. Besides state in 1945 Constitution, the recognition to the indigenous peoplesy post-1945 Constitution Amendment (see Article 18B paragraph (2)] is also distributed in many Law besides Forestry law; Law Number 39 of 1999 concerning Human Rights; Law Number 32 of 2004 concerning Local Government; Law Number 31 of 2004 concerning Fisheries; and Law Number 27 of 2007 concerning the Management of Coastal Area and Small Islands;

The Constitutional Court Decision Number 3/PUU-VIII/2010 dated 16 June 2011, the Court had also provided recognition on the unit of indigenous peoples, i.e. considering that Article 33 paragraph (3) 1945 Constitution determined that the land and waters and natural resources within shall be under the powers of the State. With the phrase "be used to the greatest benefit of the people" in Article 33 paragraph (3) 1945 Constitution, the greatest benefit for the people is the main parameter for the State to determine the care, regulation, and management of the land, waters, and natural resources within. Aside to that, the power of the State upon the land, waters, and natural resources within should also mind the existing rights, both individual rights and collective rights owned by the indigenous peoples (indigenous land right), the right of indigenous peoples as well as other constitutional rights is owned by the people and guaranteed by the constitution, such as access rights to pass, right on healthy environment, and et cetera (see the Decision of Constitutional Court Number 3/PUU-VIII/2010 dated 16 June 2011, paragraph [**3,14,4**]);

One of the important events related with the recognition and strengthening of the indigenous peoples internationally was the result of Earth Summit in Rio de Janeiro

on 1992 by the enactment of Rio Declaration on Environment and Development. In the Principle 22 it was stated that the indigenous peoples has important role in the management and development of the environment because the traditional knowledge and practice. Therefore the state should recognize and support entity, culture, and their interests as well as providing the opportunity to actively participating in achieving sustainable development.

Article 1 letter 4 Law on Forestry determines that state forest is the forest located in the land that is not burdened by the right of land. Whereas Article 1 letter 5 Law on Forestry determines that forest under rights is the forest located in the land burdened by right of land. Both the state forest and forest under rights in accordance with the construction derived by Article 33 paragraph (3) 1945 Constitution is under the power of the state. The right of power from the state comprises the entire land without exception;

Customary forest in reality is in the territory of indigenous land area. In the indigenous land area there are parts of land that is not part of forest that can be in the form of herding area, public cemetery, and individually owned land which functioned as fulfilling individual needs. The existence of individual right is not absolute, one time the right could be thinning and thickening. If it is thinning and disappearing eventually and it becomes communally owned. The relation between individual right and indigenous land right is flexible. The right of managing the customary forest is in the hand of indigenous peoples, but if in the development the indigenous peoples are no longer there, the right to manage the customary forest goes to the hand of the Government (see Article 4 paragraph (4) the Forestry law). The authority of indigenous land right is limited as far as the content and the authority of the indigenous land right. Therefore, there is no overlap (*kejumbuhan*) between the state authority and the authority of the indigenous peoples related with the forest. The state only has indirect authority to the customary forest.

Based on the abovementioned statement, the relation between the state's right of power with the state forest, and the state's right of power with the customary forest. To

the state forest, the state has full authority to rule and decide the supply, allocation, utilization, maintaining, as well as legal relations which happen in the state forest. The management authority by the state in the forestry should have been handed to the ministry handling aspects of forestry. To the customary forest, the state authority is limited to how far is the authority comprises in the customary forest. The customary forest (also called as clan forest "*hutan marga*", patron forest "*hutan pertuanan*", or other names) is witih the scope of indigenous land right in an territorial unit (single territory) of the indigenous peoples, the demonstration is based on *leluri (traditio)* that lives in the communal environment (*in de volksteer*) and has a central committee with authority in the entire territory. The member of indigenous peoples has the right to clear the customary forest to be managed and worked with for the fulfillment of his/her individual and family needs. Therefore, there is no possibility the right owned by the indigenous peoples will be erased or "frozen" as long as it comply to the provisions in the scope of definition of indigenous peoples pursuant to the Article 18B paragraph (2) 1945 Constitution;

