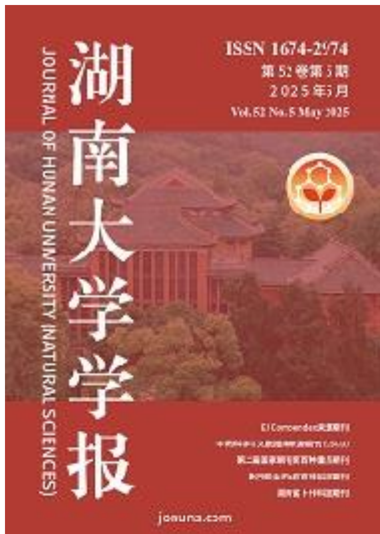

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Determination of Indigenous Community's Forests as A Form of State Recognition of Customary Sovereignty

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Abstract: Forestry in Law Number 11 of 2020 concerning Job Creation has two major problems that change the basic character of the Forestry Law: abandoning the spirit of conflict resolution and forest resource conservation efforts. The emergence of provisions for "strategic areas" will be prioritized in accelerating the determination of forest areas with the aim of opening up investment space as much as possible. This study aims to examine the extent to which the precautionary principle is applied to address overlapping spatial planning, forest areas, and investment permits, and to assess the recognition of indigenous peoples' forests as a form of state acknowledgment of customary sovereignty. This study also explores the dynamics of structural agrarian conflicts and the legal uncertainty surrounding customary forest determination.This study uses qualitative research methods through a normative juridical approach, analyzing various legal sources and academic literature relevant to the topic.The scientific novelty of this research lies in highlighting how the Job Creation Law structurally diminishes indigenous sovereignty over forests by prioritizing economic investment over legal certainty and customary rights. Furthermore, it offers a comprehensive legal argument advocating the application of the precautionary principle to restore a balance between economic interests, forest sustainability, and indigenous land rights.The results of the study conclude that investment interests, such as being given a smooth path and becoming a priority compared to the interests of forest conservation and state recognition of customary sovereignty over forests belonging to indigenous peoples, should apply the precautionary principle approach to addressing the overlapping issues between spatial planning, forest areas, and investment permits. Furthermore, structural agrarian conflicts are rooted in overlapping claims of forest tenure and ownership as well as the absence of state recognition of indigenous peoples and their living spaces which has an

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impact on the narrowing of the living space and management rights of indigenous peoples in customary areas. The latest existing regulations have not achieved legal certainty regarding the determination of forests belonging to customary law communities.

Keywords: Customary forest, State recognition, Customary sovereignty.

确定土著社区的森林是国家承认习惯主权的一种形式

摘要：2020年第11号《关于创造就业的法律》中的林业规定存在两个主要问题，改变了《森林法》的基本性质，即放弃了解决冲突和森林资源保护工作的精神。出台"战略区域"规定，将优先加快确定林区，尽可能开放投资空间。本研究旨在考察预防原则在解决空间规划、森林面积和投资许可重叠问题中的应用程度，并评估对土著人民森林的承认作为国家承认习惯主权的一种形式。该研究还探讨了结构性农业冲突的动态以及围绕传统森林认定的法律不确定性。本研究采用规范法律方法的定性研究方法，分析与该主题相关的各种法律来源和学术文献。这项研究的科学新颖性在于强调了《创造就业法》如何通过优先考虑经济投资而不是法律确定性和习惯权利，从结构上削弱了土著对森林的主权。此外，它还提供了全面的法律论据，主张应用预防原则来恢复经济利益、森林可持续性和土著土地权利之间的平衡。研究结果得出结论，与森林保护利益和国家对土著人民森林习惯主权的承认相比，获得平稳过渡和优先考虑等投资利益应采用预防原则的方法来解决空间规划、森林面积和投资许可之间的重叠问题。此外，结构性土地冲突的根源在于森林使用权和所有权的主张重叠，以及国家对土著人民及其生活空间的缺乏承认，这导致习惯地区土著人民的生活空间和管理权利不断缩小。现有的最后法规对于确定森林是否属于习惯法社区也没有实现法律确定性。

关键词：传统森林，国家承认，传统主权。

1. Introduction

The management of natural resources by the community turned to colonizers after they controlled the archipelago. The laws of the colonial state and its policies were applied to the management of natural resources [1]. Then, the control to manage natural resources was transferred to the Government of the Republic of Indonesia after Indonesia declared its independence and formed a government [2]. This is stated in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which reads: "Earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people."

