

***Syirkah* and Agrarian Disputes Resolution in Toll Construction Projects**

AM. Hasan Ali
UIN Syarif Hidayatullah Jakarta, Indonesia
hasan.ali@uinjkt.ac.id

Abstract

Agrarian disputes require resolution. For years, acquiring people's land for constructing toll infrastructure project still use compensation as the popular term. Philosophically, the term means a reward in the form of money or non-money (in kind) which creates agrarian disputes. The partnership-profit sharing or *syirkah* offers a win-win solution to solve agrarian disputes. This article used systematic literature review (SLR) approach, which is similar with helicopter view model in looking at the topic of a particular study as a whole by using machine engine system. The aim of using this approach is obtaining complete and comprehensive information that have not been conducted by the previous researches.

Keywords: Agrarian disputes, Compensation, Sharing Profit

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Introduction

Recently, many agrarian disputes need solutions carried out by the government in avoiding negative effects for social life (Senarath & Franchis, 2024). Based on the Ministry of Agrarian and Spatial Planning/National Land Agency, there were 8.625 cases of agrarian disputes in 2018-2020 and 63.5% of them have been resolved.

According to Bernhard Limbong, there are two factors provoking agrarian disputes, involving legal and non-legal (Media Indonesia). Legal factors are caused by the overlapping rules and court in resolving the disputes. While, non legal factors are caused by overlapping land using high economic value of land, increasing public awareness, the remain number of land compared with increasing population numbers, and poverty (Zakie, 2016).

The writer observed agrarian disputes in some area, including Jombang Regency-east Java which some people's lands are affected by toll of Trans Java construction. This increasing public awareness of their land assets causes agrarian disputes.

The agrarian disputes in Jombang is the effect of Trans Java toll construction. Though Jombang-Mojokerto route has been opened officially since October 2014, there are some affected residents have not received payment for their land. They create a community namely Victims of Toll Construction (*Jamaah Korban Pembangunan Jalan Tol/ JKPJT*). They persisted to defend their ownership because of the low compensation. At that time, the community revealed that they would get IDR 100.000/meter. This is the

main trigger for raising agrarian disputes in Jombang Regency, especially for land owners affected by the toll construction.

Based on the above example of an agrarian dispute, there must be a win-win solution by which provides benefits for both parties. The both parties are the government and the people as the legal owners of their land. The solution must be conducted through the Toll Management Agency (*Badan Pengelola Jalan Tol/BPJT*) who has the right to administer the development and management of tolls in Indonesia. For several years, the acquisition of people's land for infrastructure development purposes, such as tolls, has often used a 'compensation' approach. The term compensation literally means that it does not reflect the win-win solution. On the contrary, there is one party who ultimately feels disadvantaged, meaning that the solution that has been going on so far has prioritized the spirit of a win-loss solution.

Therefore, there must be a solution to ensure that both the land owner and the government who implement the National Strategy Project (Proyek Strategi Nasional / PSN) for toll infrastructure construction, can realize the mutual benefits. This article attempts to offer a solution for agrarian disputes through a cooperative partnership approach which is known as *syirkah* in Arabic literature (Hasanuddin & Mubarak, 2012). *Syirkah* or partnership cooperation is quite familiar in muamalah fiqh study, both classical and contemporary books (Syahpawi, 2019). Apart from that, *syirkah* practically has now become one of the models and products developed in the Sharia Financial Institutions industry (Siregar & Buchori, 2016).

Methodology

This research used Systematic Literature Review (SLR) approach. According to Rowley and Slack, a literature review is a summary of a subject area that supports the identification of research questions (Rowley & Slack, 2004). In addition, the literature review approach must attract and evaluate various types of different sources including academic articles, professional journals, books and web-based resources, based on the data from Google Scholar system. The data was taken not over the last 5 years, 2018 to 2022.

