

Land Policies for the Benefit of State, Investors and Indigenous People in the Natural Resources Exploitation

St. Laksanto Utomo

Lecturer

Master Program of Law Science

Esa Unggul University

Jakarta, Indonesia

laksanto@gmail.com

Abstract— Cases involving land disputes can never be receded and tend to increase in terms of complexity of the problem and its quantity as economic, social, and political dynamics. It needs a systematic handling. Various efforts to resolve land disputes through the existing litigation process are considered not able to resolve existing disputes, so that alternative efforts such as mediation, facilitation and others are offered to minimize land for the sake of economic and social. Therefore, it is necessary to have a government agency that makes "One Roof" in issuing land utilization policy so as to avoid any overlapping and conflicting government policies. Any policies that support the utilization of land for the welfare of the People should be set forth in the Act so that every other institution can obey it and not just be the policy of one agency alone. In addition, there is also a need for regulation in the legislation on land affairs by providing legal protection to indigenous peoples' lands. It is recommended to add legal protection points for customary lands and lands that are handed down through the generations of the Basic Agrarian Law by including the point: "The State recognizes and protects the lands owned by the citizen-managed and any change of ownership of the land must be approved by the state and the manager "

Keywords— *harmonization of land policy, indigenous peoples, basic agrarian law*

I. INTRODUCTION

The dominant paradigm and policy of development today is oriented towards industrialization to boost economic growth[1]. This paradigm and policy stems from the capitalism on the modern science paradigm which assumes that "tradition is a problem" and impedes development. Although the modern science is not fully successful in explaining complex ecological systems. This complex ecological system is very diverse, spatially and temporally, and causes generalization efforts to have little meaning, especially to provide input to the sustainable resource use perspectives. Scientific societies have tended to simplify complex ecological systems, with the result of a series of problems in the use of natural resources and environmental degradation.

In order to support such a development paradigm and policy, a lot of highly centralized political and legal tools are technocratic and repressive. National laws are applied

uniformly by ignoring regional and local disparities, which in turn kill off indigenous peoples' autonomy, law and institutions. The marginalization process of indigenous peoples in the development and management of these natural resources in turn awaken the cultural counter movement, the cultural resistance movement of indigenous peoples to the persistence and exclusion of local institutions and laws that have been respected and confirmed in the management of their natural resources.

The conditions and problems faced by indigenous peoples are regulated with other regions in Indonesia is varied. There is, however, a fundamental similarity among them as a minority population, that is, the experience of life is suppressed, exploited and removed in such a long time, by other dominant and dominant populations. These indigenous peoples become minorities not merely because of their small populations but more sourced from their conditions as groups of people with specific, locally specific socio-cultural ideologies, socio-cultural systems, and socio-political systems, both built on regional equality living together from generation to generation (territorial base) as well as on the equality of the ancestor (blood relation) or the combination of the two.

Legal certainty in land ownership is regulated in Law No. 5 of 1960 and Government Regulation No. 10 of 1961 which has been amended by Government Regulation No. 24/1997, among others regulated registration: Sale and Purchase, Grant and Inheritance, land registration regulation is individual, economical (capitalist) and tends to destroy local wisdom[2].

Indigenous peoples own their legal culture, attitude, customary and way of thinking[3]. For example, the Samin / sikep Society tends to be more apathetic, skeptical, because the rules are written, binding, general and static, coming from top down[4]. State law is the modernization of law; the modernization of law is done to provide opportunities for industrialization and business activities through national law, the way this law is encouraged by the value of capitalism[5]. In traditional societies such as indigenous peoples in Papua there will be some constrained problems as revealed by Unger[6];

“all traditionalistic societies have dual structure, often sharply divided between the modern and the non-modern sector, and in all of them “traditional” institutions serve more or less effectively as instruments of “modernization”, and with effects the ultimately overflow the economic and the technological sphere and contribute to the transformation of the culture and the social structure’.

