

**NONRETROACTIVE PRINCIPLE FOR BUSINESS GUARANTEES IN EXISTING
PLANTATION COMPANIES FOLLOWING THE CONSTITUTIONAL COURT DECISION
NUMBER: 138/PUU-XIII/2015**

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ABSTRACT

This study examines the legal implications of Constitutional Court Decision No. 138/PUU-XIII/2015 concerning palm oil plantation businesses in Indonesia, particularly regarding the requirement to obtain both a Plantation Business License (IUP) and Land Use Rights (HGU) cumulatively. While the decision was intended to ensure legal compliance, environmental accountability, and sustainable land governance, it has inadvertently created legal uncertainty for companies that had lawfully operated with only an IUP prior to the ruling. This has raised significant concerns about the retroactive application of legal norms and the risk of criminalizing actions that were previously considered lawful. By applying the principles of legal certainty, non-retroactivity, and justice within a democratic state governed by law, this research emphasizes the urgent need for transitional legal frameworks. These frameworks should aim to harmonize regulatory enforcement with investment protection, uphold the rule of law, and prevent arbitrary state actions. Ultimately, this study advocates for policy reforms that balance environmental objectives with the legal rights and economic security of legitimate business actors in the plantation sector.

Keywords: Legal Certainty, NonRetroactive Principle, Constitutional Court Decision

INTRODUCTION

Indonesia, as stipulated in Article 1 paragraph (3) of the 1945 Constitution, is a state based on law (*rechtstaat*), which mandates that all actions of the government and its citizens must be subject to and governed by law. This foundational principal place law as the highest norm in regulating various aspects of life, including governance, societal behavior, and economic activity. In practice, the notion of state of law in Indonesia is manifested through efforts to establish legal certainty, ensure justice, and maintain order particularly within sectors that significantly impact national development. One of these critical sectors is agriculture, with the palm oil industry emerging as a major economic driver. The palm oil industry contributes substantially to Indonesia's gross domestic product (GDP), employment, foreign exchange reserves, and rural development. According to data from the Central Statistics Agency (Badan Pusat Statistik), in 2024 there were 2,281 palm oil plantation companies operating across 26 provinces, and the total export value reached approximately USD 27.76 billion. This positions palm oil as a strategic export commodity, crucial to the country's economic resilience and food security.

However, the rapid expansion of the industry has also exposed it to complex legal and regulatory challenges, particularly concerning land use rights and licensing. Under Law No. 39 of 2014 concerning Plantations, Article 42 stipulates that plantation business activities may only be carried out by companies that have both a Plantation Business License (IUP) and Land Use Rights (HGU). The use of the term "and/or" in this article became the subject of a judicial review, culminating in the Constitutional Court Decision No. 138/PUU-XIII/2015. The Court ruled that the phrase must be interpreted cumulatively, not alternatively meaning companies must possess both IUP and HGU to

operate legally. This ruling, while aimed at strengthening governance and environmental accountability, inadvertently caused legal uncertainty for hundreds of companies that had already operated with only an IUP, based on previously applicable legal norms. The Ministry of Agrarian Affairs and Spatial Planning/National Land Agency (ATR/BPN) recorded that as of October 2024, at least 537 companies had IUPs but lacked HGUs, covering around 2.5 million hectares of land. Consequently, many of these companies now face allegations of illegality, despite their operations having been lawful at the time of establishment.

From a legal perspective, this raises serious concerns regarding the non-retroactive principle, which posits that legal norms especially judicial decisions should not be applied retroactively to penalize or delegitimize actions that were lawful under previous rules. This principle is essential in ensuring legal certainty and protecting the legitimate expectations of business actors. Its violation not only undermines investor confidence but also disrupts the continuity of national development efforts, particularly in sectors that rely on long-term planning and capital investment, such as plantations. Moreover, the application of the Constitutional Court's decision without transitional legal mechanisms has led to real socio-economic consequences, including land disputes, law enforcement uncertainty, and stalled licensing processes. There is an urgent need for a more nuanced approach one that respects constitutional interpretation while acknowledging the legal and economic realities of businesses operating in good faith under prior laws.