After the differentiation is set between the state forest, forest under rights (both private forest and customary forest which is under the indigenous land right), it will not be possible that the forest under rights is located within the state forest, or on the contrary the state forest is located in the forest under rights area in accordance to Article 5 paragraph (2) and Elucidation Article 5 paragraph (1) of the a quo Law, as well as customary forest inside the state forest, so the status is clear and the location of the customary forest in relation with the recognition and protection of the indigenous peoples that is guaranteed by Article 18B paragraph (2) 1945 Constitution. Therefore, the forest based on its status is differentiated to be two, state forest and forest under rights. Meanwhile the forest under rights is differentiated between customary forest and private/legal entity forest. The three forest statuses in the highest level are entirely under the power of the state.

As comparison, in land law, the right "power under the state" does not give authority to physically control the land and use it as right upon land, because the character is public law pursuant to Article 2 Law Number 5 of 1960 concerning Basic Principles of Agrarian Regulation (hereinafter will be mentioned as Principles of Agrarian Law), the authority of right of power from the sate is for the greatest benefit of

the people in the meaning of nation, welfare, and freedom in the society and the Indonesia rule of law that is independent, sovereign, just and wealthy.

Article 18B paragraph (2) and Article 28I paragraph (3) 1945 Constitution is the recognition and protection on the existence of customary forest on the unit with the territory of indigenous land of the indigenous peoples. This offers the consequences of recognition to the indigenous law as the "living law" that has been long originated, and continues until now. Therefore, placing the customary forest as part of the state forest is a neglect of the indigenous rights;

Based on the abovementioned legal consideration, according to the Court, the word "*state*" in the Article 1 number 6 Forestry law is against the 1945 Constitution. Therefore the arguments of the Petitioners are legally reasonable;

[3.13.2] The Petitioners argued that the Article 4 paragraph (3) Forestry law in the phrase "as long as it exists and its existence is recognized, as well as not against the national interest" is against the Article 1 paragraph (3), Article 18B paragraph (2), Article 28D paragraph (1), and Article 28I paragraph (3) 1945 Constitution because it limits the rights of indigenous peoples to utilize the natural resources in their indigenous land;

The Petitioners, among others, stated that the recognition to the indigenous peoples based on recognition principle, not due to the principle introduced by the de-concentrated local government, decentralization and assistance duty. The indigenous peoples has the right to determine their own fates, freely determine the political status and freely after their economical, social and cultural progress. The Petitioners recognize that the regulating order on the method of recognizing and respecting the indigenous peoples as well as their traditional rights through the Law. That the existence of the provisions in the articles of Forestry law proposed for judicial review that strictly caused the deprivation and the destruction of indigenous peoples along with the indigenous jurisdiction and rights, made these provisions against the Article 18B paragraph (1) and Article 28I paragraph (3) 1945 Constitution;

In relation with the petition of constitutionality review on the a quo article, the Court had decided the judicial review on Article 4 paragraph (3) Forestry law in the Judicial Decision Number 34/PUU-IX/2011, dated 16 July 2012, among others, stated the following:

- *... in the certain territory there may be rights embedded upon land, such as property right, right to build, right of tenure for long lease, and other rights over land. The rights should have constitutional protection based on Article 28G paragraph (1) and Article 28H paragraph (4) 1945 Constitution. Therefore, power over forest by the state shall also pay concern to those rights besides the indigenous right stated in the a quo norm;*

