

# The State's Sovereign Rights to Protect Biodiversity in Indonesia for the Sake of the Indonesian People's Survival

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The state has the country's sovereign right to protect biodiversity. This sovereign right gives the state authority to regulate the use of biodiversity within its territory. The CBD and Nagoya Indonesia Protocol have a very large biodiversity. Biodiversity needs to be protected for the survival of human life. Therefore, this article will examine the state's sovereign rights to protect biodiversity in Indonesia. This study is a doctrinal study that uses literature study data. The results of the study found that in the constitution, Indonesia has a strong foundation to protect biodiversity for the survival of the people. Article 33 emphasises the state's right to control biodiversity, including the right to create laws and regulations that protect biodiversity.

**Key words:** *Sovereign rights, protect, biodiversity and survival.*

## Introduction

Biological diversity is commonly called biodiversity (J. Linereli, 2004). Diversity among living things from all sources (including land, ocean and other aquatic ecosystems as well as ecological complexes) are also part of diversity. This includes diversity in species, between species and ecosystems (C. Viser, 2009). Diversity of organisms exists in all ranks of life, starting from the genetic type of a species (the family), which is at a high taxonomic rank. It includes the diversity of ecosystems consisting of two communities of organisms in certain habitats and physical conditions in which organisms live. Indonesia is a mega-diverse country, which has the largest biodiversity and genetic resources. Its wealth consists of 22,215 species of fauna and 35,000 species of flora (YR Suhardhono, 2006). Most of Indonesia's biodiversity is located in natural forest areas, mainly in natural conservation forest areas. The total area of conservation in Indonesia covers 27 million hectares. This area consists of Nature Reserves (nature reserves and wildlife reserves), Nature Conservation Areas (national parks, natural tourism parks, and forest parks) and hunting parks. Indonesia has 50 national parks, which are located on various islands. There are 11 national parks in Sumatra, 12 national parks in Java, 6 national parks in Bali and Nusa Tenggara, 8 national parks in Kalimantan, 8 national parks in Sulawesi, and 5 national parks in Maluku and Papua (S.M Assgart, 2009).

Indonesia's biodiversity continues to decline. Tropical forests in Indonesia are diminishing with uncontrolled use. Agricultural land increasingly damages forests and degrades marine ecosystems, such as coral reefs and other marine life. The exploitation of biodiversity can threaten the survival of Indonesian people (Sutoyo, 2010).

The Convention on Biological Diversity (CBD) has stated under article 1 that there are three main objectives, namely ‘...conservation of biodiversity, continuous use of components of genetic resources and the existence of fair, mutually beneficial cooperation from these genetic sources...’ In article 15, the country’s sovereign rights strengthen these goals. In article of 6 the Nagoya Protocol, it is also affirmed that the country has a sovereign right to protect biodiversity and genetic resources within its territory.

Indonesia has ratified two international instruments related to the access of biodiversity and genetic resources. These are the CBD, which was ratified in 1994, followed by the Nagoya Protocol in 2013. In addition, national rules under article 33.3 in the Indonesian constitution have also confirmed that the earth, the water and assets contained therein are under state authority and are to be used for the prosperity of the people. The earth, water, and assets contained therein are included in Indonesian biodiversity. Because it is Article 33.3, the Indonesian Constitution grants sovereign rights to the state to protect biodiversity and genetic

resources. This article will analyse the state's sovereign rights to protect biodiversity in Indonesia for survival of Indonesian people.

### **Method of Research**

This study is a doctrinal or theoretical study that uses library studies to look for legal material and legislation. Doctrinal research is adopted to achieve research objectives and answer the normative.

### **The Convention on Biological Diversity**

The Convention on Biological Diversity (CBD) is the agreement of countries in the Trial on Environment and Development. It takes place in Rio de Janeiro, Brazil, in 1992 (C. L. Diaz: 2007). Indonesia has ratified the CBD with Law No. 5 of 1994. The CBD contains four main principles in the protection of biodiversity and genetic resources. One of them is the principle of state sovereignty.

The state's sovereign rights regarding biodiversity are listed under article 3 of the CBD. This article indicates that states have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources and to pursue their own environmental policies. They also have the responsibility to ensure activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction. Under article 3 of the CBD, each country is given the right to draft laws and policies for the protection of biodiversity and genetic resources (C. Anton, 2012). The state is also responsible for access to biodiversity and genetic resources to ensure sustainable maintenance and use within its territory (K. Raustiala, 1996). The state's sovereign rights give it authority to draw up legislation regarding access to biodiversity and genetic resources, which is carried out by national empires (T. Swanson, 1999). Article 15 (1) of the CBD confirms that in recognising the sovereign rights of states over their natural resources, the authority to determine access to genetic resources rests with the national government and is subject to national legislation.