The challenge, therefore, lies in harmonizing constitutional mandates with legal consistency and predictability. Businesses, particularly in capital-intensive sectors like palm oil plantations, require a stable legal environment to operate and grow. Sudden changes in legal interpretations without adequate transitional measures can disrupt long-term investments and erode trust in the legal system. This underscores the importance of ensuring that judicial decisions are implemented with foresight and sensitivity to their broader implications. This article aims to explore and analyze the juridical implications of Constitutional Court Decision No. 138/PUU-XIII/2015 on palm oil plantation companies that commenced operations prior to the ruling. It focuses on the intersection between legal certainty, the principle of non-retroactivity, and the necessity for transitional legal policies (*transitional justice*) that uphold both rule of law and economic justice. The study also reflects on the broader implications for regulatory reform in Indonesia's natural resource governance.

METHODS

This study employs a descriptive normative legal approach, focusing on the norms, principles, and legal doctrines related to electronic land certificates and their implications for legal certainty. It analyzes the law in its written form, in accordance with applicable laws and regulations. The descriptive nature of the study aims to provide a systematic and accurate overview of the application of the non-retroactive principle to ongoing plantation companies following the Constitutional Court Decision No. 138/PUU-XIII/2015. This includes the legal basis, characteristics, implementation process, and the juridical impact on legal certainty and legal protection. Data is obtained through literature review, using primary legal materials such as the 1945 Constitution of the Republic of Indonesia, the Basic Agrarian Law (UUPA), the Plantation Law, and other relevant legislation, as well as secondary legal materials including books, journals, and scholarly articles. Data analysis is conducted qualitatively using legal interpretation methods, including grammatical, systematic, and

historical interpretations, to identify legal norms and principles and to link them with the theories of the rule of law, legal certainty, and legal protection.

RESULT AND DISCUSSION

The Position of The Non-Retroactive Principle for Business Guarantees for Plantation Companies That Have Been Operating Since the Constitutional Court Decision Number 138/PUU-XIII/2015

According to Mochtar Kusumaatmadja, general legal principles are the fundamental principles that underpin the entire structure of the modern legal system, providing direction in the formation and application of positive legal norms. J.H.P. Bellefroid views legal principles as fundamental rules that serve as guidelines for assessing the validity of a legal regulation, even for testing its validity. Paton adds that principles are broad, fundamental ideas that serve as the foundation for the birth of legal norms. Therefore, the existence of a legal norm must always refer to and return to the underlying legal principles. Van Eikema Hommes emphasizes that legal principles are not concrete norms, but rather general principles that provide direction and spirit for applicable law. In line with this view, Ron Jue states that legal principles are fundamental values that form the basis of all legal rules.

One fundamental principle in law is the principle of non-retroactivity, which rejects the retroactive application of a legal rule. This principle has been known since the early 19th century and is universally accepted in various branches of criminal, civil, constitutional, and economic law, both nationally and internationally. Black's Law Dictionary defines retroactivity as "extending in scope or effect to matters that have occurred in the past," or extending to affect events that occurred in the past. This principle is a universal principle in law and has been recognized in the Indonesian legal system since the colonial era through Article 2 of the Law on the Applicability of Laws (AB), which states that laws are not retroactive. In the context of criminal law, this principle is identical to the principle of legality as stipulated in Article 1 paragraph (1) of the Criminal Code (KUHP). The application of the principle of non-retroactivity essentially aims to protect human rights from becoming victims of injustice due to the retroactive application of laws by arbitrary powers.

