

The Strengthening Customary Land Rights: Promoting Agrarian Law Reform in Indonesia

Setiawan Widiyoko¹⁾ & Agus Prasetia Wiranto²⁾

¹⁾ Faculty of Law, Universitas Islam Sultan Agung Semarang, Indonesia, E-mail: setawan.wd@unissula.ac.id

²⁾ Faculty of Law, Universitas Islam Sultan Agung Semarang, Indonesia, E-mail: Agusprasetiawiranto@gmail.com

Abstract. *Ulayat land is land that is controlled jointly by members of a customary law community, where the management arrangements are carried out by the traditional leader (Head of Adat) and its use is intended for both members of the customary law community concerned and outsiders. Indigenous communities tend to live scattered across Indonesia's vast forest areas. With the issuance of the Basic Agrarian Law (UUPA) and development programs, they are threatened with eviction from the forest land they now occupy. This is based on confusion regarding the legal position and rights of indigenous peoples to customary land and other agrarian resources. The existence of indigenous peoples and their rights to land is one of the considerations in renewing the law on agrarian affairs, especially in reforming agrarian law. This research was carried out using a normative juridical method. Data was obtained by collecting from several sources such as books, journal articles and regulations. In conclusion, the recognition of customary land rights has been regulated in the Basic Agrarian Law Articles 3 and 5 of 1960 and is in the process of being implemented. In the field there are many agrarian disputes that are detrimental to customary land and there is no clarity on the process of protecting customary land.*

Keywords: *Agrarian; Customary; Protection; Ulayat.*

1. INTRODUCTION

Land is one of the most important elements in human survival, therefore land should be cultivated to achieve the greatest prosperity of the people. In indigenous communities, land issues are very important because humans and land have a very close relationship where land is a place for indigenous people to shelter and live their lives. Indigenous peoples have high wisdom, an amazing depth of knowledge about life and a strong socio-economic system. However, in reality there is a conflict between the culture of indigenous peoples which relies on natural balance and a production system which places greater emphasis on subsystem economics (farming, hunting, gathering, gardening, etc.), and government policies which are exploitative of natural resources.¹

¹Arie Sukanti Hutagalung. (2012). *Hukum Pertanahan di Belanda dan di Indonesia*. Denpasar: Pustaka Larasan

The underlying conception of National Land Law is Customary Law, namely a religious communalistic conception that allows individual control of land with personal land rights, while also containing an element of togetherness. The religious communalistic nature of the conception of National Land Law is shown in Article 1 paragraph (2) of the UUPA, which states that "the entire earth, water and space, including the natural wealth contained therein within the territory of the Republic of Indonesia, is a gift from God Almighty, is the earth, water and space of the Indonesian nation and is a national treasure."²

This individual right of control is a personal right, because the land controlled is intended to fulfill personal and family needs. Not to fulfill group needs. The group's needs are met by using part of the common land by the group under the leadership of the Traditional Head of the customary law community concerned.³ Meanwhile, these individual rights are not merely personal. That what is controlled and used is part of the common land. Therefore, in its use it must not only be guided by personal interests, but must also remember the common interest, namely the interests of the group. The nature of such mastery in itself contains what is called an element of togetherness.

Common land is also intended as the main supporting element in the lives and livelihoods of previous, present and future generations. So it must be managed well and utilized to meet mutual and individual needs.⁴ Thus, the customary law community's customary rights: a. apart from containing joint ownership rights over land with its members or residents, it also includes the field of civil law. b. contains the duties of managing, regulating and leading its control, maintenance, allocation and use, which is included in the field of public law

The 1945 Constitution of the Unitary State of the Republic of Indonesia regulates the existence of customary law communities as legal subjects that are different from other legal subjects. The existence of customary communities has been included in the formulation of article 18 B which states, "The State recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in the Law."⁵

Ulayat land is defined as land that is controlled jointly by members of a customary law community, where the management arrangements are carried out by the traditional leader (customary head) and its use is intended for both members of the customary law community concerned and outsiders.⁶

In the era of technological development and globalization, many cases of customary land grabbing by several large companies in Indonesia have been discovered which has caused indigenous people to become angry and also feel that the customary rights which should be attached to customary law communities no longer exist, and feel

²Setyo Utomo, "Nilai-nilai Kearifan Lokal Hukum Adat dalam Hukum Tanah Nasional", *Jurnal Hukum Fakultas Hukum Universitas Panca Bhakti*, Pontianak, p. 16.

