

The Force of Legal Regard to Traditional Land When Certified Through PPAT

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Abstract. Customary land occupies a unique position in the Indonesian land law system because customary law is established as the basis for national land law through Article 5 of Law Number 5 of 1960 concerning Basic Agrarian Principles. In practice, customary land is often certified as private property without prior release of customary rights, thus raising issues regarding the validity of the certificates issued and the responsibility of the Land Deed Officials who process them. This study aims to determine, examine, and analyze the existence of customary law in the national land law system, the legal consequences of the issuance of Ownership Certificates for customary land by PPAT without prior release of customary rights, and the extent to which customary law still has legal force over certified customary land. The approach used is normative juridical with analytical descriptive research specifications. The data sources used are secondary data, including primary legal materials, secondary legal materials, and tertiary legal materials, collected through literature studies and analyzed descriptively and qualitatively. The results of the study indicate, first, that the existence of customary law is dual: strong at the normative level through constitutional and statutory recognition, but weak at the operational level due to the absence of an obligation to examine customary status in land registration procedures. Second, the issuance of a Certificate of Ownership over customary land without the release of customary rights has multiple legal consequences, namely a certificate that can be revoked, a PPAT deed that has the potential to be null and void by law, as well as administrative, civil, and criminal responsibilities for the PPAT.
Keywords: Administrative; Criminal; Responsibilities.

1. Introduction

In human life, the existence of land cannot be separated from all human actions, because land is a place for humans to live and continue their lives.¹The existence

¹Adrian Sutedi. 2009. Transfer of Land Rights and Their Registration, Jakarta: Sinar Grafika, p. 31.

²So urgent is the land in relation to human life, then Ter Haar explains that land is a place to live, land provides life and livelihood, land where humans are buried and the relationship is magical-

of land in life on earth as a natural resource is a gift from God Almighty. Land is the most basic human need, a source of life and livelihood. In fact, land and humans are inseparable from birth to death. Humans live and carry out activities on the land, so every human being is connected to it. The importance of land to humans gives it value and benefits for long-term development, and its role in meeting various needs will increase.²

In national development the role of land³The need to fulfill various needs will increase, both as a place to live and for land acquisition activities as proof of rights. However, the implementation of these provisions has not been optimal as expected. One of the main obstacles is the still low level of understanding

In this regard, the need for support in the form of legal certainty in the land sector will also increase.⁴In human life, the existence of land is inseparable from all human actions, as it provides a place for humans to live and sustain their lives. Therefore, land is essential for every member of society, leading to frequent disputes between individuals, particularly those concerning land. Therefore, rules are needed to govern the relationship between humans and land.⁵

Land and land management are vital elements in national and state life, as they are sources of justice and prosperity for the people. The Indonesian people's relationship with the land is characterized by an eternal bond.⁶Providing legal guarantees in the land sector primarily requires the availability of written, complete, and clear legal instruments. Land and buildings are objects that play a vital role in human life. Land and buildings are one of the basic human needs (the need for shelter) that affect the existence of each individual because every human being needs a place to live. In Islamic land rights (KHI), donations must be made in accordance with sharia principles and positive legal provisions to be valid both in sharia and juridical terms. This issue demonstrates the interconnectedness of social and legal aspects, thus requiring increased public

religious, as quoted in Sri Susyanti. 2010. *Land Bank: Alternative Solution to the Problem of Land Provision for Sustainable Urban Land Development*. Makassar: As Publishing, p.1.

³Land is a place from which humans live and obtain resources to sustain their lives. Therefore, even at the current stage of development, humans have a need for land. See, Djaren Saragih. 1996. *Introduction to Indonesian Customary Law*. Bandung: Tarisito, p. 74.

⁴The obstacle in implementing land registration, besides the lack of budget, equipment and personnel, is the objective condition of the land itself, which, besides being large in number and spread over a wide area, most of the control is not supported by evidence that is easily obtained and can be trusted. See, Explanation of PP No. 24 of 1999.

⁵Kenny Wijaya. 2013. *Agrarian Law Perspectives in Indonesian Society*. Unsrat Journal Vol. I/No. 5/October-December, p. 44.

⁶National Land Agency. 2013. *Government Agency Performance Report for Fiscal Year 2012*. Jakarta: BPN RI, p. 1.

awareness and understanding of the law so that donation practices can be carried out in accordance with religious values and regulations.