The clash of regulations and the circumstances of indigenous people can be categorized as a depressed cultural burden[7]. According to Bernard, the condition in the Sabu society makes people experience mental illness process that occurs due to clash between the rules of society with state law[8]. The constructivism paradigm is a part of providing conditions and situations so that people can engage, understand and implement without coercion because the rules are very inspirational, so there needs to be changes or implementation that the regulation can be achieved to obtain legal certainty and guarantee ownership of the community. Changes in legal concepts that answer the demands for social needs according to the situation and timing are necessary according to Philippe Nonet and Philip Selznick[9].

II. DISCUSSION

Land conflicts related to natural resource exploration activities are common in Indonesia. During 2017 the land area that became conflict in the mining sector amounted to 45,792.8 hectares¹. For example, exploitation of karts by PT Semen Indonesia in Rembang, Central Java, also long tail. Residents who refuse mining are at odds with the government. Citizens filed a lawsuit to the Supreme Court to evaluate the mining permit signed by Governor Ganjar Pranowo.

In October 2016, the Supreme Court won the people and ordered the governor to revoke the permit. Even so, the problem is not immediately completed. The government is still insisting on mining continues the road. In the coastal area there is a conflict that led to the death of Salim Kancil, farmer of Selok Awar-Awar Village, Lumajang, and East Java. He rejected iron sand mining in 2015. Until now the conflict there has not been completed.

Sunyoto Usman[10], describes the occurrence of land conflicts as a result of the impact of industrial activities that are closely related to the form of social relationships that exist between the stakeholders of the community, government, industry entrepreneurs, and other agencies (including non-governmental organizations and religious institutions) activity is directly related to all three. Furthermore Paul Conn[11], the dispute can be caused by two things:

- a. Plurality is horizontal; culturally such as race, nation, religion, language, and race; and compound horizontally socially in terms of differences in occupations and professions.
- b. Vertical pluralism, like the structure of society polarized according to the possession of wealth, knowledge, and power.

Muchsin said the common source of land disputes can be divided into 5 (five) groups[12]:

- a. The dispute was caused by policies during the New Order period

- b. Overlapping Regulation of Laws on Agrarian Resources
- c. Overlap of land use
- d. The quality of human resources from the apparatus implementing the regulation of agrarian resources
- e. Changes in people's mindset over land tenure

Land as the economic right of everyone, drives conflict and dispute. Conflict, by definition Coser is as follows:

“Conflicts involve struggles between two or more people over values, or competition for status, power, or scarce resources”[13].

If the conflict is real (manifest), then it is called a dispute[13]. To anticipate the growing land conflicts, quality and quantity those are not relevant to the provisions of the Law, a new legislation that regulates the land conflict in accordance with the needs of the development of science in the field of penology and victimology that can provide legal protection in accordance with sense of community justice[14].

Specifically and practically for resolving land conflicts and avoiding the views of law enforcement officials who overly adhere to the positivistic and legalistic legal propositions and concepts of law and lack of attention to and developing living law, it is necessary to develop an interface model as a consequence of character land conflict that is a model of judiciary that combines the consideration of social science to facts containing normative values and formal judicial considerations of a legislation that sociologically less follow the social changes and the development of the law against the material law (*materiele wederrechtelijkheid*)[14].

The issuance of the UUPA 1960 is interpreted that the law is a political product. That is, to accommodate a certain policy required a legal basis as legalization and legitimacy. Therefore, the existing law needs to be adjusted to the political direction it desires. For this purpose, a clear philosophical foundation is sought. It is in this connection that UUPA 1960 uses a philosophical foundation of its relation to land rejecting the theory of individualism by giving rise to social functions. Debates about legal relationships between individuals or even countries with land, are not new.

