WEAK COUNTRY PROTECTION AGAINST TRIAL PEOPLE'S LAND RIGHTS IN GLOBAL ECONOMIC DEVELOPMENT

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ABSTRACT

Indonesia's national economic development facing the global economy is supported by open investment through the use of natural resources in the form of land. For customary law communities, land has an important role apart from being a place to live, it also shows the existence of a tribe in a certain area. Therefore, the Indonesian national constitution recognizes and respects indigenous peoples and their traditional rights. The empirical fact is that quite a lot of customary law community lands have been confiscated for investment purposes which will result in the loss of the customary rights of indigenous peoples. It is interesting to study: (1) What is the position of customary community rights in Indonesian national law politics; and (2) How does the legal protection of the customary rights of the customary law community face economic globalization. The approach method is normative juridical, descriptive analysis research specifications, types and sources of data derived from secondary data supported by primary legal materials, secondary legal materials, and tertiary legal materials. The data analysis was done qualitatively. Research Results: (1) The politics of Indonesia's national agrarian law is based on customary law as a form of recognition of the customary rights of indigenous peoples with conditions if in fact they still exist, are in accordance with national interests, and do not conflict with the provisions of laws and regulations; and (2) The large number of land grabs that have been legalized by the government in supporting the global economy shows that the government has not been optimal in protecting the customary rights of indigenous peoples.

Keywords: Development, Investment, Customary Land, Plunder

INTRODUCTION

Towards 100 years of Indonesian independence, in 2045 Indonesia has a vision of realizing the level of welfare of the Indonesian people with high quality human resources (HR), becoming a developed country with high income and becoming one of the world's fifth largest economic powers.

In order to accelerate the realization of the Vision of the Unitary State of the Republic of Indonesia, and to accelerate the improvement of Indonesia's economic competitiveness and growth in the era of economic globalization, the Indonesian government under President Joko Widodo has taken several steps including strengthening infrastructure development to support economic development and basic services as a national strategic program through optimizing the utilization of Indonesia's natural resource potential.

National development requires financial support from both the APBN and APBD, as well as the availability of sufficient land / land. Realizing that there are limited funding in financing infrastructure development and utilization of Natural Resources (SDA), the government provides wide opportunities for investors to participate in national economic development through providing easy permits to utilize Natural Resources (SDA) and agrarian resources through a right. on certain lands such as Business Use Rights (HGU).

Apart from requiring financial support, national development also requires the availability of sufficiently large land. Land is an important and strategic resource because it involves the very basic life needs of all Indonesian people, because land has characteristics that are multi-

dimensional, multi-sectoral, multi-disciplinary and have high complexity (Rosalina, 2010). However, the limited land, imbalances in land tenure structure, the absence of the same perception among state managers regarding land control by the state, the inconsistency of the state with regard to land, the lack of state support for the economically weak communities, and the lack of recognition of the customary rights of indigenous peoples is one of the causes of conflict in the land sector (Mali, Tue, Gian, Fransiskus, X, 2015).

Based on the 2020 Agrarian Reform Consortium (KPA) report, there were 241 agrarian conflicts in 30 provinces spread over 359 villages / cities, which affected 135,332 families. The highest conflict occurred in plantations with 122 cases with a land area of 230,887.8 ha, followed by conflicts that occurred in forestry with 41 cases with a land area of 312,158.1 ha. Then, KPA noted that there had been 30 agrarian conflicts in the infrastructure development sector, 17 of which were caused by national strategic projects (PSN) including in the development of strategic national tourism areas, airport development, toll roads, dams, ports, and premium tourism areas, along with infrastructure. supporters (Kartika, Dewi, 2021).

The agrarian conflict related to infrastructure development and the granting of Business Use Rights (HGU) above is a vertical / structural conflict which shows the expropriation of lands that are owned or cultivated and occupied by indigenous peoples by the state (government) and / or owners of large capital / capital through legitimacy support. legal instruments in the form of statutory provisions such as Law No. 5/1967 concerning the main provisions of forestry as amended by Law No. 41 of 1999 concerning Forestry, Law No.1 / 1970 concerning Foreign Investment and Law No. 6 of 1968 as amended by Law No. 25 of 2007, as well as Government Regulation no. 40 of 1996 concerning Business Use Rights, Building Use Rights, and Land Use Rights.

If accumulated, from 2015 to 2020 the total number of structural conflicts was 2,288 cases and each year continues to increase, which has a major impact on the lives of indigenous peoples who are increasingly marginalized in obtaining and defending their rights.