Article 33 Paragraph 3 of the 1945 Constitution affirms that the use of natural resources by the community and state is carried out in the context of utilizing natural resources to create welfare for the community [3]. The principle of controlling the state is the legitimacy of the state in controlling the forest.

The forest management authority is exercised by the government through state-owned enterprises. This is also assisted by privately owned enterprises. licensed by the government [4]. In principle, forest management permits granted by the government must be carried out because of the existence of Indigenous Peoples and their rights [5]. However, there are still issues with forest management conflicts involving Indigenous Peoples. Juridical control of land is a right in its control, which is regulated by law, and there is an authority to physically control it[6].

The dependence of indigenous peoples on the forest as a source of life and livelihood must be addressed by the government. Initially, the enactment of Law No. 5 of 1960 concerning the Basic Regulations on Agrarian Principles hoped that populist law could provide protection to various customary law institutions that did not conflict with national and state interests [7]. These expectations include, among others, the protection and recognition of the existence of indigenous peoples with their customary rights and the protection of customary forests, which are the heart of the lives of these communities. However, in reality, during the Old Order regime, which was followed by the

New Order regime in power, the side was not with the people (indigenous people), but with the people with capital [8].

The struggle of indigenous peoples in Indonesia to gain sovereignty over customary forests began to find a bright spot after the issuance of the Constitutional Court Decision Number 35/PUUX/2012 (hereinafter referred to as the Constitutional Court Decision 35), which essentially involved two things: the constitutionality of customary forests and conditional recognition of the existence of the community [9]. custom. However, the issuance of Constitutional Court Decision 35 does not necessarily improve the situation. The problem is that the realization of Constitutional Court Decision 35 is still being held hostage by a follow-up process so that this legal decision is operational. This follow-up process allows opportunities for other political arenas to be faced by indigenous peoples' movements [10].

Other political arenas have the ability to turn the politics of recognition and redistribution into a force that excludes or restricts access, and provides avenues for the expansion of corporate cultural hegemony that has the opportunity to reproduce injustice. Symptoms of the emergence of another political arena began to be felt after Constitutional Court Decision 35, which was still hampered by the existence of Article 67 paragraph (2), which required the fulfillment of a number of conditions before the forest was recognized. A number of these requirements are in line with the formulation of the 1945 Constitution of the Republic of Indonesia Article 18B paragraph (2), with the phrase as long as it is still alive and its existence is recognized [11]. Refers to the similarity of the phrase that customary forests can essentially be recognized after the recognition requirements are further regulated in a regional regulation stipulated by the local Regional People's Representative Assembly. In the midst of a very dynamic agrarian structure debate after the Constitutional Court Decision 35, especially regarding who has the right (tenurial institution) and for what purposes the customary forest is designated in the future, it is relevant for further study; however, the government will make a new regulation in 2020. That may kill the spirit of indigenous peoples to own customary forests in their territory [12].

Law No. 11 of 2020 concerning Job Creation raises two major problems that change the basic character of Law No. 41 of 1999 concerning Forestry: abandoning the spirit of conflict resolution and efforts to conserve forest resources [13]. The first one is the emergence of provisions for "strategic areas" that will prioritize accelerating the growth of forest areas with the aim of opening up investment space as much as possible. Second, there is a change that removes the limit of 30% of the forest area from watersheds, islands, or provincial administrative areas. This was followed by the elimination of the role of the Regional People's Representative Assembly in approving changes to the allocation and function of forest areas, and the use of forest areas for development outside of forestry activities (road infrastructure, reservoirs/dams, mining, etc.). Both have been instruments that protect forest resources from excessive exploitation. The problems in this study are whether the precautionary principle approach in addressing the overlapping problem between spatial planning, forest areas, and investment permits has been carried out, and whether the establishment of forests belonging to indigenous peoples is still a structural and massive agrarian conflict [14].

2.Methods

This study employed a qualitative research approach with a normative juridical method to analyze the legal status and recognition of indigenous community forests in Indonesia. The research was both descriptive and analytical: descriptive in outlining the state's recognition of indigenous forest rights and analytical in examining the legal norms, principles, and statutory regulations relevant to this issue. This study aims to obtain an analytical overview of the gazettement of forests belonging to indigenous peoples as a form of state recognition of customary sovereignty [15]. It analyzes the provisions of the laws and regulations that are recorded. Through the normative juridical approach, the technique of collecting materials and data used by the author is as follows: Library Research, namely the collection of materials and data, including primary legal materials that include legislation, secondary legal materials in the form of literature books and opinions scholars or experts with relevant research as well as tertiary legal materials, namely materials obtained from articles, newspapers, magazines, and others that are related to the problem under study.