The root of land conflicts is a fundamental factor causing land conflicts. The root of land conflicts is important to identify and inventoried in order to find a way out or the form of settlement that will be done. The root causes of land conflicts in outline may be generated by the following: (1) a conflict of interest, namely the existence of competing interests related to substantive interests, procedural interests, as well as psychological interests, (2) structural conflict, caused by patterns of destructive behavior, control of unbalanced resource behavior, (3) value conflict, due to different criteria used to evaluate ideas / behavior, lifestyle differences, ideology or religion / beliefs, (4) relationship conflicts, caused by excessive emotions, false perceptions, bad or false communication, repetition of negative behavior, (5) data conflicts, caused by incomplete information, misinformation, different opinions on relevant matters, interpretation of the data, and different assessment procedures. Common causes of land conflicts can be grouped into two factors, namely legal factors and non-legal factors.

¹ Catatan Akhir Tahun 2017 Konsorsium Pembaharuan Agraria.

A. Legal aspect

Some of the legal factors at the root of recent land conflicts include:

1) *Overlapping rules.*

BAL as the parent of the regulation in the field of other agrarian resources, in its journey made several laws related to agrarian resources but did not put the BAL as the parent law, even putting the law on par with the agrarian law. BAL which was originally a legal umbrella for land policy in Indonesia, became non-functional and substantially contradicted by the issuance of various divisional regulations such as the Forestry Law, Mining Law, Transmigration Law and others.

2) *Court overlaps.*

At present, there are three judicial institutions that can handle land conflicts, namely civil courts, criminal justice and state administrative courts (TUN). In the form of a particular conflict, one of the winning parties is not necessarily criminally victorious (in the case of a conflict accompanied by a crime).

B. Non-Legal Factors.

1) *Overlap of land use.*

Over time, rapid population growth resulting in increasing population, while production food remains or may be reduced due to a lot of agricultural land the switch function. It is inevitable that in a plot the same soils may arise of different interests.

2) *High economic value of land.*

The existence of global developments and the increasing development of science and technology have an effect on increasing public awareness. People's mindset towards society also changed. Related to the land as a development asset, it appears that the change of mindset of the community to the control of the land, that is no longer placing the land as a source of production but to make the land as a means for investment or economic commodities.

4) *Land is fixed, the population increases.*

Rapid population growth through both birth and migration and urbanization, as well as a fixed amount of land, makes the land a very high value economy commodity, so that every inch of the land is kept as strong as possible.

5) *Poverty.*

Poverty is a complex problem that is influenced by various interrelated factors. Limited access to land is one of the causes of poverty in terms of limited assets and productive resources accessible to the poor.

Another study that shows the factors that cause the right to control the country then in practice there is a deviation because "in the implementation of national development oriented to simply pursue the target / rate / quantity of economic growth (growth growth) without ignoring the process dimensions in the last three decades also caused a dispute in the regions, disputes between government and / or business actors with Indigenous communities as they are carried out using a security and repressive approach by marginalizing local values, local legal norms, traditions and beliefs ". Conclusion from the description in advance is the

study of Nurjaya more put forward on the perspective of how the factors causing the occurrence of deviation of state authority in the form of the controlling rights of the socio-economic-anthropological country, thus giving a picture that the factor of "interest or interest that arises from State officials or his group to deviate from the people's mandate. Socio-economic facts that underlie or influence why such deviations occur one of them because the neo-capitalism that occurred in the early 1970s at least affect the two products of important legislation in the field of investment that is Act No.1 of 1967 on Planting Foreign Capital (PMA) and Law No.6 Year 1968 on Domestic Investment (PMDN). Based on the influence of the neo-capitalist ideology, the influence of the current law on the product of legislation can be evidenced by the terminology or for the sake of development, in many cases bringing the implications of the interests of the people to be "sacrificed".

Enforcement and protection of economic, social, and cultural rights should be the concern of all citizens. By knowing the conditions of such a nation, it is highly unlikely to depend entirely on government initiatives in enforcing and protecting those rights. The role of the wider community in this case deserves to be involved. As a democratic nation, optimizing the role of civil society can be an alternative in protecting and safeguarding economic, social and cultural rights. Civil society belonging to various community organizations: NGOs, religious groups or campus communities can be a movement pioneer. The above groups can play an active role in influencing policy makers or legislative processes in parliament.

