

The Problematic of Ulayat Rights for Indigenous Peoples in Terms of National Law

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Abstract: *States have an obligation to acknowledge, in the sense of respecting, defending, and enforcing what is a citizen's right. One of these is the ulayat right of mastery and ownership, which has not yet been exercised to its full potential. This research method is normative research with a statute approach and is analyzed qualitatively. The arrangement regarding ulayat rights for indigenous peoples has been regulated in various provisions both nationally and internationally but in the framework of its implementation and implementation there are problems related to indigenous peoples' ulayat land that until now have not been resolved. Therefore, the foundation of a unused draft law that regulates the rights of indigenous peoples which will be expected through the new law not only provides legal certainty, but too to supply assurance to the status of arrive rights and there is no re-seizure of indigenous peoples' rights to their customary lands.*

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INTRODUCTION

Land for the Indonesian nation has a significant role because it is an element that is inextricably linked to the state of Indonesian society with an agrarian pattern. In accordance with its multidimensional nature, the problems about and around the ground seem endless. One problem has not been resolved, another problem has arisen or it may also be that the same problem has reappeared at another time because the right way to solve it

has not been obtained.

The regulation of land as a means of meeting basic human needs can be seen in various laws and regulations. Awareness of the importance of land functions related to human rights began to be felt since the reform era. Starting with the issuance of Article 9 of Law No. 39 of 1999 Concerning Human Rights (1) concerning the importance of the right to live, maintain life and improve the standard of life, all of which require the availability of

land for the fulfillment of the right to welfare in the form of property, which can be owned for oneself or together with others for self-development in society.¹

Indigenous peoples have ownership of land called customary rights. According to Dominikus Rato, land is the master of man and man the master of the earth, the relationship between man and the earth has an inseparable relationship.² Indigenous peoples themselves have a cultural system and customary law that has a close relationship with the land and its natural resources. From the general description of the structure of indigenous peoples in Indonesia, it can be seen how close the relationship between indigenous peoples and land which is one of the natural resources where members of the community reside. Such a relationship is not a mere juridical one but also a magical religious one in which the land functions as a place to live, a place where they seek life, and a place where they will later be buried if they die.³

The state has an obligation to respect and protect and fulfill what is the right of every citizen. One of them is as the right of control and ownership of customary rights for indigenous peoples who until now have not been implemented optimally, as if the control and ownership of customary land rights by indigenous peoples cannot be fully accessed

both from the Basic Agrarian Law (UUPA) and other laws and regulations.⁴

One of the problems with the presence of standard freedoms is due to the absence of certainty of customary territories, in this case the absence of accurate data on customary territorial boundaries, causing conflicts over customary territorial boundaries. Especially customary land rights that is directly adjacent to state-controlled forest resources. Meanwhile, the existence of indigenous peoples themselves must first be confirmed through regional regulations.

Another problem that often occurs because the land directly controlled by the state is very limited, so that the large customary rights of indigenous peoples is one way to obtain land for the development of the agricultural and plantation sector, especially for the granting of Business Use Rights (HGU), as a result of which an issue arises about the recognition of customary land rights that need to be considered proportionately.⁵ In addition, another issue arose, namely regarding the registration of customary land in the Regulation of the Minister of Agrarian Affairs or the National Land Agency Number 5 of 1999 where the customary land plots that had been registered could no longer be enforced by the provisions of customary rights. If it is true like this, there can be a tug-of-war of legal norms, where the value of legal certainty is guaranteed the right to land, registration is required, while access

¹ Hidayat, "Pengakuan Hukum Terhadap Hak Ulayat Masyarakat Hukum Adat," *Jurnal Hukum : tô-râ* 1, no. 3 (2015): 183, <http://ejournal.uki.ac.id/index.php/tora/article/view/1140>.

² Dominikus Rato, *Hukum Benda Dan Harta Kekayaan Adat* (Yogyakarta: Leksbang Press Indo, 2016), 5

³ Rifi Marcelino Sumampouw, "Perlindungan Hukum Terhadap Hak Masyarakat Adat Di Wilayah Kegiatan Pertambangan," *Lex Privatum* 8, no. 3 (2020): 26, <https://ejournal.unsrat.ac.id/index.php/lexprivatum/article/view/29803>.