Furthermore, article 3 and article 15 (1) of the CBD clearly stipulate approval of sovereignty to safeguard access to biodiversity and genetic resources. Authority is given to the state in order to guard access to biodiversity and genetic resources (H. Meyer, 2013). The authority is given to national governments to draft laws regarding access to biodiversity and genetic resources. General issues are covered such as the definition of access, the scope of sources and activities, access procedures, institutions that have the authority to access and minimum access provisions (S. Afreen, 2008).

The sovereign right of the state regarding biodiversity and genetic resources also involves the granting of access permits, guarding access (R. Goel, 2008) and guaranteeing benefit sharing from the use of biodiversity and genetic resources (M. Sunder, 2007). This is to facilitate state affairs in obtaining state financial revenues for the maintenance and sustainable use of biodiversity and genetic resources (A. Coban, 2004). Therefore, the sovereign rights of the state, under the CBD, support the right of the people of origin to protect local wisdom (Z.A Zainol, 2011).

### **Nagoya Protocol**

The Nagoya Protocol was the approval of CBD member states at the tenth COP in Nagoya, Japan, in October 2010 (C. Aubertine, 2011). Indonesia has ratified the Nagoya Protocol with Law No. 11 of 2013. The Nagoya Protocol is not intended to broaden the scope of the CBD, but is a tool to make details for the rules of benefit sharing access under CBD article 15. Users of genetic resources must give fair and balanced access to benefit sharing.

The principle of state sovereignty is reaffirmed by the Nagoya Protocol. Access to biodiversity and genetic resources is based on national legislation under article 6 (1) of the Nagoya Protocol (K. R Von Bieberstein, 2011). Thus, based on state sovereign rights, access to biodiversity and genetic resources is necessary to obtain permission for approval based on preliminary information depending on national legislation. The sovereign right of the state has given the authority to draft national legislation to the state. This is done by the government based on the authority granted by the Nagoya Protocol (T. Greiber et al, 2012). Therefore, the Nagoya Protocol becomes one of the bases for using state sovereignty in managing and utilising biodiversity (Yulia et al, 2013).

### **The Theory of Sovereignty**

According to the theory of sovereignty, there is a legal reason that the right to control the state is a derivative of the sovereignty theory. Jean Bodin said that sovereignty is a special attribute or feature and even becomes the main thing for any sovereign unit known as a state. There is no other higher power that can limit state power. This theory of sovereignty then gave birth to the theory of state control over all areas in the sovereignty of the country concerned, including its contents. Based on the sovereignty, 'Property that is the right of citizens depends on the discretion of the sovereignty holder (when property comes to citizens from sovereigns).' (Jean Bodin, 1992).

A sovereign state's jurisdiction over its territory was also emphasised by Oppenheim-Lauterpacht: 'As all persons and things within the territory of a full state under its territorial supremacy, each state has jurisdiction over them' (Oppenheim, 1966). The sovereignty of the

state becomes a strength for the state in three aspects: First, the aspect of autonomy is having the independence to act; second, the escort aspect is to control natural resources within its territory and manage any actions from outside that are considered as threats (such as bio-piracy); and third, the aspect of validity is the right to repeal laws and make decisions in applicable cases. Therefore, the state has the sovereign right to guard access to biodiversity and genetic resources (J. Waldron, 2011). Control over biodiversity and genetic resources is carried out by the state. It changes legislation regarding access to biodiversity and genetic resources that may provide benefits to providers and users of biodiversity and genetic resources (F. Francioni, 2006).

### **State Sovereignty Rights in the Indonesian Constitution**

The Law of 1945 is the Indonesian Constitution. It refers to all laws and regulation in Indonesia. The sovereign rights of the Indonesian State have been affirmed in the Indonesian Constitution. It protects biodiversity and genetic resources. The Indonesian Constitution is the written constitution and the constitution of the Republic of Indonesia. It is the supreme law in the hierarchy of laws in Indonesia. As the highest law, the Indonesian Constitution serves as a guide for the drafting of other laws and regulations. This case is summarised on the basis of 'remembering'. Statutory regulations and other legislation that is made must not conflict with the Indonesian Constitution (J. Ashidiqie, 2008).

The preamble of the Indonesian Constitution has affirmed the sovereignty of the state as an independent state. State sovereignty is affirmed in Article 1.2. of the Indonesian Constitution. The sovereignty of the Indonesian state rests with the people and is carried out by law. In Article 1.2, an amendment was made in 1999. Before the amendment, sovereignty was in the hands of the people and the implementation was entirely in the hands of the people. After the amendment, sovereignty is still in the hands of the people, but implementation needs to be in line with the law. It is to reduce the arbitrariness of the people's sovereignty.