The role of legislators and policy makers is a very central role. Therefore, influencing them should be the first and foremost priority in the civil society movement that wants to uphold and protect the rights of the ecosphere. This can be done through legal process in the form of political lobbying and audiences. Another aspect that can be done is to utilize the media (both print and electronic), by making various opinions that lead to the importance of enforcing the rights of the ecosystem. In some developed countries, the media has a major role in influencing every public policy-making process.

The economic obstacles, will be the biggest stumbling block. Civil society is not a single player in terms of influencing public policy. In the current economic and poverty context, civil society must also deal with "investors" who share interests with decision makers. Conflict of interest between the power of capital and the interests of the people cannot be avoided. Here it takes on a strong civilian movement and not easily broken brown in the face of the collision.

Given the important role of legislation in the Indonesian legal system in moving social change towards the desired goals, the 1960 BAL can serve as one of the examples that carry out the function. UUPA 1960 can be cited as an example of a law that raises the type of change. The desired type of change of BAL 1960 is a structural change. That is, qualitatively would change the structure of relations between people and land in Indonesia. By Satjipto Rahardjo, it is mentioned that this can be found in the explanatory chapter, as follows.

1. Laid down the basis of nationalism, namely by asserting that the whole of Indonesia is the unity of the homeland

of all the people of Indonesia, united as the nation of Indonesia (Article 1 verse 1) and declares that everything is a gift of God and is a national treasure (paragraph 2);

2. Eliminate the original domain principle, which contains the provision that the state is the owner of lands not owned by an individual. This principle is replaced by the principle of the state as the governing body.
3. To lay the groundwork for the relationship between Customary Rights (hak Ulayat) and state power;
4. The social function of property rights.
5. The principle, that the land can only be owned by Indonesian citizens only.
6. The principle that every citizen of Indonesia has equal opportunity to obtain the right to land and benefit and the result.
7. Laying the groundwork for land reform.
8. Laying the groundwork for land use.

As a step to build the national legal system of land, it does not escape the enormous challenge that the Indonesian nation must face, it is necessary to have the wisdom of the state (in this case the government) to consider the following factors:

1. Globalization is defined as the process of forming the world's catalyst system or it can be said that the globalization is essentially the movement of international capitalism. The fundamental question pertaining to this process is whether globalization is profitable and does globalization ensure that a group of countries benefits and the other does not lose money? According to Arie Sukanti, the Basic Agrarian Law has provided guidelines on Article 9 Paragraph (1) which states that: "Only Indonesian citizens can have full relationship with earth, water, space within the boundaries of Articles 1 and 2" (Boedi Harsono, 2003: 38). Referring to the above signs, foreign investment, especially transnational corporations, is still open, given space through the provision of Right to Use of Land as stipulated in Articles 41-43 of the Basic Agrarian Law and Government Regulation No. 40/1996.
2. Human rights (HAM), is one of the basic principles of national land law that is a fair and civilized principle of humanity in land issues in accordance with the Second Precept of Pancasila. As a universal provision, the question of human rights is a basic provision that must be implemented and developed in all countries which declare themselves to be a modern democratic state, namely to protect and recognize relationships or relationships between citizens and the land and the state is not allowed to take let alone by forcible land (object) with the subject (holder of land rights) in any way, and required to regulate it into legislation. Indonesia has established a legal instrument relating to human rights in Law No. 39 of 1999 on Human Rights. It is also related to the concept utilitarian, then the goal to be achieved in relation between human to the land is the greatest happiness of the greatest number. It takes place in a free market atmosphere as in this case. Economic freedom is based on a wealth of modernization that will only materialize in a free market atmosphere. In this case wealth (wealth) has been viewed as a value (value). (Achmad Sodiki, 2000: 9). Thus, in the relation of the subject of rights to the land, the public interest which is essentially bordering on the general benefit or from Fiqh