⁴ Rianda Dirkareshza, Aji Lukman Ibrahim, and Roni Pradana, "Urgensi Hak Ulayat Terhadap Perlindungan Masyarakat Hukum Adat Di Indonesia," *Jurnal Ilmiah Hukum DE'JURE: Kajian Ilmiah Hukum* 5, no. 1 (2020): 94, <https://journal.unsika.ac.id/index.php/jurnalilmiahhukumdejure/article/view/3497>.

⁵ Maria S.W. Sumardjono, *Kebijakan Pertanahan: Anatar Regulasi Dan Implementasi* (Jakarta: Kompas, 2007), 54.

from Registration is no longer required provisions of customary rights. Thus indirectly, the causes of customary land rights as mentioned earlier cannot be recognized as customary land rights of indigenous peoples if they have been registered under the UUPA.

One of the amendments to the 1945 Constitution is Article 18 B paragraph (2) and Article 28 I paragraph (3) which is related to the existence and rights of indigenous peoples. Both articles explain that, for as long as they are alive and in accordance with societal evolution, the state acknowledges and respects the unity of indigenous peoples and their customary rights to be further regulated in law.⁶

Thus the provisions order to regulate customary land rights in the form of legislation. But until now, laws specifically regulating the further Indigenous peoples' solidarity and customary land rights have not been created. This makes the regulation and implementation of customary land rights in Indonesia's positive law provided by the state in order to achieve legal certainty of customary land tenure by indigenous peoples to be ambiguous and unclear.

METHOD

The type of research used is normative legal research, which is research that is centered on evaluating how well rules or norms are applied in relevant positive legislation. Obtain insights into various aspects of the legal issues explored in this study using the statute approach.⁷

The major legal resources used are laws

and regulations, secondary legal resources are books, articles, and scientific journals, and tertiary legal resources are dictionaries that are relevant to the issues in this research.⁸ The Prescriptive method, which is an analysis, is the analytical methodology employed in this study that is intended to provide arguments for the results of research that the author has done. The author makes this argument to offer a prescription or judgement of what is true or wrong or what should be legal o the facts or legal events of the results of this study.

ANALYSIS AND DISCUSSION

Regulation of Ulayat Rights of Indigenous Peoples

What is meant by customary land rights of indigenous peoples is a series of authorities and obligations of an indigenous law community, which relates to land located within the land environment of its territory.⁹ According to Mochamad Tauchid, customary land rights are regional or ethnic rights to land intercourse, which contains the authority to regulate the control and use of land within its territory.¹⁰

The definition of the term customary land rights was further affirmed by G. Kertasapetra and his friends who stated that customary rights are the highest rights to land owned by a legal alliance (village, tribe) to ensure order in the use or utilization of land. Customary land rights are the rights of a legal alliance (village or tribe) where the citizens of the community (legal alliance) have the right

⁶ Article 18 B paragraph (2) and Article 28 I paragraph (3) of the 1945 Constitution.

⁷ Peter Mahmud Marzuki, *Penelitian Hukum*, Cetakan 8. (Jakarta: Kencana Prenada Media Group, 2013), 83.

⁸ Bader Johan Nasution, *Metode Penelitian Hukum* (Bandung: Mandar Maju, 2008), 87.

⁹ Boedi Harsono, *Hukum Agraria Indonesia* (Jakarta: Djambatan, 2008), 7.

