The Strengthening Legal Protection of Indigenous People in Facing Investment Climate in Era of Asean Economic Community in

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Abstract: Indigenous people, along with their traditional rights including communal rights, are recognized and sheltered under article 18B section (2) and article 28I section (3) of 1945 Constitution, Forestry Act, and regional regulation. However, the arrangement still remains sectoral and inconsistent, which does not fully stand for the Indigenous people. This contradiction was revealed in the Decision of the Constitutional Court Number 35/PUU-X/2012 on customary forest position provisions in the Forestry Act that was confirmed contradictory to the 1945 Constitution. This juridical fact becomes a foundation for State to provide communal indigenous people’s land for investing in natural resources. The used paradigm fact is positioning indigenous people and communal rights, including local wisdom, as the object of development. Consequently, several problems occurred, including: environmental degradation, inequality of structural control, ownership, utilization of land, declining of indigenous people’s welfare, and the emergence of conflicts; thus, posing a threat for national stability, security, and integrity. The enforcement of ASEAN Economic Community (AEC) will make investment climate more open to increase development which correlates to the improvement of people's welfare, including indigenous people. The recommendations are: 1) Ratification of indigenous people’s draft act which expressly and consistently acknowledges and respects the indigenous people and their traditional rights; 2) Obligating local governments to establish local regulations on the treatment of indigenous people and their traditional rights including customary land rights; 3) Identifying, mapping, and establishing customary land rights as indigenous people’s rights and issuing certificates of ownership; 4) Mediating partnership between indigenous people’s land owner and investor; and 5) Placing indigenous people as the subject of development by implementing free prior informed consent, regulating it in nomenclature constitution, while engaging and enhancing the role of government as mediator and facilitator between indigenous people and investor.

Keyword: Legal Protection, Indigenous People, AEC

1. Introduction

One of the ASEAN Economic Society (AEC) pillars that is currently being established since the end of 2015 is to create a single market and production base through the free flow of investment and capital [1]. However, if the AEC blueprint was reexamined, AEC investment climate would harm indigenous people due to land and territories would be used and exploited on behalf of development that was adverse for indigenous people. Such a situation ignores indigenous people’s rights over land and sources that lead to poverty [2]. As mention above, it requires state intervention to protect indigenous people from AEC bad excesses and warn them to overcome it, considering the state is responsible for all citizens’ welfare as written in Article 26 Paragraph (3) United Nation Declarations on The Rights of Indigenous Peoples and 4th paragraph of the 1945 Constitution Preamble. Moreover, current protection
that is given by state for indigenous people is a recognition of their customary rights and communal rights, which is mentioned in constitutional regulations; namely Article 18B Paragraph (2) 1945 Constitution, Article 28i Paragraph (3) 1945 constitution, Tap MPR IX/MPR/2011, Act No.5 / 1960 on Basic Agrarian, Act no. 41/1999 on Forestry, Act No. 7/2004 on Water Resources, and Act no. 27/2007 on Coastal Areas and Small Islands; even at the regional level such as the Central Kalimantan Regional Regulation No. 16/2008 on Dayak Indigenous Institutions in Central Kalimantan.

Nevertheless, the aforementioned law instruments still cannot protect indigenous people properly. For instance, a number of sectoral regulations of constitutions are inconsistent and contradictory in categorizing the status of indigenous people and their customary rights. It greatly impacts the non-recognition of the legal standing of indigenous people as too many cases of customary land loss befall the indigenous people [3]. The condition is often a trigger for conflict as what happened in Timika, Papua[3].

The next problem is recognition of indigenous people and their customary rights which is supposed to be completed by regional regulations. From 2302 entities of indigenous people in Indonesia, only 11 are recognized by the local regulation, and only 1 is processed to obtain its determination of the National Land Agency (Badan Pertanahan Nasional) by only 1 communal right [4]. This shows the low recognition of the state to indigenous people. Without local regulations, it is impossible to be able to act for and on behalf of himself and to manage his own customary rights.

Moreover, indigenous people are still pictured as the object of development rather than the subject of development. It can be seen from the low participation of indigenous people on every development agenda. According to Sutoro Eko, most of the time they just obtained social responsibility funds from the investors which could not strengthen their welfare [5]. The bad impact of this implementation was the impoverishment of indigenous people [6]. Another evidence that indigenous people are still pictured as the object of development was many land dispute cases between indigenous people and financiers which lead to losing over their customary land rights [7]. Based on further investigation, this occurred due to unbalance bargaining between indigenous people and financier along with the absence of the state’s role during the bargaining process[7].

All those facts indicate that indigenous people in Indonesia are not properly protected. However, AEC has been implemented and its bad impact has been shadowed over indigenous people. Therefore, the strengthening of legal protection to indigenous people must be prepared by the state. The purpose of this study is to determine what steps should be taken by the state to protect indigenous people from the worst excesses of the investment climate in the AEC as well as empowering indigenous people to be part of the investment climate in the AEC era.

2. Methodology

This study occupied normative study [8]. The nature of the research is descriptive analysis. The data collection used literature study, in which writer collected secondary data either from constitution, books, journals, or work proceedings and other secondary data which were related to indigenous people and AEC to be analyzed in order to obtain legal opinion illustration about the answer of the problem.