Steps of this approach are: First, choosing the topic that would be discussed in the literature review. In this case, it is about resolving agrarian disputes through partnership cooperation; Second, searching for keywords in reputable journals. In this study, the author searched from reputable journals by using keywords: agrarian dispute resolution, toll infrastructure construction, and profit-sharing partnership; Third, selecting the journals and topics that have been obtained; and fourth, conducting a literature review, analysis as well as drawing conclusions.

Result

Agrarian Dispute Resolution

Agrarian disputes or conflicts have become a phenomenon in society. For years, the emergence of agrarian disputes has been dominated by dissatisfaction from land owners, like the case between some people in the Jombang whose land was affected by the construction of the Trans Java road infrastructure. Through the compensation mechanism model, the land owners believe they have not received a justice.

In general, topics of agrarian disputes in Indonesia can be classified into 4 categories: first, recognition of land ownership; second, handing over the land rights; third, encumbrance of rights, and fourth, occupation of ex-private land (Abdurrahman, 2013). Meanwhile, based on the subjects, agrarian disputes are grouped into three models: first, land disputes between people; second, agrarian disputes between citizens and the government; and third, disputes of natural resource management (Roeroe; 2013).

According to the keyword “agrarian dispute” on Google Scholar, during 5 years (2018-2022), for original writers (patent) or exclude cited writing, there were 194 articles. Meanwhile, if there is “resolution” that becoming “agrarian dispute resolution”, there were 3,070 results. This article presents some of the literature reviews that have more relevance to the topic that the researcher wants. Here are the results using the keyword “agrarian dispute” obtained from Google Scholar.

Based on the results above, Rara Verawati et al (2022), in her article, gave more focus on the role of regional governments through the regulations they made to resolve agrarian disputes. The results provided an illustration that the regulations issued by the regional government were quite effective in supporting agrarian disputes resolution. Furthermore, Rara suggested that the head of region to issue regional regulations that bind, provide solution and be easy to be implemented in resolving agrarian disputes.

Meanwhile, the article by Gelar Ali Ahmad (2018) focused on the construction process of the New Yogyakarta International Airport (NYIA) in Kulon Progo Yogyakarta which rose the agrarian disputes and fulfilled the categories of criminogenic and victim genic construction. According to Gelar Ali Ahmad, the construction of the NYIA had experienced administrative defects related to AMDAL. This problem placed the construction of the NYIA as an irrational construction plan fell which did not cover comprehensive protection strategy.

Sri Anggraini Kusuma Dewi, et al (2021) wrote an identical article with Rara Verawati, et al. The first one discussed about the legitimate position of the village head in resolving agrarian disputes. She provided two impacts by positioning the village head as a dispute problem solver in resolving positive and negative impacts as the effects of agrarian disputes. The positive impacts are: first, it did not cost much compared to settling through court; secondly, it could be adjusted to suit the time constraints of the parties to the dispute; and third, it could be easier to analyze the main points behind the dispute. Meanwhile, the negative impacts arose because: first, the village head's competence was very minimal; second, the results of the village head's decision could not provide legal certainty; and third, it was possible that the village head was not neutral.

Agrarian disputes during the construction of the Bener Dam in Purworejo became a focus of a study conducted by Haykal and Devi (2022). The results illustrated that dispute resolution in the construction of the Bener dam in Purworejo did not go smoothly due to a conflict of interest between parties who wanted to control the land and who had rights and interests over the land. Apart from that, the agrarian dispute over the construction of the dam was also influenced by overlapping government policies.

The existence of agrarian disputes promoted Aditya (2019) to form a land court to resolve agrarian disputes. Aditya's proposal was based on many agrarian disputes which had been increasingly massive and widespread. Besides that, Aditya concerned the inability of the available legal institutions in solving problems and incompetence of being a balancing force between low and high level communities. Aditya believed that the establishment of a land court is under the general court within the Supreme Court. This

land court has judges and officers who are specially educated and trained to handle complex and multidimensional land cases.