¹⁰ Tauchid Mohammad, *Masalah Agraria, Bagian Pertama* (Jakarta: Cakrawala, 1953), 81.

to control a piece of land around their environment where the implementation is regulated by the head of the alliance (chieftain or village head) concerned.¹¹

Within the national measurement, Acknowledgment of the presence of customary land rights is moreover found in a few laws and controls, namely:¹²

a. The 1945 Constitution of The Fourth Amendment:

- Article 18 paragraph (2): *“As long as they are alive, in accordance with societal advancement, and in accordance with the Unitary State of the Republic of Indonesia as outlined in the legislation, the State recognizes and respects the unity of indigenous peoples and their customary rights.”*¹³
- Paragraph (3) of Article 28I: *Culture and identity traditional peoples’ rights are preserved in a way that is consistent with how times and civilizations are changing”*.¹⁴

b. MPR Decree No. IX/MPR/2001 of November 9, 2001 on the renewal of agriculture and the management of natural resources:

- a. letter j: Recognize, respect, and protect the Rights of Indigenous Peoples and Cultural Diversity of the State to Agriculture/Natural Resources;

b. Letter k: Seek State, Government (Central, Provincial, County/City and Village or at the same level), society, individuals;

- Letter b of Article 5 (1): The policy of agricultural renewal is to promote the development of agriculture in a way that will benefit society as a whole: To carry out the realignment of the control, possession, use and fair use of land (landreform) with due regard to landed property for individuals”.

c. The Constitutional Court’s decision on case number 35/PUU-X/2012 on May 16, 2012.

“Stating the arrangements of Article 4 passage (3) which peruses *“The control of woods the state keeps on focusing on the freedoms of its residents. native people groups, as long as the truth actually exists and is perceived for its presence, and doesn’t struggle with public interests”*, changed to *“The control of woodlands by the state keeps on focusing on the freedoms of native people groups, for however long they are alive and as per the improvement of the local area and the standards of the Unitary State of the Republic of Indonesia, accommodated in the rule”*.”

In these regulations, it is clearly stated that there is still acknowledgment of the presence or presence of native people groups who are still alive, even including individual rights and their customary rights. This respect and recognition of the existence of indigenous peoples was even ordered by the 1945 Constitution which became a reference for law-making.

From this, of course, it is not strong enough

¹¹ G. Kertasapoetra, R. G.Kertasapoetra, and A. Setiabudi, *Hukum Tanah, Jaminan Undang-Undang Pokok Agraria Bagi Keberhasilan Pendayagunaan Tanah* (Jakarta: PT Bina Aksara, 1985), 88.

¹² Dirkareshza, Ibrahim, and Pradana, “Urgensi Hak Ulayat Terhadap Perlindungan Masyarakat Hukum Adat Di Indonesia.”

¹³ Constitution of the Republic Indonesia of 1955 Fourth Amandement, Article 18b Paragraph (2).

¹⁴ Ibid, Article 28I paragraph (3).

if the regulation of the presence of standard freedoms is only determined by nearby states as regulated by Article 5 of the Regulations of the Minister of Agrarian Affairs or of the Head of the National Agency (BPN) number 5 of 1999 concerning the guidelines for the solution of standard regulation issues of native people groups. If this is sufficiently determined by local regulations, the legal force is lower than that of the law, so that at any time it can be changed by the local government concerned.¹⁵

Based on Section 2 (2) of the Ministry of Agricultural Affairs or National Land Authority Regulations No. 5 of 1999 on Rules for Resolving Customary Rights Issues of Indigenous Peoples, that the standard land privileges of indigenous peoples are deemed to in any case exist if:¹⁶

- a. There is a gathering who, as citizens with a certain legal alliance, still feel bound by their usual legal order, who perceive and apply the scholarship arrangements in their every day life.
- b. There could be a specific standard land which is the living environment of the citizens of the legal alliance and the place where they take their day to day necessities.
- c. There is customary law governing the management, control and use of customary land that is enforceable and observed by the residents of the legal alliance.