- *Based on the aforementioned consideration, according to the Court, Article 4 paragraph (3) of the Forestry Law does not include the norm concerning other land rights granted under the provisions of laws and regulations, so that the article is inconsistent with the 1945 Constitution due to the exclusion of land rights granted under the provisions of laws and regulations. Although the Court is not authorized to change the sentence in a Law, since such authority is held by legislators, namely the People's Legislative Assembly and the President, the Court may however determine that a norm is conditionally constitutional;*
- *Whereas in line with the intention of Decision of the Court Number 32/PUU-VIII/2010 dated June 4, 2012 , the word "taking into account" in Article 4 paragraph (3) of the Forestry Law must also have imperative meaning in the form of assertion that the Government, when determining a forest area, is required to first include the community's opinion as a form of the function of control over the Government to ensure the fulfillment of citizens' constitutional rights to live a physically and mentally prosperous life, to have residence, and to obtain a proper and healthy living environment, to possess personal proprietary rights and the said proprietary rights shall not be taken over arbitrarily by anybody [vide Article 28H paragraphs (1) and (4) of the 1945 Constitution]. Accordingly, Article (4) paragraph (3) of the Forestry Law is inconsistent with the 1945 Constitution insofar as it is not construed as follows: "Forestry concession by the State shall be required to keep protecting, respecting and fulfilling the rights of customary law communities insofar as they are still in existence and their existence is acknowledged, the right of the community granted under the provisions of laws and regulations, as well as shall be consistent with the national interest* (vide Decision of Constitutional Court Number 34/PUU-IX/2011 paragraph **[3.16.2]**)";

Based on abovementioned legal consideration Decision Number 34/PUUIX/ 2011 stated that Article 4 paragraph (3) of the Forestry Law is inconsistent with the 1945

Constitution insofar as it is not construed as follows: *"Forestry concession by the State shall be required to keep protecting, respecting and fulfilling the rights of customary law communities insofar as they are still in existence and their existence is acknowledged, the right of the community granted under the provisions of laws and regulations, as well as shall be consistent with the national interest"* (*vide* Decision of Contitutional Court Number 34/PUU-IX/2011 dated July 16, 2012, paragraph **[3.16.2]**);

Although the Court has once delivered its decision on constitutionalism of Article 4 paragraph (3) Forestry Law, the Court founded that constitutional basis of petition filed by the Petitioners on Article *a quo* is different. According to Article 60 paragraph (2) of Constitutional Court Law and Article 42 paragraph (2) of Constitutional Court Regulation Number 06/PMK/2005 on the Procedures of Judicial Review of Law, the petition regarding the judicial review of the Law in terms of its material content of the paragraphs, articles, and/or the same parts as the case having once been decided by the Court can be proposed to be judicially reviewed in so far as the constitutional basis on which the said petition is founded is different. Therefore, the Court will give its legal consideration on arguments in the case *a quo;*

According to the Court, 1945 Constitution has guaranteed the existence of indigenous peoples along with their traditional customary rights as long as these remain in existence and in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia as set forth in Article 18B paragraph (2) of 1945 Constitution. Although it is called indigenous peoples, such community is not a static community. Overview of indigenous peoples in the past most likely has changed in recent times. Even indigenous peoples with their customary rights in various places, especially in urban areas have started to diminish or gone. Such community has changed from *the mechanical solidarity community* to *organic solidarity community*. In mechanical solidarity community they barely knew about division of work, they put importance on togetherness and uniformity, no individual should be dominant, they were generally illiterate and self-sufficient on their own (*autochton*), important decision making is left to the elders (*primus interpares*). In various places in Indonesia this kind of indigenous peoples can still be found. Such units of community are recognized and respected by the 1945 Constitution. In contrary organic solidarity community are

familiar with various division of labor, individuals are more prominent, the law is more developed because it is rational in nature and it is deliberately made for clear objectives;

The word *"taking into account"* in Article 4 paragraph (3) of the Forestry Law must be construed more imperative, that the state recognize and respect the existence of indigenous peoples along with their traditional customary rights, in line with Article 18B paragraph (2) of 1945 Constitution. Requirement of recognition and respect toward the indigenous peoples in the phrase of "*if any (read: indigenous peoples) still in existence and their existence is acknowledged as well as consistent with the national interest"*, shall be construed insofar they are still alive or remain in existence and in accordance with the societal development, because in general customary law is not written and it is a living law, meaning the law is accepted and observed and obeyed by the community as it is fulfilled their sense of justice and in accordance and acknowledged by the constitution;