In the Indonesian legal system, this principle is reinforced in Article 28I paragraph (1) of the 1945 Constitution, which states that the right not to be prosecuted under retroactive laws is a human right that cannot be diminished under any circumstances. Therefore, the principle of non-retroactivity is an important foundation for maintaining legal certainty and protecting citizens' legitimate expectations, particularly in the context of legislation and judicial review decisions by the Constitutional Court. The Constitutional Court, as the executor of judicial power in the constitutional field, has final and binding decisions, as stipulated in Article 24C paragraph (1) of the 1945 Constitution. One important characteristic of Constitutional Court decisions is their prospective nature (*ex nunc*), meaning they apply going forward from the date the decision is pronounced, not backward (*ex tunc*). According to Bagir Manan, the use of the term "void" in the context of prospective Constitutional Court decisions indicates that the norm being reviewed remains in effect until it is annulled by a Constitutional Court decision. This is emphasized in Article 58 of the Constitutional Court Law, which states that a law remains in effect until it is declared contrary to the 1945 Constitution.

This principle is crucial given that Constitutional Court decisions can impact many parties. Therefore, the application of the principle of non-retroactivity also applies to Constitutional Court decisions. Retroactive application, for any reason, is undesirable because it can create legal uncertainty, arbitrariness, and bias in the implementation of law and politics. Prof. Indriyanto Seno Adji emphasized that the prohibition on retroactivity is a manifestation of the rule of law and a hallmark of a democratic state that guarantees fair trials. In practice, Constitutional Court decisions can be divided into two forms. First, self-executing decisions, namely decisions that can be implemented immediately without the need for changes to the law. Second, non self-executing decisions, namely decisions whose implementation awaits action by the legislative or executive branch.

Constitutional Court Decision No. 138/PUU-XIII/2015 is a concrete example of how changes to norms impact pre-existing legal entities. This ruling stated that the phrase "and/or" in Article 42 of Law No. 39 of 2014 concerning Plantations must be interpreted cumulatively, meaning that plantation business activities can only be conducted if both land rights and a plantation business permit are held simultaneously. This undoubtedly impacted many plantation companies that had previously legally operated solely with a Plantation Business Permit (IUP) without a Right to Cultivate (HGU), as this was the prevailing legal provision at the time.

PT. Agro Nusa Abadi is a subsidiary of PT. Astra Agro Lestari Tbk, a Limited Liability Company established under the laws of the Republic of Indonesia and domiciled in East Jakarta, pursuant to Deed of Establishment of the Limited Liability Company Number 2 dated September 6, 2006, drawn up before Notary Ir. Rusli, S.H., which has been legalized by the Decree of the Minister of Justice of the Republic of Indonesia Number: W8-00741 HT.01.01-TH.2006 Dated November 22, 2006, Deed Number: 50 Dated April 8, 2022 made before Notary Anita Dewi Kartika, S.H., M.Kn., which has been received and recorded in the Legal Entity Administration System by the Ministry of Law and Human Rights Number: AHU-0026545.AH.01.02. April 12, 2022 with the latest amendment deed Number: 28 dated April 2, 2024 made before Notary Anita Dewi Kartika, S.H., M.Kn., which has been received and recorded in the Legal Entity Administration System by the Ministry of Law and Human Rights Number: AHU-AH.01.09-0135322 dated April 3, 2024 which carries out oil palm plantation business activities located in 7 villages, namely Bungintimbe Village, Bunta Village, Peboa Village, Tompira Village, Molino Village, Towara Village and Towara Pantai Village, Petasia Timur District, Morowali Regency now North Morowali Regency, Central Sulawesi Province.

In carrying out its business activities, PT Agro Nusa Abadi has obtained permits, namely the Decree of the Regent of Morowali No. 188.45/0760/UMUM/2008 dated December 8, 2008 concerning the Granting of Location Permit for the Purposes of PT. Agro Nusa Abadi's Palm Oil Plantation Business in Petasia District. Morowali Regent's Letter No. 525.26/0479/UMUM/2007 dated April 27, 2007 concerning the Approval of Palm Oil Plantation Business Permit on behalf of PT. Agro Nusa Abadi and North Morowali Regent's Decree No. 188.45/KEP.B.MU/0096/VII/2014 dated August 20, 2014 concerning the Approval of the Renewal of Location Permit for Integrated Palm Oil Plantation Business and Other Supporting Facilities to PT. Agro Nusa Abadi in Petasia District, Morowali Regency, Central Sulawesi Province. North Morowali Regent's Decree No. 188.45/KEP.B.MU/0097/VII/2014 dated August 20, 2014, concerning the Approval of the Renewal of an Integrated Palm Oil Plantation Business License with a Palm Oil (CPO) and Palm Kernel

(KERNEL) Processing Plant with a Processing Capacity of 60 Tons/Hour to PT. Agro Nusa Abadi in Petasia District, Morowali Regency, Central Sulawesi Province.