In addition, Article 4 paragraph (1) states, that the control of customary land can be con-

veyed out if citizens of indigenous peoples who are affected by the right of control under applicable common law provisions, who may be listed as land rights under the UUPA at the request of their rights holder; or By government organizations, corporations' or individuals who are not citizens of indigenous peoples dealing with land rights under the UUPA on the basis of a gift from the state after the land has been cleared by the customary regulation local area or its residents under the terms and systems of the pertinent custom-based regulation.¹⁷

From the provisions described above, the author means that there is opportunities for "foreigners" gave that individuals outside the custom-based regulation local area have customary rights, with clause a first waive the rights of indigenous peoples by the concerned party. So, according to the author, it seems to affect the very nature of customary law itself, which has explicit and implicit power. Presumably, if desired, the land could be claimed by "foreigners" should the precedent-based regulation local area itself be conclusive. It tends to be finished up from the arrangements that this guideline offers less security and is a more unobtrusive endeavor than past endeavors to stress the scope of public interests and ignore the interests of indigenous peoples.¹⁸

Furthermore and also stated there is evidence that suggests the presence of customary land rights is recognized, provided that this isn't in opposition to the public interest,

¹⁵ Achmad Sodiki, *Politik Hukum Agraria* (Jakarta: Konstitusi Press, 2013), 3- 4.

¹⁶ Article 2 paragraph (2) of the Regulation of the Minister of Agrarian State/Head of the National Land Agency concerning Guidelines for Resolving Customary Rights Problems of Indigenous Peoples, PM Number 5 of 1999.

¹⁷ Article 4 of the Regulation of the Minister of Agrarian Affairs or the National Land Agency Number 5 of 1999 concerning Guidelines for Resolving Customary Rights Problems of Indigenous Peoples.

¹⁸ Maria S.W. Sumardjono, *Semangat Konstitusi Dan Alokasi Yang Adil Atas Sumber Daya Alam* (Yogyakarta: Fakultas Hukum Universitas Gadjah Mada, 2014), 17-23.

but is often abused in practice. Therefore, besides the content of the public interest, it is full of personal or group interests, it also ignores the primary interest in the life of the indigenous legal community with the national tertiary interest, so that there should be a peaceful grant of recognition to the customary law local area for the substitution of part of their customary land, not the arrangement of remuneration forcibly.

Aside from what has been provided for in national law, in fact the concern for the significance of regarding and safeguarding native freedoms has been realized with the responsibility of the worldwide local area including different global shows that started with The United Nations Charter in 1945. In its development, various international conventions containing respect and protection of indigenous rights were recorded, among others, on:

1. The United Nations Charter (1945)
2. The Universal Declaration of Human Rights (1948)
3. The United Nations Convention on the Prevention and Punishment of the crime of Genocide (1951)
4. Rio Declaration on Environment and Development (1992)
5. Agenda 21 (UN Conference on Environment and Development (1992)).

The Problematic of Ulayat Rights for Indigenous Peoples Reviewed from National Law (Implementation of Legal Recognition and Its Obstacles)

Although customary law is generally in accordance with the personality of the Indonesian nation, which is based on the principles of kinship and mutual cooperation, this

¹⁹ Hidayat, "Pengakuan Hukum Terhadap Hak Ulayat Masyarakat Hukum Adat."

has not fully qualified as desired. Judging from the understanding and nature, customary law is a law owned by a group or group of people who are still traditional in accordance with their beliefs and habits of life, with a limited personal and territorial scope. Meanwhile, UUPA is intended as a law used by a more modern society, with a personal and territorial scope that covers the entire territory of the Unitary State of the Republic of Indonesia (NKRI).²⁰

One of the regulations regarding the rights of indigenous peoples through Article 18B Paragraph (2) of the 1945 Constitution verifies that the state perceives and regards the solidarity of native people groups and their conventional privileges for however long they are alive and as the advancement of the local area and the standards of the unitary condition of the Republic of Indonesia controlled in the Law.

However, it turns out that the arrangements of Article 18B Paragraph (2) of the 1945 Constitution are contrary to the opinion of Boedi Harsono who stated that the UUPA deliberately did not order further regulation of customary land rights in the implementing regulations of the UUPA, because that right would be abolished. Ten years after the constitutional amendment, it turns out that it is still unable to solve the problems that are actually faced by indigenous peoples, especially in the regions. This is due to various reasons including²¹, there are restrictions on legal recognition in the form of requirements such as those contained in the Forestry Law, the Lo-

²⁰ Sajuti Thalib, *Hubungan Tanah Adat Dengan Hukum Agraria Di Minangkabau* (Jakarta: Bina Askara, 1985), 20.