Moreover, in regard to requirement of insofar remain in existence and their existence is acknowledged, in reality the status and forest function in indigenous peoples is depended on their status of existence. Possibilities that occur are: (1) remain in existence but not acknowleged; (2) no longer in existence but acknowledged. *If it is remain in existence but not acknowlegded,* then it can impair the existing community. For example; their customary land/ forests is used for other purposes without their permission by ways of evictions. Indigenous peoples is no longer able to get benefits from their customary forests. On the contrary, it may occur that there is no indigenous peoples any longer but the object of customary rights is still recognized. That is, based on the history their existence is acknowledged by the state, when in fact along with development of times there is no signs or anything inherent on the indigenous peoples. Such signs and the nature of a indigenous peoples should not be revived anymore, including the community authority over land and forests they once controlled. Such customary forest is then re-administered by the Government/State. Recognition of the existence of indigenous peoples shall not be intended to preserve indigenous peoples to stay behind; they should still have access to achieve welfare, ensuring fair legal certainty for both the subject and object of the law, if necessary to obtain affirmative

action. The cultural identities and rights of traditional communities shall be respected in accordance with the development of times and civilizations [vide Article 28I paragraph (3) of 1945 Constitution]. Can not be avoided, due to the influence of the development of science and technology, indigenous peoples sooner or later will also undergo a change, and even disappear properties and signs. Such changes can have positive or negative for the community concerned. To prevent negative impacts, 1945 Constitution ordered existence and protection of indigenous peoples that unity-regulated in the Act, in order to ensure legal certainty so that justice

The Petitioners stated, "*a indigenous peoples has the right to self-determination, freely determine their political status and freely pursue their economic, social and cultural development"*. According to the Court, territory of the Unitary State of the Republic of Indonesia which was formerly Dutch colony, and later gain its sovereignity and independence, was bound into agreements, which then set forth in a written agreement, 1945 Constitution. Territory of Unitary State of the Republic of Indonesia stretches from Sabang to Merauke. Petitioners' opinion abovementioned may have implication for separation attempt by indigenous peoples to establish a new state that is separated from the Unitary State of the Republic of Indonesia (separatism). Such existence of indigenous peoples is not in accordance with the principle of "not inconsistent with the national interest" and principle of "the Unitary State of the Republic of Indonesia". Even if there is freedom, the limitation has been regulated in the Law on regional autonomy and other laws and still in the frame and scope of The Unitary State of Republic of Indonesia. The Court's consideration in regard to Article 4 paragraph (3) of the Forestry Law in Court Decision Number 34/PUU-IX/2011 shall be applicable *mutatis mutandis* for Article 4 paragraph (3) of Forestry Law in the case *a quo*. In relation to constitutionalism review of Article 4 paragraph (3) Forestry Law on the phrase of *"Article 4 paragraph (3) on the phrase "if any (read: indigenous peoples) still in existence and their existence is acknowledged as well as consistent with the national interest"* is legally founded in part, and according to the Court, Article 4 paragraph (3) of Forestry Law is conditionally unconstitutional toward the 1945 Constitution, therefore it does not have binding legal force insofar as it is not construed as follows: "*Forest concession by the State shall keep taking into account the rights of indigenous peoples, insofar as they*

still in existence and in accordance with societal development and principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law";

[3.13.3] The Petitioners argued that Article 5 paragraph (1) of the Forestry Law is inconsistent with Article 1 paragraph (3), Article 28C paragraph (1), Article 28D paragraph (1), Article 28G paragraph (1), and Article 33 paragraph (3) of 1945 Constitution. Legal reasons in the petition *a quo* is in line with Article 1 point 6 of Forestry Law;

In regard to that argument, The court consider that provision set forth in Article *a quo* is related with Article 1 point 6 of Forestry Law as already considered abovementioned. Therefore, legal reasoning on Article 1 point 6 Forestry Law is applicable *mutatis mutandis* to petion on Article 5 paragraph (1) of the Forestry Law. However, because Article *a quo* regulates categorisation of legal relationship between subject of law and the forest, including the land on which contained a forest then 'customary forest' as one of the category shall be stated strictly as one of the categories concerned, so that provision on ***'category of title forest within should include customary forest'***;