Legal protection is a protection of dignity, recognition of rights which belong to the law subjects under rule of law of arbitrariness or as a collection of rules that may protect one thing from another [9]. The form of state law protection to customary law communities refers to Article 26 Paragraph (3) of UNDRIP in the form of giving legal recognition and protection to customary land, territory, and resources [10]. Concrete operational in this case can be done by increasing the legal instruments that support the creation and the growing opportunity of investing, as well as conducting empowerment activities [11].
3. Findings

AEC era is an investment era. As a part of ASEAN countries, Indonesia should not be left behind. It should adapt. Especially for indigenous people, the legal protection which might be given by state is increasing the legal instruments that support the creation and the growing opportunity of investing, as well as conducting empowerment activities [11] for indigenous people who are ready for being a part of this change.

The first thing that must be made by the state is to make the nomenclature of the special law regulation concerning the customary law community, in this case encouraging the approval of the Draft Act Recognition and Protection of Indigenous People to Indonesia Council of representative (DPR). This step is very important to do, so that the legal standing of indigenous people is clear, then they will be able to do it with their own identity as indigenous people. In addition, the communal rights of indigenous people are more protected because of the same criteria of assessment toward customary rights of indigenous people, which reduce the potential loss of indigenous people’s customary territory. The current protection of communal rights of indigenous people is very weak, especially communal rights towards customary land. For instance, the transferring of 1,000,000 m2 communal land to the Ministry of Forestry and customary land rights Tembawang cannot be claimed since it was located in protected forest areas [11].

To ensure legal certainty, benefit, and security over indigenous people’s communal rights, especially in this investment climate, customary land of indigenous people must be registered to the National Land Agency (Tehupeiory, 2014). However, only a few of customary land that was confirmed by regional regulation and registered to the National Land Agency. The state must encourage the government and indigenous people together to identify and map the customary territory of both forest area and non-forest area, so that it can be confirmed in the form of local regulations. Furthermore, the state must make empowerment in the form of awareness for indigenous people [12] to actively register their communal rights to National Land Agency/BPN.

Based on the Agrarian Reform Consortium, the highest agrarian conflicts include large plantation and land disputes [13]. The conflict is usually caused by one of two things; first, the government grants the permit (concession) of customary land use without involving the participation of indigenous people [13]; or second, during negotiation between indigenous people and investors, the government was absent, causing the imbalanced bargaining and making indigenous people lost [7]. Those two problems should not be repeated and must be solved. For the first cause, it can be prevented if the principle of Free Prior Inform Consent (FPIC) is implemented to indigenous people. FPIC is a process that allows indigenous people to accomplish their fundamental rights for declaring whether they agree or disagree on an activity, project, or policy to be implemented in their customary territory [14]. Furthermore, the essence of FPIC implementation is to ensure significant involvement of indigenous people [15]. The absence of FPIC is due to the principle is set out in the guidelines of activities and is not included in the nomenclature of legislation [16]. Therefore, the state is obliged to make the nomenclature of law and regulation which contains the obligation for accomplishing FPIC either for government or investor to indigenous people. For the second cause, for solving the unbalance bargaining between indigenous people and investors, the state’s participation is needed and the government acts as a facilitator and mediator between indigenous people and investors. Not only the government assists the negotiation process between indigenous people and investors, but also the presence of the government can increase the trust of indigenous people to the state, which reduces such conflict [17].
Finally, to encourage indigenous people to be part of AEC investment climate, it is a must to exhibit empowerment [17]. This can be done by encouraging indigenous people to establish a customary village. Since the emergence of Act No. 6/2014 about Village, indigenous people can establish entities in the form of customary villages. With the customary villages, indigenous people can manage their own customary wealth, and strengthen communal ownership as mentioned in the review of academic texts of the Village Act[18]. Since customary wealth management can be done independently, indigenous people can become a shareholder of development. It is not merely a beneficiary as it is today. Indigenous people can even establish its own business entity known as “Village-owned enterprise”. However, to gain recognition as a customary village is not easy, since the authority of determining custom village must be confirmed by local regulations with the authority of local government. Therefore, the task of the local government should not hinder but instead facilitate the entities of indigenous people who want to establish their own customary village, for sake of the welfare of indigenous people.

4. Conclusion

In order to protect indigenous people from bad excesses and support the investment climate in the era of AEC resulting in higher welfare, the state must provide legal protection to indigenous people, namely: 1) Ratification of Recognition and Protection constitution of Indigenous People to Indonesia Council of representative in order to clarify legal standing of indigenous people and their communal rights especially on customary land be more protected; 2) Encouraging local governments to identify and recognition of indigenous people by the local regulation; 3) Encouraging the government to identify and map customary territory which is confirmed by local regulations and registered to the National Land Agency. In addition, the state is also obliged to provide awareness to indigenous people for registering his/her communal rights to the National Land Agency; 4) Placing indigenous people as the subject of development by implementing free prior informed consent, regulating it in nomenclature constitution, also engaging and enhancing the role of government as mediator and facilitator between indigenous people and investor; and 5) Involving indigenous people as shareholders to the investor-built business on indigenous people’s land, by encouraging the establishment of the customary village.

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