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## Investment problems and indigenous people a social-constructivist approach to law

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### ABSTRACT

Investment problems and indigenous peoples occur by several factors, one of which is investment problems in the land sector. Given that land has an important meaning in investment, land policy is oriented to ease of investment. This study uses a normative research method with a Social-Constructivist approach. The results of the research that were examined from several cases and related journals showed that the problem of investment and customary law communities over land was caused by several factors such as the determination of state policies in investment at the level of basic norms, national and national regulations, and including legal products that live in the region. indigenous peoples live.



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## Introduction

Land has a very high social function, this is based on the concept of a welfare state (welfare state) adopted by the nation state called Indonesia, which aims for the greatest prosperity of the people. This is a constitutional mandate in Article 33 paragraph (3) which states that, "the earth, water and natural resources contained therein are controlled by the state for the greatest prosperity of the people". The goal of the welfare state is to guarantee the rights of citizens in the current modern era, depending on the availability of natural resources. The condition of the availability of natural resources is a determining factor in fulfilling the basic rights of citizens (Abdullah, 2021).

One of the most important resources in the current era of globalization is the availability of land. The gift of God Almighty over land is one of the most important parts as a means of human survival. The existence of land as an important natural resource for the Indonesian state, which is regulated in Law Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA), in Article 1 paragraph (1) states that, "all land within the territory of the State of Indonesia is land together from all the people of Indonesia". Furthermore, Article 6 of the LoGA states that, "All land rights have a social function" (Sitorus, 2015).

Given that land has an important meaning in investment. The land policy is oriented to ease of investment. This change was marked by the stipulation of a pro-investor PMA Law, such as the ease of permits, the proportion of capital ownership above 75 percent and land use permits for more than 25 years. Obviously with an orientation on economic growth, land policy adjusts to macroeconomic policies. With the enactment of Law no. 25 of 2007 on April 26, 2007, which is a policy on investment in the context of the need to increase

investment to process economic potential into real power, using both domestic and foreign sources of capital, is one of the government's ways to accelerate national economic development without had to sacrifice Indonesia's political and economic sovereignty. The public considers Furthermore, in relation to investment, the government has issued Presidential Regulation (Perpres) No. 36 of 2005 concerning Land Procurement for the Implementation of Development in the Public Interest and has been revised by Presidential Decree no. 65 of 2006. However, this Presidential Regulation addresses the strong guarantee of compensation for people whose land has been expropriated for development activities, while investors consider it less attractive due to unclear land status and land use period. Land that has a social role and is a community need is certainly not far from conflict due to the struggle for existing natural resources (Abdullah, 2021). Based on the background explanation above, the researcher is interested in knowing more by conducting a study entitled "Investment Problems and Indigenous Peoples".

## Method

This study uses a normative research method with a Social-Constructivist approach. The normative research method is normative legal research, which is a scientific research procedure to find the truth based on scientific logic from the normative side Ibrahim (2006) in (Puspitasari, 2014). While the constructivist social approach means a critique of the positivist paradigm. According to the constructivism paradigm, the social reality observed by one person cannot be generalized to all people as positivists usually do. The constructivism paradigm, which is traced from Weber's thought, assesses human behavior as fundamentally different from the behavior of nature because humans act as agents who construct their social reality, both through giving meaning and understanding behavior among themselves. This Social-Constructivist Legal Approach arises because of the discourse of paradigms, paradigms are not the only factor, but are crucial factors. So there needs to be a paradigm shift so that we can find the best solution for all parties (Umanailo, 2019). Meanwhile, the data collection technique was carried out by exploring journals and other information relevant to the study. The analysis is carried out by identifying and drawing common threads among the facts of investment activity in customary lands as presented in various scientific studies and research as well as other sources.

## Results and Discussions

Indigenous peoples themselves are community units that remain regular in which members are not only bound to the place of residence of a particular area, both in terms of the world as a place of life and in spiritual terms but are also bound to hereditary relationships in ties of blood or kinship with one another ancestors (Sabri, 2015). Indigenous peoples are also defined as an indigenous community unit that was born or formed by the community itself, not formed by other forces (Akmal, 2021). Customary law experts agree that customary law contains elements of religion, and magic, constancy, cash, and flexibility (Thontowi, 2013). The terminology of indigenous peoples refers to a number of indicators, namely: those who claim to be indigenous people in a certain area, are a minority group among the majority group, and groups who are deprived of their rights and oppressed Haba (2010) in (Marhayati & Suradi, 2019).