Responding to the continuing conflicts in the land sector, it is interesting to study: First, what is the position of customary community rights in Indonesian national legal politics, and second, how is the state's protection for the existence of customary community rights in the era of the global economy.

METHOD

This study uses a normative juridical approach as an approach that refers to written regulations or other legal materials secondary. The use of this normative juridical approach is given that the problems studied are related to the recognition and protection of the customary rights of indigenous peoples in the era of economic globalization. Then, the research specification is descriptive analytical with the aim of providing a general and comprehensive description of the object being studied or researched (Soekanto, Soerjono, 2010). Then, the types and sources of data used in this study are secondary data in the form of primary legal materials as legal materials that have binding power in the form of legal regulations that are related to the issue of recognition and protection of customary community rights. Furthermore, it is supported by secondary legal materials consisting of books and journals relevant to the field of study, as well as tertiary legal materials such as general dictionaries. Finally, data analysis is carried out qualitatively in which the data obtained is then systematically compiled and then analyzed to achieve clarity on the issues discussed. After the data is analyzed, then a conclusion is drawn using the deductive thinking method, which is a thinking pattern based on general matters, then a conclusion is drawn (Hadi, Soetrisno, 1995).

FINDINGS AND DISCUSSION

The Position of Indigenous Peoples' Ulayat Rights in Indonesian National Law Politics

Development of Indonesian law has gone through a transformation that is long enough based Pancasila as the state philosophy *(Philosophische Grondslag),* view of life *(way of* life),and the ideals of law *(rechtsidee)*of the Indonesian nation (Wijaya, Hendra, Made, 2015). Therefore, the concept of a rule of law in Indonesia which is often translated by *Rechtstaats* as reflected in the

1945 Constitution of the Republic of Indonesia. The fourth amendment to Article 1 paragraph (3) is "a rule of law based on Pancasila" (Wijaya, Hendra, Made, 2015).

Indonesia is a constitutional state that has the characteristics of multiculturalism with all the richness and diversity of races, ethnicities, cultures, customs, and religions, constitutionally it has received recognition from the state as contained in Article 18B paragraph (2) of the 1945 Constitution which states that: "The state recognizes and respect customary law communities and their traditional rights as long as they are still alive and in accordance with community development and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law ".

The customary law community which is termed *rechtgemeenschapt* or *the indigenous people* is a genealogical or territorial community unit that lives in an area (ulayat) where they live and a certain environment, has their own wealth and is a leader who is responsible for protecting the interests of the group, and has rules and regulations (an independent legal system (Taqwaddin, 2010).

In terms of "confession" (*erkenning)* is a process, method, act of confessing or acknowledging, according to Hans Kelsen in his book *General Theory of Law and State*, from this recognition there are 2 actions, namely political action and legal action. Political action is implemented with political relations and other relations with society that it acknowledges. Then, legal action is an acknowledgment of the existence of indigenous peoples through statutory provisions (Alting, Husen, 2010).

Legislation that strengthens the provisions of Article 18 B paragraph (2) of the 1945 Constitution, namely Article 28I paragraph (3) of the 1945 Constitution which states that cultural identity and traditional society are respected in accordance with the development of times and civilization. Apart from the 1945 Constitution, several sectoral laws also guarantee the recognition of the rights of indigenous peoples, including: TAP MPR No. IX / MPR / 2001 concerning Agrarian Reform and Management of Natural Resources, through the provisions of Article 4; Law Number 5 of 1960 concerning Basic Agrarian Basic Regulations (UUPA); Law No. 39 of 1999 concerning Human Rights Article 6 paragraph (2); Law No. 41 of 1999 concerning Forestry, Article 1 letter f, and Article 4 paragraph (3), Article 5 paragraph (1) (2), and Article 67 paragraph (1); Law No. 22 of 2001 concerning Oil and Natural Gas Article 34 paragraphs (1) and (2), Law No. 7 of 2004 concerning Water Resources Article 6 paragraph (2); Law No. 18 of 2004 concerning Plantations, Article 9 paragraph (2), Law no. 31 of 2004 concerning Fisheries as amended by Law no. 45 of 2009 Article 6 paragraph (2); Law Number 26 of 2007 concerning Spatial Planning; Law Number 32 Year 2009 concerning Environmental Protection and Management; Law Number 6 of 2014 concerning Villages; Law Number 23 of 2014 concerning Regional Government; and Law Number 39 of 2014 concerning Plantations (Ismail, Ilyas, 2010; Gayo, Ari, Ahyar, 2018).