Based on abovementioned legal reasoning, according to the Court, provision in Article 5 paragraph (1) of Forestry Law is *conditionally unconstitutional* toward the 1945 Constitution, therefore it does not have binding legal force insofar as it is not construed as follows *"State forest as referred to in paragraph (1) point a, does not include customary forest".* Title forest consists of customary forest and private/legal entity owned forest;

On state forest, as consequnces for forest concession by the state, the state can give forest management to the village to be used for the welfare of rural communities, and state forest can also be used for community development. Therefore, the Petitioners' argument on review of Article 5 paragraph (1) of Forestry Law is legally founded in part;

[3.13.4] Provision in Article 5 paragraph (1) of Forestry Law is explain in the Elucidation of Forestry Law. Elucidation on Article 5 paragraph (1) Forestry Law states:

"State forests may be form in customary forest; a state forest given to be managed by indigenous peoples (rechtsgemeenschap). The customary forest formerly called customary

forests, clan clan, seignorial forest, or other callings. Forest managed by the community is included in definition of state forest as a consequence of the rights of forest concession by the State, as an organization of power of all people at the highest hierarchy and the principles of the Unitary State of Republic of Indonesia. Inclusion of customary forest in the definition of state forest does not negate the rights of indigenous peoples insofar remain in existence and recognized, to perform management activities. State forest managed by the village and utilized for the welfare of the village is called village forest. State forest which main utilization is targeted to empower community is called community forest. Title forest located on the land encumbered by proprietary is commonly called people's forest;"

Although the Petitioner did not petitioned any review on Elucidation of Article 5 paragraph (1) of Forestry Law, according to the Court, Elucidation of Article 5 paragraph (1) Forestry Law is closely related and formed in unity with Article 5 paragraph (1) Forestry Law. Therefore, the Court need to give legal assessment on Elucidation of Article 5 paragraph (1) Forestry Law, although it is not petitioned to be reviewed by the Petitioners;

Whereas the Forestry Law was approved and enacted on September 30, 1999. Therefore, the formation of Forestry Law should refer to the Presidential Decree No. 44 of 1999 on on the Technique to Prepare Laws and Government Regulations and the Form of Proposed Bills, Draft Government Regulations and Draft Presidential Decrees (hereinafter referred to as Presidential Decree 44/1999), which was set on May 19, 1999. According to the prevailing custom in the practice of drafting legislation, which also recognized as legally binding, elucidation serves to explain the substance of the norms contained in the Article and not adding new norm, let alone including the inconsistent substance to the norms elucidated.

Annex I to Presidential Decree 44/1999 states that basically the elucidation cannot be used as a basis for the subject matter set forth in the main text/body. Therefore, formulation adjustment of the norm in the main text/body should be clear and does not raise any doubts. Elucidation serves as an official interpretation on a particular matter, but cannot be used as the legal basis to make further regulations. Therefore, the making of formulation of norms in elucidation section should be avoided;

Considering that the custom had been ignored by the legislator in formulating Elucidation of Article 5 paragraph (1) of Forestry Law as it contains hidden alteration. This was evident from the fact that Elucidation of Article 5 paragraph (1) of Forestry Law has set a new norm with different meaning to the norm contained in Article 5 paragraph (1) of Forestry Law. According to the Court, there is a formulation of norm within the Elucidation of Article 5 paragraph (1) Forestry Law that should be set forth in the main text/body of Forestry Law

In regard to the content of Elucidation of Article 5 paragraph (1) of Forestry Law, according to the Court, legal assessment on Article 5 paragraph (1) of Forestry Law shall also apply to Elucidation of Article 5 paragraph (1) of Forestry Law, which asserts that state forest may formed in customary forest. In legal assessment on Article 5 paragraph (1) of Forestry Law, the Court argue that title forest should be construed that title forest consists of customary forest and private/legal entity owned forest. Thus, customary forest are included in the category of title forest, not state forest; Based on the above legal considerations, according to the Court, Elucidation of Article 5 paragraph (1) of Forestry Law is inconsistent with the 1945 Constitution;

[3.13.5] The Petitioners argued that Article 5 paragraph (2) Forestry Law is inconsistent with Article 1 paragraph (3), Article 28C paragraph (1), Article 28D paragraph (1), Article 28G paragraph (1), and Article 33 paragraph (3) of 1945 Constitution. Legal resons in petition *a quo* is in line with Article 1 point 6 and Article 5 paragraph (1) of Forestry Law;