Indonesia's sovereign rights over state assets are affirmed in Article 33.3 of the Indonesian Constitution. The land, water and assets contained therein are controlled by the state and used, as much as possible, for the prosperity of the people. Article 33.3 strengthens the state's right to territory under its sovereignty. It is used for the welfare of its people in the midst of a rapid world economy that goes beyond borders. This means the 'water, earth and the contents of the assets in it' is the property of the Indonesian state in the sovereignty of its territory. Therefore, the Indonesian state has sovereign rights over its wealth (Irfan Nur Rachman, 2016). The earth, water and the wealth in it contains the principles of prosperity of the people, which needs to be controlled by the state to guarantee the prosperity of the people. The state has sovereign rights in managing the natural wealth within its sovereign territory.

Reaffirmation of the country's sovereign rights in the elucidation of Article 33 in the Indonesian Constitution indicates that: The economy is based on economic democracy and prosperity for all individuals. Therefore, the branches of production, which are important for the state and control the livelihoods of the people, need to be controlled by the state. If not, the reins of production fall into the hands of individuals in power and the people will be suppressed (Jimmly Asshidique, 2009). Only companies that do not control the lives of many people may be in the hands of individuals. The earth, water and property contained in the earth are principles of people's prosperity. This prosperity needs to be controlled by the state and used for the people's prosperity as much as possible.

The meaning of 'controlled by the state' refers to control by the state at large. This originates and is derived from the concept of the sovereignty of the Indonesian people over all sources of assets 'earth, water and the assets contained therein'. This includes the notion of the people's collective ownership of natural resources. The people are collectively outlined by the 1945 Constitution. It gives the state a mandate to carry out its functions in making policies (beleid), management actions (bestuursdaad) regulation (regelendaad) and management (beheersdaad). It also ensures the state functions as an escort (toezichthoudensdaad) (V.I Williamson Nalle, 2012).

The meaning of biodiversity and genetic resources 'controlled by the state', is the state's sovereign right to making policy, administration, management and to act as an escort (S.E Swasono, 1997). If the biodiversity and genetic resources are on their land, they may be used by the owner of the land rights or transferred to someone else. Likewise, biodiversity and genetic resources at the provincial level may be used by the provincial government. However, the use of biodiversity and genetic resources must comply with legislation drafted by the central government, such as the need to obtain permission from the government or the requirement to notify it about the use of biodiversity and genetic resources. This is an important form of state control that directly manages biodiversity and genetic resources in order to gain greater benefits (Constitutional Awareness Education Development Team, 2007). State control over biodiversity and genetic resources contains implied meaning regarding the country's sovereign rights.

State control, referred to as state sovereignty rights, is a legal relationship between the state as a subject and natural resources as an object (Afifah Kusumadara, 2013). This legal relationship gave birth to the right to control natural resources and, at the same time, gave 'obligations' to the state regarding the use of natural resources. This is to ensure the greatest prosperity of the people. In terms of state control, the state only carries out the 'bestuursdaad and beheersdaad', which give the state the authority to regulate, administer, maintain and supervise. Essentially, 'the right to control' or 'beheerrecht' is not a kind of civil right, but a



social obligation for people (the corpus) to maintain and administer. In the context of the state, this is called public obligation (Julius Sembiring, 2015).

The state's authority to regulate it was limited by two things. 'First, it is limited by the Constitution, so that these arrangements do not result in violations of basic human rights. Second, the substantive limitation, answers the question of whether the regulation is relevant to its purpose in order to realise the greatest prosperity of the people (Maria SW. Sumardjono in Suparjo Sujadi, 2011).

The concept of Article 33.3 in the Indonesian Constitution originated from on the integralist state (Julius Sembiring, 2011). It was stated that, in an integral state based on unity and in the economic field, a system of 'State Socialism' (Staats Socialisme) will determine: where, in what time and what company will be held by the central or regional government. It will also determine if it will be handed over to a private legal entity. It depends on the interests of the state or the interests of the people. It also depends on water and on the essence of the state that controls water entirely.

## **Conclusion**

The sovereign rights of the Indonesian state over biodiversity and genetic resources are affirmed in Article 33.3 of the Indonesian Constitution. The earth, water and assets contained therein are under state authority and are used for the prosperity of the people. Based on the country's sovereign rights in that article, the Indonesian government has the authority to protect biodiversity and genetic resources within its territory. It also has the authority to make laws in to regulate access to biodiversity.

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