Recognition of the existence of customary law communities' customary rights in Law no. 5 of 1960 concerning the Basic Regulations of the Principles of Agrarian Affairs is regulated in Article 3 which reads: "By considering the provisions in articles 1 and 2 the implementation of customary rights and rights is similar to those of customary law communities, as long as in reality there are , must be in such a way that is in accordance with the national and state interests, which are based on national unity and must not conflict with laws and other higher regulations "(Saleo, Admon, 2014). The customary rights in the customary library called *beschikking recht* are lands that are jointly controlled by indigenous peoples, where the management arrangements are carried out by customary leaders (adat heads) and the utilization of which is intended for both the members of the customary law communities concerned and outsiders (Ngakan, Oka , Putu, 2005).

Then, customary rights according to Article 1 number 1 Agrarian Regulation / Head of BPN No. 5 of 1999 is the authority which according to customary law is owned by certain customary law communities over certain areas which are the environmental areas of its citizens to take advantage of natural resources, including land in the said territory, for their survival and livelihood, arising from relationships physically and spiritually, from generation to generation and there is no disconnection between the customary law community and the area concerned. Furthermore, according to Article 1 point 2, ulayat land is a plot of land on which there is the ulayat right of a certain customary law community (Syuryani, 2016).

According to Boedi Harsono, the subject of customary rights is customary law communities who live in a certain area which is divided into 2, namely: (1) territorial customary law communities where residents live in the same place, and (2) genealogical customary law communities where the citizens are bound by blood ties.

For the Customary Law Community (MHA), land is a very valuable asset, not only as a place to live to carry out the routine of daily life, land is also a symbol and prestige that shows the existence of a tribe or people in a certain area, so it is known as land. land with the status of ulayat nagari, ulayat tribes, or ulayat clan (Warman and Hengki, 2014; Sumardjono, Maria SW, 2008).

Recognition of customary rights above, does not only exist in the regional, national dimensions, but also in the international dimension (Samosir, Djamanat, 2013). The recognition and respect of the international community in providing protection of customary rights began with The United Nations Charter in 1945. In its development, various international conventions containing respect and protection of customary rights include: (1) *The Universal Declaration of Human Rights (1948);* (2) *The United Nations Convention on the Prevention and Punishment of the crime of Genocide (1951);* (3) *Rio Declaration on Environment and Development (1992)*; and (4) *Agenda 21 (UN Conference on Environment and Development (1992).*

Recognition and protection of the rights of indigenous peoples has an important meaning, because the tradition of indigenous peoples was born and existed long before the Unitary State of the Republic of Indonesia was formed and the existing formulations. In the Preamble to the 1945 Constitution which contains Pancasila as a view of life in which it contains noble values, a mindset, and the spirit of customary law as a reflection of the national personality.

However, in its development, referring to Article 3 of the UUPA, there are several conditions that must be met by customary rights, namely:) As long as the reality is that indigenous peoples still exist, (2) In accordance with national and state interests, and (3) Not in conflict with laws and higher regulations. Furthermore, based on Article 18 B paragraph (2) of the 1945 Constitution, state recognition The customary rights are carried out by taking into account: (1) The existence of a customary law community and its traditional rights ; (2) The recognized existence is the existence of indigenous peoples; (3) The indigenous peoples are alive (still alive); (4) In environment (*lebensraum)* a certain; (5) Such recognition and respect are given without neglecting the measure of worthiness for humanity in accordance with the level of development of the nation's existence; and (6) recognition and respect must not reduce the meaning of Indonesia as a country in the form of a unitary state of the Republic of Indonesia (Ashiddiqie, Jimly, 2003; Jawahir, Thontowi, 2013).

The existence of various requirements that must be met by customary law communities and their customary rights, shows that there is recognition of the existence of customary rights from the State, but at the same time limits this recognition. The government does not provide enough space to live for social and cultural diversity (customary law), through the weakening and destroying of the rights of indigenous peoples to become a modern society, as well as efforts to subdue customary / local laws and try to turn them into formal / positive law / national (Saleo, Admon, 2014). In the implementation aspect, the customary rights of the customary law community must not conflict with the national, nation and state interests as well as other higher level laws and regulations, so that the interests of a customary law community must be subject to the higher and broader interests of the public, nation and state. . This conditional recognition shows the amount of state authority in legitimizing the customary rights of indigenous peoples so that such a paradigm is not in accordance with the principles of equality and autonomy that exist in democracy, which guarantees pluralism (Salam Ignas Tri, 2006).