2. Research methods

This type of research falls within the scope of normative legal research. The approach method in this research is legislation (statue approach). The type of data in this research is secondary data sourced from primary, secondary and tertiary legal materials. The data collection method uses library techniques (document study). The analysis in this research is prescriptive.

3. Results and Discussion

3.1 Existence of Law in the National Land Law System

Discussion on the existence of customary law in the national land law system must begin with the affirmation that customary law is not a foreign element superimposed on national land law, but rather is the foundation on which national land law is built. This affirmation is explicitly stated in Article 5 of the UUPA which states that the agrarian law applicable to land, water, and space is customary law, as long as it does not conflict with national and state interests based on national unity, with Indonesian socialism and with the regulations contained in this law and with other laws and regulations, all of which take into account elements based on religious law.

The formulation of Article 5 of the UUPA contains two layers of meaning. The first layer is stipulating, namely that customary law is declared agrarian law applicable nationally. The second layer is restrictive, namely that its validity is not unconditional but is subject to four limitations: national and state interests, Indonesian socialism, regulations in the UUPA and other laws, and elements based on religious law. With this construction, customary law is positioned as both the primary source and the object of filtering.

Boedi Harsono explained that what is meant by customary law in Article 5 of the UUPA is not customary law that is still full of weaknesses, but rather customary law that has been sanitized, namely customary law that has been cleaned of its defects and adjusted to the principles stated in the UUPA.⁷The filtering process includes the elimination of feudal characteristics in land ownership, the elimination of discrimination, and adjustment to the principle of the social function of land rights.

The author's analysis shows that the construction of Article 5 of the UUPA actually contains internal tensions that have not been fully resolved to this day. On the one hand, customary law is positioned as a source, but on the other

⁷Boedi Harsono. Agrarian Law... Op.Cit., p. 179.

hand, its filtering criteria are formulated with concepts that are very open to interpretation, namely "national and state interests" and "Indonesian socialism." In practice, these open concepts tend to be interpreted unilaterally by the state, so that customary law, which originally served as the primary source, has instead transformed into law whose validity depends on the will of the state.

This tension becomes even more apparent when connected with other national land law principles. The UUPA, on the one hand, emphasizes the religious communalist principle rooted in customary law, as reflected in Article 1 paragraph (2) which states that all the earth, water and space, including the natural resources contained therein, are within the territory of the Republic of Indonesia.

The Republic of Indonesia, as a gift from God Almighty, possesses the land, water, and airspace of the Indonesian nation, constituting a national treasure. However, the UUPA also adopts the principle of individualized rights through the regulation of individual property rights and a land registration system that focuses on individual plots of land. These two principles do not always reconcile smoothly in practice.

3.2. Constitutional Recognition of the Unity of Customary Legal Communities

At the constitutional level, the existence of customary law communities is recognized through Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which states that the state recognizes and respects customary law communities 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 by law. This provision is reinforced by Article 28I paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which states that the cultural identity and rights of traditional communities are respected in accordance with the development of the times and civilization.

These two constitutional provisions place recognition of indigenous peoples as a state obligation, not simply a policy that can be adopted or abandoned at the whim of lawmakers. However, the phrases "as long as they are still alive" and "as regulated by law" have given rise to a conditional and tiered construction of recognition, which in practice often hinders indigenous peoples from obtaining effective protection.

The Decree of the People's Consultative Assembly of the Republic of Indonesia Number IX/MPR/2001 concerning Agrarian Reform and Natural Resource Management also strengthens the basis for this recognition. Article 5, letter j of this Decree, emphasizes that agrarian reform must be implemented by recognizing, respecting, and protecting the rights of indigenous peoples and the nation's cultural diversity over agrarian resources. Unfortunately, this MPR

Decree has not been fully translated into organic law that provides a simple and accessible recognition mechanism for indigenous peoples.

From this description, the author argues that the existence of customary law in the national land law system at the normative level is actually strong and multi-layered, starting from the constitution, MPR decrees, laws, and implementing regulations. The problem does not lie in the absence of recognition norms, but rather in the weakness of the operational mechanisms to realize that recognition, as well as the lack of uniform understanding among officials. including PPAT and Notary, regarding the legal position of customary law in the land registration process.

3.3. Operational Criteria for the Existence of Customary Rights

As explained in Chapter II, Article 2 paragraph (2) of PMNA/KBPN No. 5 of 1999 provides three cumulative criteria for determining whether customary rights still exist, namely the existence of a group of people who are still bound by their customary legal system, the existence of certain customary land which is the living environment of its citizens, and the existence of customary legal systems regarding the management, control and use of customary land which are still adhered to.