In regard to that argument, the Court considered that provision set forth in Article *a quo* is related to Article 1 point 6 and Article 5 paragraph (1) of Forestry Law therefore legal considerations given for those two articles are applicable *mutatis mutandis* to review on Article 5 paragraph (2) Forestry Law. Therefore, the Petitioners' argument is legally founded;

[3.13.6] The Petitioners argued that Article 5 paragraph (3) of Forestry Law on the phrase of *"and paragraph (2); and customary forest shall be stipulated if any (read: indigenous peoples) still in existence and their existence is acknowledged"* is inconsistent with Article 1 paragraph (3), Article 18B paragraph (2), Article 28D paragraph (1), dan

Article 28**I** paragraph (3) of 1945 Constitution, because the Article *a quo* is difficult to be understood, difficult to enforced fairly and has disriminated indigenous peoples;

In regard to that argument, the Court considered that since review on Article 5 paragraph (2) has been declared legally founded and inconsistent with 1945 Constitution and does not have binding legal force then the phrase of *"and paragraph (2)"* in Article 5 paragraph (3) of Forestry Law is no longer relevant and shall be declared not having binding legal force. Meanwhile, on the phrase of *"and customary forest shall be stipulated if any (read: indigenous peoples) still in existence and their existence is acknowledged",* the Court argued that the phrase is right as it is in line with constitutional provision set forth in Article 18B paragraph (2) and Article 28I paragraph (3) of 1945 Constitution;

Therefore, formulation of Article 5 paragraph (3) of Forestry Law shall be read as follows, *"The Government shall determine status of the forest as referred to in paragraph (1*), *and customary forest is stipulated insofar the indigenous peoples* concerned remain in existence and their existence is acknowledged;

[3.13.7] The Petitioners argued that Article 5 paragraph (4) of Forestry Law is inconsistent with Article 1 paragraph (3), Article 18B paragraph (2), Article 28D paragraph (1), dan Article 28I paragraph (3) of 1945 Constitution because it limits the rights of indigenous peoples to use product of natural resources contained within its customary forest and has discriminated the indigenous peoples;

On that argument, the Court has given its legal considerations on constitutionalism review of Article 4 paragraph (3) of Forestry Law in paragraph **[3.13.2]** on the phrase of *"Article 4 paragraph (3) on the phrase "if any (read: indigenous peoples) still in existence and their existence is acknowledged as well as consistent with the national interest"*.

Based on that considerations, according to the Court, if in its development, the indigenous peoples in concern has extinct then it is appropriate to give management rights of customary forest back to the Government, and the status of the customary forest is changed to state forest. Therefore, Petitioners' argument *a quo* is not legally founded;

[3.13.8] The Petitioners argued that Article 67 paragraph (1) Forestry Law on the phrase of *"if any (read: indigenous peoples) still in existence and their existence is acknowledged"* is inconsistent with Article 1 paragraph (3), Article 18B paragraph (2), Article 28D paragraph (1), and Article 28**I** paragraph (3) of 1945 Constitution because it limits the rights of indigenous peoples to use product of natural resources contained within its customary forest and has discriminated the indigenous peoples. Moreover, the Petitioners also argued that Article 67 paragraph (2) of Forestry Law is inconsistent with Article 1 paragraph (3), Article 18B paragraph (2), Article 28D paragraph (1), and Article 28I paragraph (3) of 1945 Constitution because procedures for affirmation of indigenous peoples and abolishment of indigenous peoples by Regional Regulation is an unconstitutional provision;

On that argument, the Court considered that Article 67 paragraph (1), paragraph (2), and paragraph (3) of Forestry Law contain similar substances with Article 4 paragraph (3) of Forestry Law in context of phrase of *"Article 4 paragraph (3) on the phrase "if any (read: indigenous peoples) still in existence and their existence is acknowledged".* Therefore, legal consideration on Article 4 paragraph (3) of Forestry Law regarding context of phrase of *"Article 4 paragraph (3) on the phrase "if any (read: indigenous peoples) still in existence and their existence is acknowledged" apply mutatis mutandis* to the review on Article 67 paragraph (1), paragraph (2), and paragraph (3) of Forestry Law;