Yudha Chandra Arwana and Ridwan Arifin (2019) believed that agrarian disputes do not have to be resolved through litigation in the court as the final place for justice. They offered to resolve agrarian disputes through mediation. Apart from that, this article emphasized that the process of resolving agrarian disputes in many cases in Indonesia had not met the standards for fulfilling human rights, such as the existence of coercive measures and acts of violence from the government as well as repressive, discriminatory and intimidating attitudes. This article underlined and concluded that resolving agrarian conflicts in human rights studies must involve many parties, one of which is *Komnas HAM*.

On the contrary, Retno Sulistyarningsih (2021) suggested that there must have been agrarian reform in Indonesia. She believed that the implementation of agrarian reform that had been carried out by the government left the main problems faced in the land sector which rose of conflicts or disputes in the land sector. This case, especially the legalization and redistribution of land, although had positive impact on society, were also able to answer problems regarding land disputes. The problem was actually one of the main tasks that must have been completed in implementing agrarian reform. This research suggested the importance of evaluating policies in the land sector and continuing in paying attention to the philosophy and basic principles contained in the UUPA that the objectives of agrarian reform could run as they should have and provided welfare impact on all levels of society.

Eka Arya Wirata (2020) stated that regarding agrarian reform, the dispute resolution can be carried out both through non-litigation and litigation. Regarding resolving problems, this management is carried out by regulating law-based management rights, and confirming legal acts regarding management rights in authentic deeds as well as activating the role of the community. Agrarian reform in resolving management disputes in the future will be carried out with recommendations for the creation of a land dispute court. This research aimed to analyze and find the causes of problems that will be arise between management rights holders and third parties, as well as resolving management disputes in the future.

Damianus Krismantoro (2019) wrote that resolving the issue of verponding eigendom land dispute claims through agrarian conflict law reveal a finding. The process of legality of the status of land rights in many cases of verponding eigendom land disputes taken over by the state, was the main occurrence of verponding eigendom land conflicts. The conflict was also caused by other things, such as incomplete land registration process in Indonesia by the government or the land owner. Besides, the state officials often forcibly hand over land from people called by construction projects. Even though the handing over was based on legal regulations for the elimination of privately owned land, there was no process of regulated providing funding compensation as regulated in the national agrarian law and caused legal conflicts with each other.

Furthermore, Siti Athirah Zahrah and Sonyendah Retnaningsih (2022), in their research entitled legal protection for engineering legal acts to annex disputed land, explained that land registration is an activity to provide legal certainty for applicants. It is a proof of land rights in the form of land rights certificates. However, there were several obstacles due to the actions, because of the people who did not materially annex the

disputed land. The result showed that the act of annexing land was against the law, in accordance with the rules in the Civil Code Article 1365.

Meanwhile, this research provides a new formulation related to the concept of *syirkah* as a cooperation model that can be established between land owners and toll construction managers. Therefore, there is no need to transfer ownership from land owners to toll managers because of agrarian disputes due to inappropriate compensation from the toll managers, which in this case are the government and related parties.

Partnership Cooperation

Partnership cooperation is a type of cooperation that is often carried out between individuals or institutions. The previous studies showed that this topic is quite interesting for many researchers. After investigating the articles about the term “partnership cooperation” in Google Scholar written in during past 5 years from 2018-2022, limited by the category of specific requests and sort the relevance, there are 76 articles found. However, if the keyword is added with “toll partnership cooperation”, there are only 4 articles. The following explanation are the results of using the keyword 'cooperative partnership'.

Erna and Ersya, in their article, provided an overview of the analysis of research with the topics in toll project research funded by KPBU scheme during the 2004-2019 period. The research also identified the popular topics and looked for gaps in research topics to enrich the future research. The research analysis showed that Risk and Finance topics are the most popular. There are some risks in Toll KPBU projects in Indonesia, including: Financial/Economic Risk, Land Availability/Procurement Risk, Traffic volume Risk, Revenue Risk, Operation and maintenance Risk, Construction Risk, Tariff Risk, Force Majeure Risk, Tender/Tender Risk contracts, legal and policy risks, and political risks. Financial topics discuss the Viability Gap Fund, the influence of inflation in financial feasibility analysis, payment of KPBU project guarantees, sensitivity analysis calculations to measure the relationship between financial feasibility conditions and the extent of support needed for a KPBU project. This research found several important research problems that did not yet exist and must be researched further. Interesting topics for further research include KPBU accounting issues, government accountability, and the cultural/social impacts of toll road projects. These issues can be used as a guide and reference for further research on KPBU, especially in Indonesia (Nurhayati & Wahyuni, 2020).