(Islamic law) is called kemaslahatan (prosperity), not to the right of individuals or a group of people ultimately sacrificing the public interest. Therefore, if activities involving the public interest sacrifice the individual's interest, then the activity must still ensure the maintenance of basic human rights and guarantees, namely:

- a. Salvation of religious beliefs;
 - b. Soul safety;
 - c. Safety of reason;
 - d. Family safety and heredity;
 - e. Safety of property.
3. Regional Autonomy as regulated in Law Number 22 Year 1999 regarding Regional Government Article 11 amended by Law Number 32 Year 2004 particularly Article 13 letter k and Article 14 letter k which has meaning as the authority of autonomous region, to regulate and take care of the local community's interests according to their own initiative based on community aspirations, in accordance with the laws and regulations. This means in relation to the land aspect, then within the framework of the unitary state of the republic of Indonesia, the freedom to regulate and manage the land affairs shall be within the framework of the basic policy and the subject of the provisions of the land law applicable nationally as stated in the sentence: "in accordance with the rules legislation". The consequence of that sentence, then the autonomy clearly does not mean the handover of the arrangement and management of all aspects of land issues completely to the respective district and city (Arie Sukanti, 2003: 40-41). It is this meaning that in many regions of Indonesia almost leads to multiple interpretations that lead to: conflict of norms, institutional conflicts, conflict of interest between the central government and the regions, cities with villages, provinces and districts.
 4. People's disappointment with the state accumulates as the state fails to fulfill its obligations, especially its basic obligations to citizens in basic fulfillment: food, education, protection and recognition of private property, health eventually accumulates and develops socialistic views which, according to its supporters are the most able to address structural inequalities in society and will be realized through a frontal social movement. Back to the question of the role of agrarian law in the state of Indonesia, the function of agrarian law as said Achmad Sodiki (2000: 15) is to keep the law of agrarian in addition to be a means of change and normative protection for both advanced and underdeveloped segments of society, while maintaining the integrity of the nation and state.

UUPA 1960 which is a guideline of national land law should be able to function as a social engineering tool. In practice, UUPA 1960 not only wants structural change in the relationship between people and the land alone, but also a structural change that allows for other changes, especially changes in social processes. The intended changes are contained in the UUPA 1960's manifest function, among which are to lay the foundations for the formulation of national agrarian law as a means to bring prosperity, happiness and justice to the state and people, especially the peasants in the framework of a just and prosperous society.

The number of land problems in Indonesia is very complicated and often overlapping, both in terms of ownership and in terms of status. What if a person or a group of people wants to master it, then they must apply to the State. On the other hand, if the State wants to utilize customary land, in accordance with the Law for the public interest, or for the sake of national development, the State may control and use it, not ignoring the interests of the local people. Based on this, it is necessary to implement a clear and definite protection for the community, especially the indigenous people in land tenure. Currently it is felt that UUPA has not been able to facilitate land tenure for people who are inherited from generation to generation. Therefore, there needs to be a constructivism in the BAL in order to protect the control of land, especially the indigenous people who are controlled by generations.

III. CONCLUSION

The number of land problems in Indonesia is very complicated and often overlapping, both in terms of ownership and in terms of status. What if a person or a group of people wants to master it, then they must apply to the State. On the other hand, if the State wants to utilize customary land, in accordance with the Law for the public interest, or for the sake of national development, the State may control and use it, not ignoring the interests of the local people. Based on this, it is necessary to implement a clear and definite protection for the community, especially the indigenous people in land tenure. Currently it is felt that UUPA has not been able to facilitate land tenure for people who are inherited from generation to generation. Therefore, there needs to be a constructivism in the BAL in order to protect the control of land, especially the indigenous people who are controlled by generations.