Legal Protection of Customary Rights of Customary Law Community Facing Economic Globalization.

Economic globalization through the WTO regime is marked by the depletion of the boundaries of economic or market activities nationally or regionally, has increased interdependence between countries, not only in international trade, finance and production, but also in investment activities with the ideological dimensions of capitalism (Zaroni, Nur, Akhmad, 2015). Likewise, the economic policies of developing countries including Indonesia since the 1980s have shifted towards economic liberalization, but still based on the constitution as required

in Article 33 paragraph (4) of the 1945 Constitution, which states that: "The national economy is organized. based on democracy with the principles of togetherness, equitable efficiency, sustainability, environmental insight, independence, and by maintaining a balance between progress and national economic unity "(Faniyah, Iyah. 2017; Arliman S. Laurensius. 2018).

The opening up of the flexibility to invest as an effort to get around the limitations of national development funding, due to the large need for national development investment that cannot be funded from state financial sources. Indonesia's investment needs in 2019 are around IDR 5,557.4-5,606.8 trillion. Of the total investment needs, government investment will contribute 7.3-7.9 percent. Apart from the government, BUMN capital expenditures are expected to contribute IDR 448.7-727.8 trillion, while the rest will come from the private sector amounting to IDR 4,397.5-4,701.4 trillion, with the target of realization of foreign and domestic investment (PMA and PMDN) in the amount of Rp. 833.0 - 870.0 trillion, as illustrated in the table below.

Table 1. Investment Needs 2019

Description	Score (Rp Triliun)	Share Percent
The Total Investment Requirement	5.557,4-5.606,8	100,0
Government Investment	407,3-481,5	7,3-7,9
BUMN Investment	448,7-727,8	8,1-10,2
Private Investment	4,397,5-4.701,4	81,9-84,6

Source: 2018 Bappenas Calculations

In addition, to prepare land needs for the implementation of national development, through Article 33 paragraph (3) of the 1945 Constitution, the Indonesian national constitution mandates that the control of the earth, water and natural resources contained therein be used for the greatest prosperity of the people "(Abdurrahman, Alif, 2019). Following up on these provisions, on September 24, 1960 the Government passed Law No. 5 of 1960 concerning Basic Agrarian Principles. The meaning of the word controlled according to Article 33 paragraph (3) of the 1945 Constitution is not owned, as *Agrarisch Besluit (Staatsblad* 1870 Number 118) as the implementing rule of *Agrarische Wet (AW* 1870) with the concept *domein verklaring* states that land whose ownership cannot be proven is considered as owned land. Country (Rejeki Ningsih, Triana, 2011).

Juridically, the meaning of controlling as regulated in Article 2 paragraph (2) of the UUPA, which is to give authority to the state as the highest authority organization to: (1) regulate and administer the allotment, use, supply and maintenance of the said earth, water and space; (2) determine and regulate legal relations between people and earth, water and space, (3) determine and regulate legal relations between people and legal actions concerning earth, water and space, (4) Everything with the aim of achieving the greatest prosperity of the people in the framework of a just and prosperous society (Maramis, R. Marhcel, 2013). The authority of the state, in the implementation of its granting either to a person or a legal entity, must pay attention to the limitations of the 1945 Constitution, and pay attention to the customary rights of the customary law community in the area as long as it still exists (Harsono, Boedi, 2004).

However, the empirical pact that opens up investment opportunities in Indonesia is often the cause of the confiscation of land rights of indigenous peoples, both by the government and the private sector, with government support, resulting in horizontal conflicts in the development process. Based on data submitted by the Consortium for Agrarian Reform, in 2020 there were 241 agrarian conflicts, with an area of 624,272,711 in 30 provinces as can be seen from the figure below.

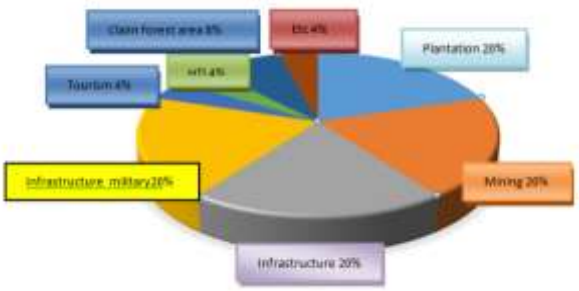
Figure 1. 2020 Conflict Spread In Each Province

In 2020 there were 241 agrarian conflict eruptions, with an area of 624,272, 711 H in 30 provinces Source of the Consortium for Agrarian Reform

Specifically for the typology of agrarian conflicts in plantations in 2020 there were 122 conflicts, meaning that there was a 28% increase in conflicts from 2019. Based on the commodity, the conflict was dominated by oil palm-based plantations with 101 conflicts. Then followed by sugarcane, rubber, tea, coffee plantations, and so on, and based on the ownership of business entities, for BUMN plantations 12 cases and private plantations 106 cases. Structural agrarian conflicts show land grabbing over lands that have been cultivated and occupied by customary law communities for years through legal legitimacy facilitated by the government against investors who have strong capital and networks (Kartika, Dewi, 2020).