In addition, according to the Court, the existence of indigenous peoples, functions and status of forest (customary), forest concession, require insofar still in existence and their existence is acknowledged, therefore all legal considerations abovementioned apply *mutatis mutandis* in this legal consideration. As for the affirmation and the abolishment of indigenous peoples established by regional regulation and further provisions stipulated in Government Regulation, according to the Court is a delegation of authority set forth in Article 18B paragraph (2) 1945 Constitution which states *"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*".

To date the law mandated by Article 18B paragraph (2) of 1945 Constitution has not formed yet. Because of the urgent need, many legislations born before the law in question is formed. This can be understood in order to fill the legal vacuum in order to ensure legal certainty. Thus, regulations set through Government Regulation and Regional Regulation can be justified insofar these regulations guarantee a fair legal certainty. After all determination of boundaries of state forest and customary forest cannot be determined only by the state but based on Court Decision Number 34/PUU-IX/2011 dated July 16, 2012, which should involve stakeholders in the area concerned. Therefore Petitioners' argument is not legally founded;

4. CONCLUSIONS

Based on the aforementioned considerations of facts and laws, the Court has come to the following conclusions:

[4.1] The Court has authority to hear the petition *a quo;*

[4.2] The Petitioner has legal standing to file the petition *a quo;*

[4.3] The Petitioner's arguments are legally founded in part;

Based on the Constitution of the State of the Republic of Indonesia Year 1945, Law Number 24 Year 2003 concerning the Constitutional Court as amended by Law Number 8 Year 2011 concerning the Amendment to Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2011 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 5226), as well as Law Number 48 Year 2009 concerning Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076);

5. INJUNCTION OF DECISION

Handing Down the Decision,

Declaring:

1. To grant the Petitioner's petition in part;

1.1. The word "*state*" in Article 1 point 6 of Law Number 41 Year 1999 concerning Forestry (State Gazette of the Republic of Indonesia Year 1999 Number 167, Supplement to the State Gazette of the Republic of Indonesia Number 3888) is inconsistent with the 1945 Constitution of the State of the Republic of Indonesia;

1.2. The word "*state*" in Article 1 point 6 of Law Number 41 Year 1999 concerning Forestry (State Gazette of the Republic of Indonesia Year 1999 Number 167, Supplement to the State Gazette of the Republic of Indonesia Number 3888) does not have binding legal force, therefore Article 1 point 6 of Law No 41 of 1999 on Forestry to read as follows *"customary forest is a forest located in indigenous peoples area"*;

1.3. Article 4 paragraph (3) Law Number 41 Year 1999 concerning Forestry (State Gazette of the Republic of Indonesia Year 1999 Number 167, Supplement to the State Gazette of the Republic of Indonesia Number 3888) is inconsistent with 1945 Constitution insofar as it is not construed as follow *"Forest concession by the State shall keep taking into account the rights of indigenous peoples, insofar as they still in existence and in accordance with societal development and principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law*";

1.4. Article 4 paragraph (3) Law Number 41 Year 1999 concerning Forestry (State Gazette of the Republic of Indonesia Year 1999 Number 167, Supplement to the State Gazette of the Republic of Indonesia Number 3888) does not have binding legal force insofar as it is not construed as follow *"Forest concession by the State shall keep taking into account the rights of indigenous peoples, insofar as they still in existence and in accordance with societal development and principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law*";

1.5. Article 5 paragraph (1) Law Number 41 Year 1999 concerning Forestry (State Gazette of the Republic of Indonesia Year 1999 Number 167, Supplement to the State Gazette of the Republic of Indonesia Number 3888) is inconsistent with 1945 Constitution insofar as it is not construed as follow *"State forest as referred to in paragraph (1) point a, does not include customary forest";*

1.6. Article 5 paragraph (1) Law Number 41 Year 1999 concerning Forestry (State Gazette of the Republic of Indonesia Year 1999 Number 167, Supplement to the State