²¹ Hidayat, "Pengakuan Hukum Terhadap Hak Ulayat Masyarakat Hukum Adat."

cal Government Law and the Plantation Law; Policies in each government agency have not been synergistic so as to create sectoralization. This sectoralization has eventually made many government agencies deal with indigenous peoples using different and partial approaches in looking at the presence and privileges of native people groups, which results in the condition of indigenous peoples who are divided following the pattern of sectoralization of government agencies; The absence of clarity of the most competent institutions dealing with the existence and rights of indigenous peoples and the lack of a comprehensive regulatory model in the legal recognition of the existence of indigenous peoples, both in substance and framework for their implementation.

As per Van nook Berg with the hypothesis of *Receptio in Complexu*, the standard law of a general public keeps the laws of the religion with which it complies. Therefore, the guideline of the option to discard standard land will likewise be controlled, or if nothing else has something to do with the strict laws of the local area concerned. Subsequently, “outsiders” who are permitted to own portions of customary land of different religions certainly cannot enforce the standard guidelines of the local area in the utilization of their land. As in the customary local area in Bali, where religion and custom have been coordinated into the day to day existence of their kin in the compartment of the customary village or Pakraman Village, it is even challenging to isolate them, one can recognize. For instance, it is the connection of “*ayahan*” to the usual country, which is a community religion. The Regulation of the Minister of Agrarian Affairs or of the National Agency No. 5 of 1999 can be considered plagiarism with article 3 of the

UUPA, which still recognizes the customary land rights of indigenous peoples, because article 4 of the Regulation states: they are registered, while Article 3 of the Regulation of the Minister of Agriculture or of the National Land Office No. 5 of 1999 establishes that the parcels of land surveyed can no longer be applied by the provisions of customary law. If this is true in this way, there may be a tug-of-war of legal norms, where to ensure the worth of lawful conviction the right to land requires registration, while access from registration is no longer imposing provisions of common law. Finally, automatic customs duties are not recognized if registered in the UUPA. For example, according to the UUPA, the registration of customary land could result in the loss of the status of customary land, leading in particular to individualization in the proprietorship framework. Eventually, these former customary lands were as of now not expose to standard regulation. One more felt that can be expressed is that not-all common law “registrations” have access, that common law no longer applies common law provisions, but that registration has led to a change in the “status” of commons. Land in common law full individual ties to land. If common law status is issued or revoked by indigenous peoples and land themselves, land rights are taxed under the UUPA. So it tends to be presumed that it was not a direct result of his enlistment, but rather due to the demonstration of exile for the situation with his country. This condition should be emphasized in order to stay away from assuming that customary land rights as “*Laba Pura*”, for example, in Pakraman Village in Bali, which are registered for a certificate, are no longer relied upon by customary law provisions which ultimately fail to do perceived by

the state. In the meantime, the vision of the announcement of the Minister of the Interior No. SK.556/DJA/1986 is to achieve legitimate conviction by registering “Laba Pura” as customary law. In fact, today many lands of Laba Pura are surveyed to obtain certificates of ownership (for the sanctuary), so the capability of the law for the purpose of social change (social engineering tool) can be effectively declared in this case. It is unique if the land “Laba Pura” as a component of Ulayat right is enrolled in an individual name to get SHM so after affirmation by an endorsement the land can at this point not be proclaimed as Ulayat right however changed into a totally individual right. On the other hand, according to article 3 of the Ordinance of the Minister of Agrarian Affairs or of the National Territory Agency n. 5 of 1999, it is stated that the land of Ulayat which has been owned by natural or legal persons entitled to land according to UUPA can no longer be used applied to the customary freedoms of native people groups. Therefore, the Regulation of the Minister of Agrarian Affairs or of the National Service of the Territory No. 5 of 1999 isn’t suitable as reference material, as it isn’t suitable to decipher Article 3 of the UUPA, which actually perceives the presence of customary rights, nor does it respect the law of regional origin referred to in the explanatory notes to Article 18B, paragraph 2, modification of the fourth amendment to the ANR Statute of 1945. From the entry into force of the Regulations of the Minister of Agrarian Affairs or of the National Office of the Territory No. 5 of 1999 up to that time, was abrogated by the Regulation of the Minister of Agrarian Affairs and Territorial Planning No.5 of 2015, which was repealed by the Regulation of the Minister of Agrarian Affairs and Territorial Planning No. 10 of