Furthermore, Erna et al also wrote the results of their research in the Journal of Asset entitled Infrastructure and Facilities Management regarding the risks of road infrastructure by using a public-private partnership (PPP) scheme. As the result, toll infrastructure construction using the PPP scheme is increasing. The increasing problem complexity in PPP projects has become an interesting research object for academics/researchers. The publications discussing the risks of toll PPP relatively increase every year, but literature review studies of existing papers have not been available. This study addresses this gap by conducting a literature review of 75 articles used as research samples published in national/international journals in 2010-2019. The articles were reviewed to investigate about research trends in annual publications in ASEAN, and find out what risks arose. The research results showed that there was an increasing trend in publications, Indonesia is the first with 42 articles (56%), followed by Singapore and Malaysia. A qualitative approach was implemented in 33 articles (44%).

Based on the results of the literature, it was found that the risks that were frequently identified were the 10 risk factors that were most widely reported in the literature/high frequency, namely: Political Risk, Financial Risk, Design Risk, Construction and Operational Testing, Operation and Maintenance Risk, Revenue Risk, Force Majeure Risk, Risk Location, Asset Ownership Risk, Relationship Risk, and Interface Risk. The dominance of discussions regarding risk identification in articles is the most frequent topic, while risk mitigation is still rarely found so it can become a research topic for future researchers (Nurhayati & Wahyuni, 2021).

The study is different from Jeffrey et al., which stated that before the Government decides to choose PPP (Public Private Partnership) for the public infrastructure project procurement scheme, it is necessary to carry out a Value for Money (VfM) analysis. VfM is defined by Moralos and Amekudzi (2008) as the optimal combination of all costs over the life cycle and quality with the aim of meeting user demand. According to Prince (2010), VfM has been only used in a few cases with conventional methods, which did not take into account project risks and only focus on the financial side. Such testing using conventional methods can risk sub-optimal impacts on the benefits of public procurement projects. Related to the infrastructure project procurement scheme in Indonesia, the Government has decided to use the BUMN (State-Owned Enterprise) assignment scheme to work on the Trans Sumatra toll project as mandated in Presidential Decree No.100/2014. This paper reviews the VfM test for the Palembang Indralaya Toll Road (which is part of the Grand Trans Sumatra toll road) where an optimal VfM of 46% is generated in the BUMN assignment scheme which is higher than the PPP or APBN (State Revenue and Expenditure Budget) options (Jeffrey. et al, 2018).

Discussion

From the review of the articles above, it was found that agrarian disputes were not directly related to the topic of partnership cooperation. Among those 10 articles whose agrarian disputes topic, none specifically linked the partnership model of cooperation as a solution in resolving the disputes.

On the contrary, based on the searching process, there were only 3 are specifically related to toll infrastructure development. These three articles specifically do not relate to the subject of agrarian dispute studies. Therefore, it can be seen that these two keywords, both 'agrarian dispute' and 'partnership cooperation' seem to stand alone with a variety of independent studies, which are based on different approaches. The keyword 'agrarian dispute' is more nuanced in legal studies, namely agrarian law, while the keyword 'agrarian dispute' is often associated with the model and method of resolving it. This is different from searches using the keyword 'partnership cooperation' which is identical as a form of embodiment of the economic study section which contains economic values that provide benefits for both parties.