If we look closely at these three criteria, they are actually a description of the elements of customary law communities as stated by Maria SW Sumardjono, namely the existence of a group of people, the existence of separate wealth that is separate from individual wealth, the existence of certain territorial boundaries, and the existence of certain authorities.⁸⁸The first criterion concerns the elements of human groups and authority, the second criterion concerns the elements of territory and shared wealth, and the third criterion concerns the elements of the applicable legal order.

The author's analysis of these three criteria revealed three serious legal issues. First, determining whether these criteria are met is left to local governments through research involving experts. customary law, so that customary law communities are positioned as objects of assessment, not as subjects asserting their own existence. Second, the cumulative nature of these three criteria makes recognition very difficult, because the weakening of even one element, for example due to some residents migrating to the city, can be used as a reason to declare customary rights no longer exist. Third, there is no mechanism requiring the Land Office or PPAT to first verify the customary status of a plot of land before processing a registration application.

This third issue is the direct root of the problem being studied. In sporadic land registration practices, the required documents are generally limited to old

⁸⁸Maria SW Sumardjono. Land Policy... Op.Cit., p. 54

written evidence, a certificate of physical possession from the village head/sub-district head, proof of tax payment, and a statement of no dispute. There is no requirement to attach a certificate from a customary institution regarding the customary status of the land in question. As a result, existing customary land can be registered as former individual customary land with only a certificate from the village head.

3.4. Shifting Position of Customary Law in Land Registration Practices

If we look closely at the development of legislation in the land sector since the UUPA came into effect until now, there appears to be a tendency. The shift in the status of customary law from a source of law to merely an object of regulation. In the early days of the UUPA, customary law served as the basis for the formation of national land law. However, as the focus on economic development strengthened, customary law became increasingly positioned as an obstacle that had to be overcome before land could enter modern legal systems.

This shift is evident, among other things, in the policy of accelerating land registration, which places the number of certified plots as an indicator of success. This quantitative orientation has the potential to simplify verification procedures, including verification of the customary land status of a plot. However, as Achmad Sodiki emphasized, agrarian legal policy should favor justice for the common people and indigenous communities, not solely administrative efficiency.⁹

Using Mochtar Kusumaatmadja's Theory of Development Law, as outlined in the theoretical framework, it can be argued that law does indeed function as a means of societal renewal. However, Mochtar Kusumaatmadja himself emphasized that legal reform must occur in an orderly manner and must not sacrifice order.¹⁰ Land registration that ignores the rights of customary law communities actually creates new disorder in the form of prolonged disputes, thus contradicting the intent of the theory itself.

Based on the entire description in this sub-chapter, it can be concluded that the existence of customary law in the national land law system is dual. Normatively, customary law is recognized as the legal basis for national land rights, and customary rights receive constitutional recognition. However, operationally, this recognition is not accompanied by adequate procedural instruments within the land registration mechanism, resulting in customary law often being marginalized in practice. This gap between normative recognition and

⁹⁹Achmad Sodiki. 2013. *Agrarian Legal Politics*. Jakarta: Constitution Press, p. 240.

⁹Mochtar Kusumaatmadja. 2006. *Legal Concepts in Development*. Second Edition. Bandung: Alumni, p. 14.

operational protection creates the opportunity for the issuance of certificates of ownership over customary land without relinquishing customary rights.

4. Conclusion

Customary law retains legal force over customary land that has been certified, in four forms. First, as a basis for proving rights, because the negative publication system with a positive tendency adopted by Indonesia allows certificates to be invalidated by opposing evidence. Second, as a norm for testing the validity of procedures, because the absence of release of customary rights becomes a measure for assessing whether or not the requirement of "legally issued" in Article 32 paragraph (2) of PP Number 24 of 1997 is fulfilled. Third, as a source of rights that cannot be relinquished forever, so that the five-year statute of limitations cannot be applied mechanically to customary rights. Fourth, as a source of value in legal findings by judges based on Article 5 of Law Number 48 of 2009 concerning Judicial Power. This power is not absolute power, but is limited by the condition that the customary law community in question actually still exists according to the cumulative criteria of Article 2 paragraph (2) of PMNA/KBPN Number 5 of 1999, and that its implementation does not conflict with national interests as required by Article 3 of the UUPA.

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