³Harsono, Budi, (2016). *Hukum Agraria Indonesia: Sejarah Pembentukan Pembentukan Undang-Undang Pokok Agraria, Isi dan Pelaksanaannya*, Jilid 1 Hukum Tanah Nasional, Jakarta: Universitas Trisakti, p. 181.

⁴Muhamad Wahid Cahyana, "Hukum Agraria Marjinalisasi Hak Masyarakat Adat Terhadap Tanah Ulayat Di Indonesia", *Jurnal Ilmiah Hukum Universitas Wishnu Wardana*, No. 2, Vol. 11 (2013). p. 123

⁵Yazid Fadhil. (2020). *Pengantar Hukum Agraria*, Undhar Press,

⁶Samosir, Djamanat. "Legalisasi Hak Ulayat Masyarakat Hukum Adat", *Jurnal Hukum Universitas Katolik Santo Thomas*, No. 2 Vol. 42 (2013), p. 237

anxious about their survival because they feel marginalized from the land they inhabit, this is based on confusion regarding the legal position and customary rights of indigenous groups to land and agrarian resources. This has indirectly hampered the determination of attitudes among local indigenous communities regarding land tenure disputes involving their interests.

2. RESEARCH METHODS

This research method is normative research. Legal research is a process of finding legal rules, legal principles and legal doctrines to solve research problems on the sources of legal issues faced, so this research was carried out to examine library sources.⁷This research examines customary land rights, obstacles in protecting customary land rights, protection of customary land rights.

3. RESULTS AND DISCUSSION

3.1. The Position of Customary Land Law in the Basic Agrarian Law

Customary land law has been promulgated in new regulations, namely the basic agrarian law or what is known as the 1960 UUPA. In the formation of this law, customary law was the main source in the formulation of the UUPA. This is reflected in the preamble to the 1960 UUPA which reads that;⁸

"In connection with what is mentioned in the considerations above, it is necessary to have a National Agrarian Law, which is based on customary law regarding land, which is simple and guarantees legal certainty for all Indonesian people, without ignoring elements that rely on religious law."

Based on Article 5 of the UUPA, it is stated that: "Agrarian law that applies to earth, water and space is customary law, as long as it does not conflict with national and state interests, which is based on national unity, with Indonesian socialism and with the regulations contained in this law and other statutory regulations, everything takes into account elements that rely on religious law."

In the regulations of the Basic Agrarian Law of 1960 there is a communalistic nature referring to the collective rights of members of customary law communities to land, which in the legal literature is called *Ulayat* Rights. Customary rights are a series of authorities and obligations of a customary law community, which relate to land located within its territorial environment as the main support for the livelihood and life of the community concerned throughout time. Customary rights cover all land within the territory of the legal community in question, whether or not someone has owned it. In the context of *Ulayat* Rights there is no land as "res nullius". Generally, the boundaries of the territorial rights of territorial customary law communities cannot be determined with certainty

Because customary land law is used as a parameter for taking the materials needed to develop national land law. Customary land law has the position of customary land law in the UUPA, namely that national customary land law is prepared based on customary law regarding land, stated in the considerations/opinions of the UUPA.

⁷Soekamto, Soerjono and Sri Mamudji, (1985). *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, Jakarta: Rajawali Press

⁸Abdul Hamid Usman, (2020). "Perlindungan Hukum Hak Milik Atas Tanah Adat Setelah Berlakunya Undang-Undang Pokok Agraria", *Jurnal Hukum dan Keadilan*, No. 2, Vol. 1, p. 70

Regulation of customary land rights

Recognition of customary rights is contained in Article 18 B paragraph (2) of the 1945 Constitution which states that "the state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in the law."

In land matters, we often hear the term customary rights. In article 3 of the UUPA, the term "customary rights and rights similar to it" is explained in full,⁹Bearing in mind the provisions in articles 1 and 2, the implementation of *ulayat* rights and similar rights from customary law communities, as long as in fact they still exist, must be in such a way that it is in accordance with national and state interests, based on national unity and not may conflict with laws and other higher regulations."¹⁰

Requirements that must be fulfilled by customary rights in article 3 UUPA:¹¹

1. As long as the reality is that customary law communities still exist: Regarding this matter, in accordance with the explanation of article 67 paragraph (1) of Law no. 41 1999 concerning forestry "a customary law community is recognized for its existence, if in reality it fulfills the following elements:

- a. The community is still in the form of community (*rechtsgemeenschap*)
- b. There are institutions in the form of traditional rulers
- c. There is a clear area of customary law
- d. There are legal institutions and instruments, especially customary courts, which are still adhered to
- e. Still collecting forest products in forest areas in the surrounding forest areas to fulfill daily living needs