Based on the laws and regulations at that time, PT Agro Nusa Abadi was able to commence its palm oil plantation business activities, provided that it would verify and validate data on any land claimed by others for compensation. Based on the data below, PT Agro Nusa Abadi had already completed the compensation process with a total percentage of 82.15 percent. This has not been fully implemented due to the impact of Constitutional Court Decision Number 138/PUU-XIII/2015. Since then, PT Agro Nusa Abadi has been considered an illegal company because it lacks a Land Use Right (Hak Guna Usaha). This concern has been continuously voiced by environmental activists, farmer activists, and the surrounding community.

As a result, PT Agro Nusa Abadi has struggled to complete the compensation process due to the community's brainwashed perception of PT Agro Nusa Abadi as an illegal company. Residents have begun entering PT Agro Nusa Abadi's plantation grounds, claiming land, looting and stealing oil palm fruit, threatening PT Agro Nusa Abadi employees who are about to harvest the fruit, and filing civil lawsuits in court. Then, PT Agro Nusa Abadi made a new breakthrough to comply with the latest regulations after the Constitutional Court Decision Number 138/PUU-XIII/2015, namely by dividing the location permit per village to submit an application for Cultivation Rights in several villages that have been compensated with a percentage of 100%, namely in Towara Village, Towara Pantai Village and Peboa Village, this shows the seriousness of PT Agro Nusa Abadi to continue to implement the mandate of the Constitutional Court Decision Number 138/PUU-XIII/2015.

On November 9, 2023, the author interviewed M. Ridha Saleh, S.Sos., M.H., Expert Staff to the Governor of Central Sulawesi for Food Security, Agriculture, Plantations, Horticulture, Animal Husbandry, and Natural Resources, to obtain his views on the applicability of the principle of non-retroactivity in the context of PT Agro Nusa Abadi's legal status following Constitutional Court Decision Number 138/PUU-XIII/2015. In the interview, M. Ridha Saleh emphasized: "In a legal context, the principle of non-retroactivity is a fundamental principle that must be respected. Changes to legal norms must not be applied retroactively to the point of declaring a previously legal activity to be illegal later. This would violate the principle of legal certainty for business actors. Therefore, a fair legal approach must consider the Constitutional Court Decision as non-retroactive, meaning it is only binding for legal events after the date the decision was pronounced, not going back. Therefore, the accusation that PT Agro Nusa Abadi is illegal is legally incorrect." "In fact, the Governor of Central Sulawesi issued a Recommendation Letter dated November 28, 2022, which stated in point 7: "The Central Sulawesi National Land Agency (BPN) Regional Office is requested to immediately process the HGU application for PT. Agro Nusa Abadi for a village that has been declared Clear and Clean (CnC) in Petasia District, East Morowali Regency, North Sulawesi."

He further expressed concern over the social impact of the misinterpretation of the ruling. The erroneous perception that PT Agro Nusa Abadi is an illegal company has disrupted investment and social stability. This interview reinforces the importance of consistent application of the principle of non-retroactivity to maintain justice and legal certainty for businesses, while preventing social conflict due to misunderstandings about the legal impact of court decisions. In this context, the application of the principle of non-retroactivity is crucial. Changes to legal norms should not be applied retroactively, declaring previously legitimate activities illegal. This contradicts the principles

of legal certainty and legitimate expectations that the state must protect for businesses. Therefore, a just legal approach should view the Constitutional Court's decision as valid *ex nunc*, binding only for events occurring after the decision was pronounced. Therefore, it can be concluded that a Constitutional Court decision declaring a provision of a law unconstitutional should not be applied retroactively but only applies going forward from the date of its official pronouncement. This aligns with the constitutional characteristics of the Constitutional Court and ensures the principles of a democratic state governed by the rule of law.