3. Result and Discussions

The precautionary principle approach in addressing overlapping issues between spatial planning, forest area and investment permits.

The follow-up process after the Constitutional Court Decision 35, which requires the fulfillment of requirements before customary forests can be recognized constitutionally, shows that there is a concentration of state control by using rhetorical populists who are just camouflaged to perpetuate the conservative mainstream of the previous regime. The mainstream conservatives, Ben White, do not have a strong social base or commitment to fundamental social change in rural areas [16].

As a result, the conservative mainstream as the power holder will always face the intellectual community that has direct knowledge of field conditions and comparative knowledge of phenomena in other countries, so that they are present as critics of the

agrarian policies being implemented along with its impact.

The passage of the unequal agrarian structure and the perpetuation of the conservative mainstream citing Gunawan Wiradi has caused the state to fail to carry out agrarian reform. The failure of agrarian reform was more due to the absence of political will from the authorities to resolve agrarian problems that favored the interests of the people, and most of the national elite were businessmen who certainly had an interest in agrarian interests by compromising on the owners of capital who controlled the industry and mechanisms. soil modification [17].

The great feud between the community and the government in 2020 regarding the formation of Law Number 11 of 2020 concerning Job Creation, where there are 17 articles of Law No. 41 of 1999 concerning forestry, which were modified (changed in substance), and three new articles formulated by law.

The provisions of these articles are formulated by the Job Creation Law in Paragraph 4 of Article 35, and Article 36 points 1 to 20, the manuscript version of the "Law" submitted by the Dean of Representatives to the President, totaling 1,187 pages. From the 20 points of the provisions, it can be observed that this will bring about crucial changes, at least from the perspective of conflict resolution, future sustainability/protection of forest areas (including the function of checks and balances in decision making), and community rights related to access. to forest areas.

Therefore, it is very important to be able to apply the precautionary principle in formulating a policy so that it can be carried out properly, because the nature of legislation is not only what legislators want but also what the public wants. The principle of democracy states that legislators, presidents, and parliaments in presidential systems are extensions of people's sovereignty [18]. The president becomes the executor of wishes. The constitutionality of the state’s work must be sourced from the basic law, which is only binding if it is based on the highest power (sovereignty) in a country, and when that power has been given, it is obligated to obey the concept of limiting the power that is pinned on the state and pay serious attention to it.

Opportunities for customary sovereignty by placing indigenous peoples as legal subjects over their customary forests became the state's momentum for complete agrarian reform. If efforts to push indigenous peoples towards the repeasantization of their customary forests do not find a bright spot, the pendulum of agrarian reform is moving towards sustainable agrarian involution.

The establishment of forests belonging to indigenous peoples is still a structural and massive agrarian conflict.

Looking back at the facts of indigenous peoples throughout Indonesia, it is estimated that 30 to 50 million of them are indigenous peoples whose lives still depend on forests, which is an ecosystem unit in the form of expanses of land. It contains natural biological resources that are dominated by trees in their natural environment and cannot be separated from one another. Forests are an inseparable part of the life cycle of indigenous communities, whose inhabitants are commonly referred to as indigenous peoples. Most indigenous peoples in Indonesia depend on forests for their livelihood and have developed unique and extraordinary natural resource management systems (forests, seas, and rivers) that demonstrate the quality of their knowledge and their close relationship with nature. In general, indigenous peoples who live in customary forests are aware that humans are part of nature so they must care for each other and maintain a balance and harmony between the two components of this ecosystem. To maintain harmonious relations between humans and nature (customary forests), indigenous peoples develop a social institution regarding forestland management, known as ulayat rights.

However, the above does not work well; often, indigenous peoples have conflicts with forest tenure rights permit holders who have a mandate from the state to manage and utilize forest products, but also have to think about the interests of the community, especially those around the forest. This means that forest tenure rights permit holders not only take maximum advantage of the exploitation carried out, but also pay attention to the consequences of such exploitation for the surrounding community and also pay attention to the impact on the environment. Forest tenure rights permit holders must pay attention to the communities around the project in order to live a better and more prosperous life; however, recently, the mandate given by the State has not worked well and has often resulted in conflicts that must be resolved immediately.