In the Islamic religion, land ownership rights are based on the concept of property rights. In Islamic perspective, land ownership, recognized as individual property rights or social property rights, can be divided into three parts, namely: individual ownership, public ownership, and state ownership. Individual ownership is a control over certain substances or benefits which enable those who obtain them to use them directly or take compensation from the goods (Sodiqin, 2012). In the basic agrarian law (UU No. 5 of 1960), agrarian has a very broad meaning, including earth, water, and within certain limits also space and the natural resources contained therein. Thus, what is meant by agrarian

law is the totality of legal rules, both written and unwritten, which regulate land, water and certain boundaries.

There are several principles regarding agrarian law in Indonesia. First, the principle of nationalism. It states that only the Indonesian state has ownership rights to land or may have relations with the earth and outer space without distinguishing between men and women and fellow citizens, whether native or hereditary. Second, the principle of being controlled by the state, or the earth, water and outer space, including the natural wealth contained therein, is at the highest level controlled by the state as the ruling organization of all people (article 2 paragraph 1 UUPA). Third, the principle of customary law that is presented, meaning that the customary law used as the basis for agrarian law is customary law that has been cleaned from its negative aspects. Fourth, the principle of social function, that land use must not conflict with the rights of other people and public, moral and religious interests (article 6 UUPA). Fifth, the principle of nationality or democracy, which states that every Indonesian citizen, whether native or descendant, has the right to own land. Sixth, the principle of non-discrimination (without distinction), proving that the UUPA does not differentiate between fellow Indonesian citizens, whether native or foreign descendants, in having the right to own land. Seventh, the principle of mutual cooperation, that all joint efforts in the agrarian field are based on common interests within the framework of the national interest, in the form of cooperatives or other forms of mutual cooperation. Eighth, the principle of unification, means the unification of agrarian law in one law that applies to all Indonesian citizens, that is the UUPA.

In the context of sharia, the term *syirkah* according to language is *al-ikhtilath* which means mixing. Mixing is that someone mixes their assets with other people's assets so it is impossible to differentiate them. In the Civil Code, Book III concerning Partnerships (chapter VIII concerning Partnerships [article 1618]), it is explained as follows:

"Persekutuan adalah suatu perjanjian dengan mana dua orang atau lebih mengikatkan diri untuk memasukkan sesuatu dalam persekutuan, dengan maksud untuk membagi keuntungan yang terjadi karenanya."

"A partnership is an agreement by which two or more people commit themselves to include something into a partnership, intended to share the profits resulted from it." Thus, in the context of business law in Indonesia, legally recognized *syirkah* as *syirkah-`uqud*. (because the purpose of *syirkah* property is not in line with business objectives or profits).

The term meaning of *syirkah* is the combination of assets to be used as business capital and the results in the form of profits which are divided according to the agreed or proportional profit-sharing ratio, and losses are shared proportionally (Sabiq, 1983).

The term *syirkah* is explained by scholars in different keywords. Hanafiah scholar uses the keywords *al-ikhtilath* (mixing of wealth); Malikiyah scholars use the keywords *al-idzn* (permission); and Hanabilah scholars use the keyword *al-ijtima`* (merger).

According to sharia definition, *syirkah* is a transaction between two or more people who agree to carry out a financial business for seeking profit (Irmaniyati & Nurhasanah, 2019). *Fuqoha* have different opinions related to the term of *syirkah*. Sayyid Sabiq stated that *syirkah* is a contract between two people associating on the principal of assets (capital) and profits. According to Muhammad al-Syarbini al Khatib, *shirkah* is the provision of rights to two or more people in a well-known way. Meanwhile, according to Shihab al-Din al-Qalyubi wa Umaira, *syirkah* is the determination of rights to something for two or more people. Imam Taqiyuddin Abi Bakr Ibn Muhammad alHusaini also said

that *syirkah* is like establishing a right to one thing for two or more people in a known way. Imam Hasbie Ash-Shidieqie's declared that *syirkah* is an agreement between two or more people for *ta'awun* in working on a business and sharing the profits. Meanwhile, Idris Muhammad said that *syirkah* is the same as a trading company, namely that two or more people both promise to work together in trading by handing over their respective capital where profits and losses are calculated according to the size of their respective capital.