The recognition and respect of the government for the customary rights of indigenous peoples both in the constitution and through various laws and regulations, in practice shows the lack of state legal protection for the customary rights of indigenous peoples, because according to Plato and Aristotle as pioneers of the theory of legal protection, the law should provide protection. Human rights that have been harmed by others and that protection is given to the community in order to enjoy all the rights provided by law. Law should be able to function to realize protection which is not only adaptive and flexible, but also predictive and anticipatory. Law is needed for parties who are weak and not yet strong socially, economically and politically in order to obtain social justice (Mertokusumo, Sudikno, 2009). In fact, the sources of livelihood for the customary rights of indigenous peoples, amounting to 2,359 indigenous communities throughout Indonesia, with around 17 million individual members are deprived for infrastructure development such as toll roads, military and police infrastructure, plantations, mining and others as depicted in the figur in below: (SAFE, 2020).

Figure 2. Land Alocation



One example of conflict in the plantation sector is the overlap in the granting of HGU plantation land use permits with the ulayat rights of customary communities. The state based on

the right to control the state according to Article 33 paragraph (3) of the 1945 Constitution which is implemented through Article 28 of the UUPA concerning HGU grants the authority to exploit land that is directly controlled by the state, for agricultural, fishery or livestock companies, which cover an area of at least 5 ha, with provisions if the area is 25 hectares or more must use proper capital investment and good company techniques in accordance with the times that can be transferred and transferred to other parties, and HGU is granted for a maximum period of 25 years.

Referring to the above provisions, plantation HGUs are only granted on state land. Therefore, when ulayat rights are required for HGU, ulayat land must be released and its status changed to state land. This condition is detrimental to the customary law community because after going through the process of granting HGU to entrepreneurs, it results in the elimination of the customary rights of the customary law community.

Furthermore, referring to Article 12 paragraph (1) (2) of Law No. 39 of 2014, in the event that the land required for the plantation business through HGU is Land Rights of Customary Law Communities, the Plantation Business Actor must conduct deliberations to obtain approval regarding the transfer of land and its compensation, and the deliberations with the customary law community holders are carried out accordingly. with the provisions of laws and regulations (Warman, Kurnia. Andora, and Hengki, 2014).

The existence of a "phrase" deliberation must be carried out based on the provisions of the legislation indicating the provisions of Law No. 39 of 2014 concerning Forestry is contrary to the national constitution as regulated in Article 18D paragraph (2), Article 28D paragraph (1), and Article 28I paragraph (3) of the 1945 Constitution which has provided recognition and protection of the customary rights of indigenous peoples. In addition, there is an attempt by the government to direct and subvert customary / local law to formal / positive / national law (Saleo, Admon, 2014), because the concept of deliberation and consensus in customary law has its own legal institutions and instruments as part of community life that is not regulated. in writing in the statutory regulations as confirmed in the Decision of the Constitutional Court No. 35 / PUU-X / 2012 in the case of reviewing Law No. 41 of 1999 concerning Forestry.

Examining various problems faced by customary law communities shows that indigenous peoples need a long struggle to obtain legal recognition of their identity and collective rights due to the weak *political will* government in providing protection to the customary rights of indigenous peoples.

CONCLUSION

The Indonesian National Constitution recognizes and respects indigenous peoples and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia. Recognition of the customary rights of indigenous peoples not only at the regional, national level, but also at the international level. However, the existence of various requirements that must be met by customary law communities and their customary rights, shows that the Government does not provide space to live for social and cultural diversity (customary law), through weakening and destroying the rights of indigenous peoples to become a modern society.

Economic globalization with the opening of investment space for domestic and foreign investors, which is legitimized by the government through the granting of business permits on the land of the customary law communities, has an impact on the loss of the rights of the customary law community. This shows the government's weakness in providing protection for the customary rights of indigenous peoples.

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