2. State and in accordance with national interests.

3. Not in conflict with higher laws and regulations, the criteria for determining customary rights are:

- a. The element of traditional society, namely the existence of a group of people who are still bound by their customary legal order as a certain legal association, which recognizes and applies the provisions of this association in everyday life.
- b. The territorial element, namely the existence of certain customary land which is the living environment for the residents of the legal association and the place where they collect their daily necessities, and
- c. An element of the relationship between the community and the territory, namely the existence of a customary legal order regarding control, control and use of land. customary law which is still valid and obeyed by the citizens of the legal community.

In this way, the UUPA provides conditional recognition of customary rights, namely: first, the conditions for their existence (existence), namely that customary land rights are recognized as long as in reality they still exist. This means that in areas where customary land rights originally existed, but in subsequent developments, individual

⁹Rosmidah. "Pengakuan Hukum Terhadap Hak Ulayat Masyarakat Hukum Adat dan Hambatan Implementasinya", *Jurnal Ilmu Hukum*, No. 4 Vol. 2 (2010). p. 95.

¹⁰Wignydipuro, Soerojo. (1998). *Pokok-pokok Hukum Adat*. Jakarta: Gunung Agung. p. 1998.

¹¹Warman, Kurnia, (2010). *Hukum Agraria Dalam Masyarakat Majemuk*, Jakarta: Huma, p.40

property rights became stronger, resulting in the loss of customary land rights, so customary land rights will not be revived.¹²Likewise, in areas where customary land has never existed, new customary land will not be created. Second, the conditions for implementation are in accordance with national and state interests based on national unity and must not conflict with laws and other higher regulations.¹³

3.2. Obstacles in Protecting Customary Land Rights

The obstacle that arises in protecting ancestral land or customary land managed by indigenous communities is in the process of recognizing customary land under agrarian law through the National Land Agency because the National Land Agency is the only institution that has the authority to issue legal and legally recognized land ownership letters. and country.

In the process, indigenous communities recognize that the land they manage is *ulayat* land or customary land is limited by regulations to fulfill the 3 elements contained in article 3 of the Basic Agrarian Law which states that they must fulfill;

1. Indigenous communities still exist
2. State and in accordance with national interests
3. Does not conflict with higher laws and regulations

Meanwhile, in the process of identifying whether customary land belongs to indigenous peoples or not, several elements are required. Determining the status of *ulayat* rights/customary land, regional governments conduct research involving customary law experts, customary law communities in the area concerned, non-governmental organizations and relevant agencies.¹⁴In terms of the role of the National Land Agency, it is to record customary land that has previously been declared to exist by research as in Article 5 Paragraph (1) of the Regulation of the Head of the National Land Agency Number 5 of 1999 concerning Guidelines for Resolving Customary Law Community Land Rights Issues.¹⁵

When in the identification process the regional government with several elements such as customary law experts, indigenous communities, non-governmental organizations and related agencies state that the customary land object is not customary or *ulayat* land, it will be very difficult for indigenous communities to protect their ancestral customary land. from various threats of land disputes because the customary land owned does not have legality recognized by the state and national law which results in it not having legal force to protect the customary land.

Under these conditions, there must be clear regulatory reform changes to protect the rights of indigenous peoples who have long lived on customary land in the interior of the forest so that things like this are not biased and require special attention by the central and regional governments considering that the Basic Agrarian Law is already old. Turning 65 years old, of course there are many regulations that are not in accordance with the living conditions of today's society.

¹²Alting, Husain, (2011). "Penguasaan tanah Masyarakat Hukum Adat (Suatu Kajian Terhadap Masyarakat Hukum Adat Ternate)", *Jurnal Dinamika Hukum*, No 1, Vol. 11, p. 91

¹³Mudjiono. (2004). "Eksistensi Hak Ulayat dalam Pembangunan Daerah", *Jurnal Hukum*, No. 25 Vol 11, p.155.

¹⁴Sumardjono, M.S.W. (2009). "*Kebijakan Pertanahan Antara regulasi dan Implementasi*". Jakarta: Kompas. p.89.