Legal Certainty in Business for Plantation Companies Will Be Affected Following Constitutional Court Decision Number 138/PUU-XIII/2015

Legal certainty is an essential element of the principle of a state based on law. Indonesia is a state based on law, as stated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. In Indonesia, the concept of a state based on law has been developed into a Pancasila State under Law. According to Padmo Wahyono, this concept does not deviate from the universal concept of a state based on law but is adapted to local values and the Pancasila ideology as the foundation of the state. A Pancasila State under Law positions law not only as a tool of power but also to achieve social justice for all Indonesian people.

Following Constitutional Court Decision No. 138/PUU-XIII/2015, several plantation companies experienced legal uncertainty. This ruling mandated cumulative ownership of IUP and HGU permits, without since many companies had already obtained IUPs and were in the process of obtaining HGU permits a process that, in practice, often involves social, technical, and administrative obstacles. In this situation, many companies were categorized as "illegal" or faced accusations of violating the law, despite previously operating legally. Constitutional Court Decision No. 138/PUU-XIII/2015 marked a significant turning point in plantation business regulation in Indonesia, particularly in the context of the relationship between permits and land rights. In the ruling, the Court declared that the provisions of Article 42 of Law No. 39 of 2014 concerning Plantations were unconstitutional insofar as they were not interpreted to mean that plantation business activities could only be conducted if the business actor possessed land rights and/or permits. Consequently, business actors were required to have a Land Use Right (HGU) before commencing business activities; a Plantation Business Permit (IUP) alone was not sufficient.

The change in normative meaning interpreted by the Court through this ruling had serious implications for legal certainty in business, particularly for companies that had previously operated within the then-current legal framework. One of the companies directly affected was PT. Agro Nusa Abadi, a subsidiary of PT Astra Agro Lestari Tbk., which had been established and operated under a valid permit from the local government. PT Agro Nusa Abadi was established with a deed of establishment approved by the Ministry of Law and Human Rights and renewed periodically until 2024. The company operates oil palm plantations in seven villages in East Petasia District, North Morowali Regency, with formal legal support in the form of a Location Permit and a Plantation Business Permit from the Morowali and North Morowali Regents, as stipulated in regulations in effect prior to the Constitutional Court ruling.

However, following Constitutional Court Decision No. 138/PUU-XIII/2015, claims emerged that PT Agro Nusa Abadi was operating illegally because it lacked a HGU (Cultural Land Use Right).

This view was exacerbated by narratives from activist groups and some members of the public who equated the lack of an HGU with the invalidity of all company activities. This claim is not only normatively incorrect, but also threatens legal certainty for business and investment, and impacts social and security conditions on the ground. Actions such as land grabbing, employee intimidation, and civil lawsuits are clear examples of the legal uncertainty following the ruling. The theory of legal certainty, explained by Gustav Radbruch, states that the law must be predictable, generally applicable, and not subject to sudden change. This principle is crucial to guarantee that every citizen, including business actors, knows their rights and obligations in carrying out their activities. The Constitutional Court's decision, if applied without regard to the principle of non-retroactivity, could lead to legal ambiguity by rendering previously legal actions seemingly unlawful. Legal certainty is necessary so that the public, including business actors, can plan and carry out their activities with peace of mind and direction. Echoing Radbruch, Hans Kelsen also emphasized the importance of a clear legal normative structure to avoid confusion in its application.

According to Utrecht, legal certainty means that the law provides protection against the possibility of arbitrary action by authorities, so that citizens are fully aware of their rights and obligations. In the context of PT Agro Nusa Abadi, uncertainty arose due to an ex post facto change in legal interpretation, which resulted in the company's legal status becoming unclear, despite having followed valid procedures according to the provisions at the time. The principle of non-retroactivity is an important principle that aligns with the principle of legal certainty. In this context, changes to legal norms cannot be applied retroactively. This was also emphasized in an interview with M. Ridha Saleh, S.Sos., M.H., Expert Staff to the Governor of Central Sulawesi, that the Constitutional Court's decision is only prospectively binding and does not apply to legal events that occurred before the decision was pronounced. Therefore, the accusation that PT Agro Nusa Abadi is illegal is inaccurate and contradicts the principle of legal justice. This was emphasized by Paul Scholten, who stated that justice cannot be achieved if new regulations are applied to past situations that were resolved according to the law in force at the time.