### Empirical Facts : About Indigenous Peoples

*Marginal* : Poor group

*Powerless* (no bargaining position)

*Barrier*: Burden that can restrain the rate of Investment

Based on these empirical facts, it is clear that the conflict of interest between Investors and Indigenous Peoples exists in an extraordinary gap Wide: *The Gap between Investors and Indigenous Peoples is described as a relationship with Asymmetric Power*

### Empirical Facts: Asymmetric Power Relationships The

Have *vs* The Marginal, Global Power *vs* Village People, Owners of Capital and Resources *vs* the Poor. Due to the power gap between Investors and Indigenous Peoples, the Law must appear as the commander in chief to ensure the interests of all. The law must be present for this problem, however, will by submitting it to legal channels, the problem will be solved? To ensure the resolution of this problem, according to Lawrence Friedman, the law has 3 aspects: Substance, structure and culture; the three elements of the law must be present in a process that is independent, impartial, and free from corrupt behavior. There is a danger if the solution to this problem is based solely on Legal Positivism!

### Paradigm of Legal

Positivism Legal positivism, in its most traditional definition, defines law as positive norms in the statutory system. John Austin Says that "...the notion of law as a command of the sovereign. The law is an expression of the

will of the ruler/state. Example: The phrase “State forest” in the Forestry Law number 41 of 1999 article 1 point 6. Currently, Indonesian law is based on the philosophy of positivism, which is an extension of the Cartesian-Newtonian teachings. 'Actually, legal positivism is a school of thought that has a strong influence from the teachings of positivism (in general). Therefore, understanding the teachings of legal positivism is a positive norm in the system of laws and regulations (Hermanto, 2016).

Hans Kelsen with Pure Legal Theory argues that policy making by the executive or law enforcement by law enforcement must be faithful to the sound of the formulation of positive norms (what the text says in the law) in the legal system. The modern economic system is in line with the legal positivism view. The legal positivism approach has consequences for the transplantation of western law into the law of developing countries in the legal restructuring agenda. Positivism itself is an understanding that demands that every methodology that is thought of to find the truth should treat reality as something that exists, as an object that must be released from any kind of subjective metaphysical preconceptions, then legal positivism is a positivism that is applied to thought. Regarding law, positivism requires the release of meta-juridical thinking about law, as embraced by natural thinking (Haryono, 2019). As a school, legal positivism provides guidance with ontological aspects (law equals positive norms in the statutory system), epistemological (deductive doctrinal), and axiological (certainty) aspects so that followers or adherents can be safe in providing problem solving for legal problems they face (Herning Sitabuana, 2020).

The firmness of legal positivism is to eliminate the requirement of connectivity between moral law, making the axiological realm of this school only limited to achieving legal certainty (Herlambang, 2019). As for the consequences of Positivism: *Lex dura sed tamen scripta*, that the written law is rigid. Consequences of the Positive Paradigm: Strict laws, many things are not accommodated, the law goes into a dark alley. The legalistic-positivist approach that has been used by parties with power and capital power when dealing with powerless and marginal indigenous peoples. Due to the weakness of the legalistic-positivist paradigm in Investor-Indigenous Community relations, the use of a new paradigm based on the **Social-Constructivist** recommended to solve the problems in this paper.

### **Social-constructivist Paradigm The**

The legal adage “*ubi societas ibi ius*” underlines the emerging legal genre: *social-jurisprudence*. Material-normative cannot be separated from social reality. Law also has a social function. In relation to its function as social engineering, the law should run in social reality, not ignore it. The Social-Constructivist Paradigm views law as an *interaction law*. Law cannot stand alone, law is dynamic following social interactions as well as political interactions. Social-Constructivist axiology is, certainty and usefulness must run simultaneously.

Investment or investment must be part of the implementation of the national economy and placed as an effort to increase national economic growth, create jobs, increase sustainable economic development, increase national technological capacity and capability, encourage people's economic development, as well as in the context of realizing community welfare in the future. a competitive economic system (Husnulwati & Yanuarsi, 2021). District and city governments want to attract more foreign investors to invest in Indonesia, so the bureaucratic chain must be shortened. Because the length of the bureaucracy will be high cost and uneconomical as well as time-consuming, which in the end will weaken Indonesia's competitiveness in the global market. So it is very reasonable, if we immediately fix this so that it will not be left behind by neighboring countries (Suradiyanto & Warka, 2015). However, the Indonesian people are indigenous peoples who in all their actions are limited by existing norms.