Basically, *syirkah* is permissible or allowed. This is demonstrated by the Prophet Muhammad who practiced *syirkah* in the Islamic community at that time. There are several propositions from the Quran and hadith that explain *syirkah*, including:

"Sesungguhnya kebanyakan dari orang-orang ber-syirkah itu, sebahagian mereka berbuat zalim terhadap sebahagian yang lain, kecuali orang yang beriman dan mengerjakan amal salih." (QS Shad 38:24)

"Indeed, most of those who practice *Shirkah*, some of them do injustice to others, except those who believe and do righteous deeds." (QS Shad 38:24)

On DSN-MUI Fatwa No. 114/DSN-MUI/IX/2017 concerning *Syirkah*, it is a cooperation agreement between two or more parties for a particular business where each party contributes funds/business capital (*ra's al-mal*) with the stipulation that the profits and losses are shared proportionally or based on the agreed ratio.

Imam Zufar, Syafi'iah, Zhahiriah, Zaidiah, and Imamiyah stated that business capital in *syirkah* must be combined that one asset cannot be identified from another. Because the essence of *syirkah* is a mixture, there must be occurrence of the mixing of the assets used as business capital when the contract is executed and there is no contract unless the business capital has been put together. If the assets that will be used as business capital are damaged before being put together, the *syirkah* entity is not responsible for the damage; but it is the responsibility of the owner personally. Meanwhile, the majority of ulama (Hanafiah, Malikiyah, and Hanabilah) do not combine the assets used as business capital which enable it as a valid condition for a *syirkah* contract; because *syirkah* does not occur as the result of the mixing of assets (to become business capital), but coming from after contract (Ramadhan, 2007).

If the business capital is in the form of money to be used as working capital, the money collected is mixed so that one ownership cannot be identified from another. The mixture of business capital in the form of money in question is not a physical mixture of assets, but the mixture must be managerial in nature. If business capital is in the form of goods, the value must be agreed first in order to determine the portion of capital included

Thus, in the agrarian dispute over toll road construction, the author recommends the use of a *syirkah* contract as an alternative model of business cooperation between toll construction project owners and farmers as land owners. With this model, the project owner and land owner cooperate with each other by investing their respective capital. Land owners hand over capital in the form of land, while project owners can hand over capital in the form of materials for toll construction. The respective capital in the form of goods must be equated in value with money to make it easier to calculate the capital contributions of the parties.

Furthermore, the parties agree to determine the percentage of profit sharing ratio, so when the toll has been opened and makes a profit, the parties can enjoy the profit sharing as agreed. In its operations, if there is a loss in the *syirkah* business, then the loss

must be borne (become a burden) on the parties proportionally according to the portion of business capital included.

Toll projects that operate long term can provide sustainable benefits for the parties. With this model, it is hoped that a win-win solution will be achieved between the parties involved, both the people as the initial owners of the land they own and the government which is carrying out the construction of toll infrastructure.

Conclusion

Agrarian disputes that have been arisen need to find a solution. So far, the approach to acquire people's land for toll infrastructure development projects has mostly used the term compensation. The philosophy of using compensation diction contains a meaning that does not prioritize the principle of a win-win solution, resulting in agrarian disputes. The partnership-profit sharing cooperation model or *syirkah* offers a resolution formula for resolving agrarian disputes that refers to the principle of a win-win solution. Through the concept of *syirkah* or *musyarakah*, it can provide a win-win solution between farmers who own land and managers of national strategic projects. Both farmers who own land and managers of toll construction projects can benefit equally. Apart from that, the concept of land ownership carried out by land owners in the construction of toll projects also provides sustainable profits over a long period of time, because it is a form of investment in the construction of toll projects. In contrast, if the land asset is purchased by the project manager, the profit may only be momentary, when the land owner receives compensation from the purchase of the land. This article was written using a systematic literature review (SLR) approach. SLR is similar to the helicopter view model which looks at the subject of a particular study as a whole through searching using a search engine system. There is still a niche available for conducting research on resolving agrarian disputes through a cooperative partnership approach.

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