From the perspective of legal protection theory, Philipus M. Hadjon distinguishes between preventive and repressive legal protection. Preventive legal protection aims to prevent violations of citizens' rights, while repressive legal protection aims to resolve legal violations that do occur. In the case of PT Agro Nusa Abadi, the indecisive application of the non-retroactive principle and the absence of a post-decision normative transition mechanism eliminate the preventive legal protection aspect for business actors who have complied with the law previously. Satjipto Rahardjo also explains the theory of legal protection, arguing that law should not be understood merely as a rigid norm, but rather as a living and responsive tool for social justice. In the concept of law as a tool of social engineering, law must protect the interests of the wider community, including the certainty and sustainability of investment as part of economic development.

Lon L. Fuller emphasizes the importance of the "internal morality of law," namely, that good law must be known, stable, and not subject to sudden change. If the law changes abruptly without sufficient transition or socialization, the law loses its moral legitimacy. This is particularly relevant in the context of the change in the interpretation of Article 42 of the Plantation Law, which has widespread retroactive impacts.

PT Agro Nusa Abadi has taken concrete steps to comply with the Constitutional Court's ruling, namely by dividing location permits into villages to allow for gradual HGU applications. In Peboa, Towara, and Towara Pantai villages, HGU applications have been submitted because the entire compensation process has been 100% completed. This demonstrates the company's commitment to adapting to the new normal, without neglecting community rights and legal integrity. The local government also supports this initiative. The Central Sulawesi Governor's Recommendation Letter dated November 28, 2022, stated that PT Agro Nusa Abadi's HGU application can be processed immediately for areas declared clear and clean (CnC). This letter demonstrates that regional authorities understand the legal context prevailing before and after the Constitutional Court ruling and support a stable investment climate. The lack of legal certainty in this situation creates systemic risks to long-term investment in the plantation sector. If any changes to norms are applied retroactively, it will impact not only PT Agro Nusa Abadi but also all businesses operating under previous regulations. This contradicts the spirit of legal certainty and legal protection that should be provided to businesses to ensure a conducive business climate in Indonesia, as guaranteed by Article 28D paragraph (1) of the 1945 Constitution concerning guarantees of fair legal certainty.

CONCLUSION

The principle of non-retroactivity is a universal legal doctrine that serves as a cornerstone of justice, legal certainty, and the protection of legitimate expectations within the legal system. In the Indonesian context, this principle is firmly rooted in both statutory and constitutional provisions, especially as emphasized in Article 28I paragraph (1) of the 1945 Constitution. The decision of the Constitutional Court in Case Number 138/PUU-XIII/2015, which changed the interpretation of Article 42 of the Plantation Law, should therefore be applied prospectively (*ex nunc*), in line with the nature of Constitutional Court rulings. Applying the decision retroactively, especially to companies that were legally established and operated under previously valid regulations such as PT Agro Nusa Abadi, is contrary to the principle of non-retroactivity and undermines the rule of law.

The legal uncertainty that followed the ruling has had significant implications not only for PT Agro Nusa Abadi but for the broader plantation industry in Indonesia. Misinterpretation of the Court's decision led to reputational damage, operational disruptions, and social tensions, even though the company had complied with existing laws at the time. Theories of legal certainty and legal protection, as advanced by scholars such as Gustav Radbruch, Utrecht, Satjipto Rahardjo, and Philipus M. Hadjon, reinforce the need for a legal system that is stable, predictable, and just. Therefore, future legal and regulatory reforms must incorporate transitional mechanisms to prevent abrupt normative shifts that retroactively impact businesses. This ensures the creation of a fair, transparent, and conducive legal environment for sustainable economic development in accordance with the ideals of a Pancasila-based rule of law.

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