2016 (Permen ATR No.10 of 2016) on the determination of the common land rights of indigenous populations and communities in certain areas, it should be noted that the presence of Customary Rights of Indigenous Peoples, both in the Province and in the Regency/City, does not it has never been registered in a Charter of the Key Registry by decision of the Regional Head. Although acknowledgment and security has been regulated by the registration model, there is no genuine form yet, leaving tribal peoples to fight alone to defend their ancestral rights when there are claims from others parts. Therefore, it is undeniable that the customary land rights of indigenous peoples with different gatherings, both vertical and flat, are still high, like on account of Masuji in Lampung, Salim Kancil in East Java, Lembeng Gianyar Bali, Amungme clan in Papua. The Decree of the Minister of Agricultural Affairs and Land Use Planning/Head of BPN RI No. 276/KEP-19.2/X/2017 on Designation of Pakraman Village in Bali Province as Subject of Common (Municipal) Property of land indicates that the customary village of Pakraman Rights Land, as an indigenous legitimate local area in Bali, is offered one more opportunity by state regulation to be enlisted under the UUPA, at that point designated or conferred as a title of common rights. The ramifications is that there is a shift from common rights to municipal land rights. Regarding the existence of a PTSL program arranged towards the “number of certificates” objective in each regency/city, the head of the office works with the current legitimate designs with the aim of not functioning properly and not protecting, ensuring acknowledgment and regard for the customary freedoms of native people groups. Even customary land rights are also the object of “registration tar-

gets” so that customary land rights of indigenous peoples are enlisted as lands with communal rights, not kept up with as customary land rights that are affirmed or specified in the Land Registration Base Map.²²

According to the author, in practice, many indigenous peoples lose their customary land rights because the state uses the standard of lawful sureness more than the rule of equity. This can be seen in Permenag No. 5 of 1999 which contains provisions for land that has been owned by individuals or legal entities that hold land tenure rights under the UUPA, and is owned or handed over by a government agency, legal entity or individual that refers to and in accordance with existing laws and regulations cannot be implemented customary land rights on it. Indigenous peoples are peoples who use unwritten laws, so in terms of legal force, they are still very weak because they cannot authentically prove the ownership of land by indigenous peoples. Which if there is another party who has evidence such as certificates, then it is the party holding the evidence that is won, although it may be in reality that the land is customary land. Therefore, there is a need for an overhaul of agrarian law adapted to the current situation in order to ensure the protection and human rights of indigenous people’s in this very multicultural country.

CONCLUSION

The recognition and implementation of land tenure rights for indigenous peoples has not yet gained a strong position under nation-

al law even though there have been many regulations governing the concept and form of protection of land tenure rights for indigenous peoples. Various problems that arise regarding the existence of customary rights, one of which is because of the shortfall of conviction of customary territories, for this situation the shortfall of exact customary territory limit information that causes clashes over customary territorial limits. In addition, another problem that often occurs is because the land directly controlled by the state is very limited, so that the vast customary right of indigenous peoples is one way to obtain land.

Then because the nature of customary law was still very simple and unwritten, it caused the power of law to be still very weak because it could not prove authentically to the ownership of land by indigenous peoples. Therefore, there is a need for a reshuffle of agrarian law to be adjusted to the current situation in order to ensure the protection and human rights of indigenous peoples.

The existence of indigenous peoples and their rights to land is one of the considerations in the renewal of the law on agrarianism, especially in the renewal of agrarian law which was once colonial and Feudal into a UUPA which aims to better respect, respect, and protect the rights of peoples, especially indigenous peoples, to land in the context of welfare and peace of living together. Through this UUPA, it is hoped that marginalization and deprivation of indigenous people’s rights to their customary lands will not occur again.

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