Research results from Sondakh (2017) The results of the analysis show the tug of war and overlapping authority between the center and the regions in controlling mining investment which results in legal uncertainty in the implementation of mining investment in Indonesia. The results of the research from (Telussa et al., 2021) need the involvement of indigenous peoples in an implementation of Central Government investment activities specifically for customary areas belonging to indigenous peoples that are used. For the smooth implementation of investment activities, the Central Government may give permission to investors to operate in areas where the investment object is located, but there needs to be involvement Indigenous Law Communities through contracts or agreements with investors need to be carried out. From the results of two studies using Law No. 25 of 2007 on investment so that this research can pay attention to or make the basis for these rules.

The recognition and protection of indigenous peoples' rights has been normatively recognized by international and national legal regimes. But is this recognition effective? If we talk about indigenous peoples *and sich*, we will not find dynamics with high enough tension. In fact, indigenous peoples exist at the intersection of interests in space and context. The position of indigenous peoples in the intersection of these interests has caused legal problems, if the law does not guarantee social justice, it will in turn cause serious

social problems. There are strong indications, because of the pressures of globalization of world trade, various legal rules and policies issued by the government (Muntaqo, 2011), Peter Dauverge and Kate J. Neville stated: international dynamics, the influence of relations between countries and MNCs (Multi National Corporation) global economic politics that exploiting the rural poor. In the tug of war between investment and indigenous peoples, there is a tendency for the government to be indecisive. In Indonesia, the World Bank has long financed transmigration projects, large-scale infrastructure such as dams, reservoirs, irrigation and land administration projects.

The government itself does not dispute the fact of monopoly. The Minister of Environment and Forestry (LHK) Siti Nurbaya, for example, that from the granting of land and access to 42 million hectares of forest until 2017, the government has allocated around 95 percent for the private sector, and only 4 percent for the community, and the rest for the public interest. According to Coordinating Minister for Political, Legal and Security Affairs Mafud MD, 92 percent of regional head candidates who competed in the regional election contestation were financed by Cukong. Mahfud's opinion is in line with KPK data revealed by one of the KPK leaders, Nurul Ghufron, who said that 82 percent of candidates for regional heads, be they governors or regents/mayors, were financed by sponsors/businessmen. What are the consequences? cause corruption that is more dangerous than money corruption, namely policy corruption. Later the regional head will carry out Corruption Policies. Policy corruption can take the form of forest tenure licenses, mining control licenses that can harm the community, especially the Indigenous community.

Thus, the results of research reviewed from several cases and journals related to investment or capital issues in indigenous peoples' law with a social constructivism approach show that the problem of investment and customary law communities over land is caused by several factors such as the determination of state policies in investment at the level of basic norms, national and national regulations, as well as including legal products that live in the region where indigenous peoples live.

## Conclusions

The existence of customary land will be greatly influenced by the determination of state policies in investment, both at the level of basic norms, national and national regulations, and including living law products. Land as a gift from God Almighty over land is one of the most important parts as a means of human survival. In a land or area the majority is occupied or used as a residence by the community. In Indonesia itself, there is a society that remains organized where its members are not only tied to the place of residence of a certain area, both in terms of the world as a place of life and in spiritual terms, which are called indigenous peoples. The Empirical Facts About Indigenous Peoples are: *Marginal* : Poor group, *Powerless* (no bargaining position, and *Barrier*. Burden that can restrain the rate of investment. Then, Empirical Facts: *Asymmetrical Power Relationship*, namely: The Have *vs* The Marginal, Global Power *vs* People Village/ulu Lewu/ Wong nDeso and Owners of Capital and resources *vs*. Poor Groups This is what makes investment problematic for indigenous peoples. There needs to be a shift in paradigm (shift paradigm/ *shift paradigm*), shifting from a Legalistic-Positive approach to a Social-Constructivist approach Considering that law is not merely a *Lex/Lege*, not just what the texts and legislation say in the name of the principle of certainty, but law is a matter of "*ios and* also benefits for all interests.

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