It cannot be justified if in this state of law a legal society still retains the content and the exercise of its customary right absolutely, as if it is detached from its relationship with legal societies and other regions within the State as a unity. Such a bright attitude contradicts the basic principles set forth in Article 2 and in practice it will lead to the inhibition of great efforts to achieve the full prosperity of the people. But as is clear from the foregoing description, this does not mean that the interests of the legal community concerned will not be considered at all. "

Based on the discussion in this paper, the recommendations that can be submitted with a mutually beneficial Land Policy Review between State, Investor and Indigenous Peoples are as follows:

1. There needs to be coordination between government agencies concerned with land utilization such as the Ministry of Trade, Ministry of Agriculture, Ministry of Forestry, National Land Agency and Local Government so that agreement will be obtained in making a unified

policy to realize Land Utilization for the welfare of the community.

2. There is a need for a government agency that makes the government agencies "One Roof" in issuing land use policies so as to avoid any overlapping and conflicting government policies. Each of these "One Roof" Agency policies. Any policies that support the utilization of land for the welfare of the People should be set forth in the Act so that every other institution can obey it and not just be the policy of one agency alone.
3. In order to add legal protection points for customary lands and lands that are handed down through the generations of the Basic Agrarian Law by including the point: "The State recognizes and protects the lands owned by a citizen-managed citizen and any change of ownership of the land must be approved the state and the manager "

REFERENCES

- [1] Rostow and W.W., *The Stage of Economic Growth*. New York: Cambridge University Press, 1960.
- [2] E. Warssih, *Pranata Hukum sebuah telaah sosiologis*. Semarang: PT Suryandaru Utama, 2005.
- [3] C. Geertz, *Local Knowledge: further Essay in Interperatif Anthropolgy*. New York: Basic Books, 1983.
- [4] L. Sutrisno, *Masalah dan Proyek PIR-BUN, dalam Prisma No 4 Tahun XVIII*. Jakarta: LP3ES Jakarta, 1989.
- [5] S. Rahardjo, "Pembangunan Hukum di Indonesia dalam konteks Situasi Global," in *Problema Globalisasi Perspektif Sosiologi Hukum, Ekonomi dan Agama*, K. Dimiyati, Ed. Surakarta: Muhammadiyah Press, 2000.
- [6] R. M. Unger, *Law in a Modern society, toward criticism of social theory*. London: The Free Press, 1977.
- [7] B. L. Tanya, "Beban Budaya Masyarakat Lokal menghadapi Hukum Negara, Analisis Budaya dan Kesulitan Sosio Kultural Masyarakat Sabu menghadapi Regulasi Negara," Diponegoro University, 2000.
- [8] B. A. Sidharta, *Refleksi tentang Struktur Ilmu Hukum Sebuah Penelitian tetantang fondasxi kefilsafatan dan sifat keilmuan Ilmu Hukum sebagai Landasan Pengembangan Ilmu Hukum Nasional Indonesia*. Bandung: PT Mandar Maju, 1989.
- [9] P. Nonet and P. Selznick, *Law and Society Transittition ; Toward Responsive Law*. New York: New York and Row, 1978.
- [10] S. Usman, "Rekognisi Sebagai Alternatif Penyelesaian Konflik Pertanahan Tinjauan Sosiologi Lingkungan," in *Seminar and Workshop on Recognition as Land Conflict Resolution: Legal, Social, Political and Conservation of Natural Resources*, 1999.
- [11] P. Conn, *Conflict and Decision Making an Introduction to Political Science*. New York: Harper and Row Publisher, 1971.
- [12] Muchsin, "Aspek Hukum Sengketa Hak Atas Tanah," *Workshop on Land Dispute Resolution and Handling Strategy, National Land Agency*, Batam.
- [13] Moore, "Konflik dan sengketa tanah di Indonesia," 1996.
- [14] M. Thalib, H. Hambali, Prof, Dr, SH, *Sanksi Pemidanaan dalam Konflik Pertanahan*. Jakarta: Kencana Prenada Media Group, 2009.