¹⁵A, Fingli, (2014). "Fungsi Badan Pertanahan Nasional Terhadap Penyelesaian Sengketa Tanah", *Jurnal Hukum*, No. 2, Vol. II, p.101

3.3. Harmonious Model for Resolving Disputes on Customary Land Rights

Land dispute cases arise due to claims/complaints/objections from the community. In essence, defense cases can be categorized into legal and conflict of interest issues. A dispute is a conflict between two or more parties that originates from different perceptions about an interest or property right which can give rise to legal consequences for both.¹⁶

A land dispute is a conflict between two or more people who have the same interest in the status of land rights to one or several land objects which can give rise to certain legal consequences for parties who have the same interests in plots of land. What often happens in Indonesia, especially in matters relating to land, is that there are several cases regarding land including several types, including:¹⁷

1. Regarding land status issues
2. Ownership issues
3. The issue of proof of acquisition which is the basis for granting rights and so on.

The causes of land disputes are usually in resolving land disputes usually using 2 steps, namely by legislative means or through a judicial body which is usually assisted by BPN and secondly using non-legislative means, namely by using deliberation usually involving village officials or using traditional leaders in the area where this occurs. land dispute.¹⁸

The resolution of the roots of this customary land conflict is regulated in the Decree of the Head of the National Land Agency Number 5 of 1999 concerning Guidelines for Resolving Problems with Customary Law Communities' Customary Rights.¹⁹This normative regulation also clarifies the legal status of customary rights which in the UUPA are only regulated abstractly in the sense that as long as these customary rights still exist. However, in the decision of the Minister of Agrarian Affairs/Head of the National Land Agency Number 5 of 1999 concerning Guidelines for Resolving Problems with Customary Law Communities' *Ulayat* Rights, it is not clearly explained what the role of the National Land Agency is in resolving customary land disputes, but in the regulation it is stated that further regarding the status of customary land / the remaining customary rights are under the authority of the regional government.

In principle, to resolve customary land disputes in a harmonious manner, use non-litigation dispute resolution methods or alternative dispute resolution, namely resolving disputes outside the mechanisms of the Judicial Body. Typically, non-litigation dispute resolution can involve negotiation, mediation and arbitration.²⁰

Alternative resolution according to Law Number 30 of 1999 concerning arbitration and alternative resolution of land disputes.

¹⁶Supriadi, (2007). "*Hukum Agraria*", Jakarta: Sinar Grafika, p.41.

¹⁷Thontowi, Jawahir, "Perlindungan dan Pengakuan Masyarakat Adat dan Tantangannya dalam Hukum Indonesia", *Jurnal Hukum Ius Quia Iustum*, No. 1, Vol. 20, (2013). p.24

¹⁸Santoso, Urip. (2007). *Hukum Agraria dan Hak-hak Atas Tanah*. Jakarta. Jakarta: Kencana Prenada Media Group

¹⁹Ariana Novizas Shebubakar, (2019). 'Hukum Tanah Adat/Ulayat', *Jurnal Hukum Universitas Al Azhar Indonesia*", No. 1, Vol. IV, p.16

²⁰Maria Sumardjono, Nurhasan Ismail, Isharyanto, (2008). *Mediasi Sengketa Tanah*, cetakan kedua, Jakarta: Penerbit Buku Kompas

1. Civil disputes or differences of opinion can be resolved by the parties through alternative dispute resolution based on good faith by excluding litigation settlement in the District Court.

2. Settlement of disputes or differences of opinion through alternative dispute resolution as intended in paragraph (1) is resolved in a direct meeting by the parties within a maximum period of 14 (fourteen) days and the results are stated in a written agreement. Of course, the implementation of the customary land dispute resolution process through non-litigation methods involves customary institutions formed by local indigenous communities in the process.

4. CONCLUSION

The regulation of customary land rights in the Basic Agrarian Law of 1960 is contained in article 3 which can be said to be customary land that can fulfill the 3 existing elements. They are: Customary law communities still exist, State and National interests, Does not conflict with the Laws and Regulations. The absence of legal recognition of customary or *ulayat* land under national law which is registered with the National Land Agency results in the existence of *ulayat* or customary land being threatened because it does not have legal force to protect it from the threat of land grabbing by companies carrying out business activities in nearby customary land of indigenous peoples. The resolution of land disputes can be done in two ways, namely alternative resolution according to Law Number 30 of 1999 concerning arbitration and alternative resolution of land disputes as follows. (1) Civil disputes or differences of opinion can be resolved by the parties through alternative dispute resolution based on good faith by excluding litigation settlement in the District Court. (2) Settlement of disputes or differences of opinion through alternative dispute resolution as intended in paragraph (1) is resolved in a direct meeting by the parties within a maximum period of 14 (fourteen) days and the results are stated in a written agreement.

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