In this regard, the resolution of conflicts over tenure in forest areas does not appear to be of much concern in the Job Creation Act. This is most likely because the main spirit of the law is oriented towards opening up the widest possible investment space, including in the forestry sector. In Article 36 point 1 of the Job Creation Law which amends Article 15 paragraph (4) of Law no. 41 of 1999, for example, it was emphasized that "the Central Government prioritizes accelerating the gazettement of forest areas as referred to in paragraph (1) in strategic areas." From these provisions, the question arises as to what is meant as a “strategic area” and why it should be prioritized.

There is no further explanation of the intent of the provision other than that it is stated quite clearly in the explanation, and it is only stated that the priority for accelerating the settlement of forest areas is regulated by Government Regulation. Exploring the intent of this

provision, there is a strong suspicion that the most relevant “strategic areas” are areas that are considered very feasible to attract investment, so that the gazettement of forest areas should be prioritized immediately. This provision is insensitive to the problem of forest area tenure conflicts in the field, which should be resolved immediately and not abandoned.

The structural agrarian conflict referred to in this paper refers to the prolonged conflict of claims regarding who has the right to access land, natural resources (SDA), and territory between a group of rural people and the governing body/management of lands engaged in production, extraction, conservation, and others, and the parties to the conflict seek and act, directly or indirectly, to eliminate the claims of the other party. The agrarian conflict in question is initiated by a decree of public officials, including the minister of [19].

Forestry, the Minister of Energy and Mineral Resources (Energy and Mineral Resources), the Head of the National Land Agency, the Governor, and the Regent grant permits/rights/licenses to certain business entities, including land, natural resources, and areas belonging to the people, into agrarian concessions engaged in extraction, production, and conservation based on natural resources [20].

Moving on from this problem, why should the Job Creation Law not focus on emphasizing the priority of accelerating the settlement of forest areas in the context of conflict resolution, especially those concerning the land rights of local communities and indigenous peoples who are in forest area claims, while at the same time correcting the determination of forest areas that are there have been which are not infrequently still problematic? Wouldn't it be more beneficial to prioritize the resolution of overlapping issues because it accelerates the clear and clean status of forest areas which incidentally will also be meaningful for investment purposes, rather than the priority of accelerating the gazettement of forest areas that are more pragmatic in the name of “strategic areas?”

The government still ignores the existence of Indigenous Peoples when granting forest management concessions. Permits are the legal basis for concession holders to conduct forestry activities. When the concession involves forest management in customary areas, conflicts between concession holders and indigenous peoples occur. This is because the concession holder manages the forest area, which has been the customary territory of Indigenous Peoples. Therefore, forestry activities in customary forest areas by parties outside the customary community violate customary law. This is an insult to Customary Law Community. Generally, customary forest management is conducted on a massive scale to damage forest areas and hinder the establishment of forests belonging to indigenous peoples. This has an impact on the survival of indigenous peoples and ignores the form of state recognition of customary sovereignty because indigenous peoples still do not have legal certainty over the establishment of their customary forests.

4. Conclusion

This study emphasizes the urgency of applying the precautionary principle when formulating forestry policies, especially those related to the recognition and determination of indigenous peoples’ customary forests. The implementation of Law No. 11 of 2020 concerning Job Creation tends to prioritize investment interests over forest conservation and the protection of indigenous land rights. Consequently, the recognition of customary sovereignty over forests remains legally uncertain, and structural agrarian conflicts persist because of overlapping land tenure claims and weak state recognition.

The government must place indigenous peoples as full legal subjects in the forest governance system and ensure that any legislative instrument upholds their rights and ecological wisdom. Future legal frameworks should explicitly address forest land tenure conflicts and promote participatory policymaking that respects customary laws and ecological justice.

Recommendations from this study include urging policymakers to revise existing regulations that marginalize indigenous claims and develop clear operational mechanisms for implementing Constitutional Court Decision No. 35/PUU-X/2012. Precautionary principles should guide spatial planning and investment decisions to ensure environmental sustainability and social equity.

Future research should explore comparative legal models that can successfully integrate indigenous rights into forest governance. Additionally, empirical field studies involving indigenous communities’ perspectives could enrich understanding and inform more grounded policy interventions.

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