Gazette of the Republic of Indonesia Number 3888) does not have binding legal force insofar as it is not construed as follow *"State forest as referred to in paragraph (1) point a, does not include customary forest";*

1.7. Elucidation of Article 5 paragraph (1) of Law Number 41 Year 1999 concerning Forestry (State Gazette of the Republic of Indonesia Year 1999 Number 167, Supplement to the State Gazette of the Republic of Indonesia Number 3888) is inconsistent with 1945 Constitution;

1.8. Elucidation of Article 5 paragraph (1) of Law Number 41 Year 1999 concerning Forestry (State Gazette of the Republic of Indonesia Year 1999 Number 167, Supplement to the State Gazette of the Republic of Indonesia Number 3888) does not have binding legal force;

1.9. Article 5 paragraph (2) of Law Number 41 Year 1999 concerning Forestry (State Gazette of the Republic of Indonesia Year 1999 Number 167, Supplement to the State Gazette of the Republic of Indonesia Number 3888) is inconsistent with 1945 Constitution;

1.10. Article 5 paragraph (2) of Law Number 41 Year 1999 concerning Forestry (State Gazette of the Republic of Indonesia Year 1999 Number 167, Supplement to the State Gazette of the Republic of Indonesia Number 3888) does not have binding legal force;

1.11. The phrase *"and paragraph (2)"* dalam Article 5 paragraph (3) of Law Number 41 Year 1999 concerning Forestry (State Gazette of the Republic of Indonesia Year 1999 Number 167, Supplement to the State Gazette of the Republic of Indonesia Number 3888) is inconsistent with 1945 Constitution;

1.12. The phase *"and paragraph (2)"* in Article 5 paragraph (3) of Law Number 41 Year 1999 concerning Forestry (State Gazette of the Republic of Indonesia Year 1999 Number 167, Supplement to the State Gazette of the Republic of Indonesia Number 3888) does not have binding legal force, so that Article 5 paragraph (3) of Law Number 41 Year 1999 concerning Forestry shall be read as follow *"The Government shall determine status of the forest as referred to in paragraph (1*), *and customary forest is*

stipulated insofar the indigenous peoples concerned remain in existence and their existence is acknowledged*"*;

2. To order the publication of this decision properly in the Official Gazette of the Republic of Indonesia;

3. To reject the other and the remaining parts of the Petitioner's petition;

In witness whereof, this decision was made in the Consultative Meeting of Justices by nine Justices of the Constitutional Court, namely Moh. Mahfud MD., as the Chairperson and concurrent Member, Achmad Sodiki, Ahmad Fadlil Sumadi, Harjono, M. Akil Mochtar Muhammad Alim, Hamdan Zoelva, Maria Farida Indrati, dan Anwar Usman, respectively as Members, on Tuesday, the twenty sixth of March two thousand and thirteen, and was pronounced in the plenary session of the Constitutional Court open for the public on Thursday, the sixteenth of May two thousand of thirteen, selesai diucapkan pukul 15.05 WIB by nine Justices of the Constitutional Court namely M. Akil Mochtar, as the Chairperson and concurrent Member, Achmad Sodiki, Ahmad Fadlil Sumadi, Harjono, Muhammad Alim,Hamdan Zoelva, Maria Farida Indrati, Anwar Usman, dan Arief Hidparagraph, respectively as Members, assisted by Dewi Nurul Savitri as Substitute Registrar, as well as in the presence of the Petitioner or his attorney, the Government or its representative and the People's Legislative Assembly or its representative.

CHIEF JUSTICE,

sgd.

M. Akil Mochtar

JUSTICES,

sgd.	**sgd.**
Achmad Sodiki	**Ahmad Fadlil Sumadi**
sgd.	**sgd.**

Harjono	**Muhammad Alim**
sgd.	**sgd.**
Hamdan Zoelva	**Maria Farida Indrati**
sgd.	**sgd.**
Anwar Usman	**Arief Hidparagraph**

SUBSTITUTE REGISTRAR,

sgd.

Dewi Nurul Savitri