

## THE LEGAL PROTECTION FOR THE RECOGNITION OF CUSTOMARY RIGHT IN AGRARIAN REGULATIONS

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### **Abstract**

*The purpose of this research, to find out the extent to which customary law community land rights are recognized in Indonesian legislation. This article is legal research type of library research by using a statutory regulatory approach (Statute Approach). For customary law communities, Land is part of their lives that is controlled and managed jointly with the responsibility given by nature to maintain and protect it. In reality, a lot of customary land has been taken by the government and used as agricultural land, Even though customary law communities have legal standing regulated in the 1945 Constitution, Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles, MPR Decree No. IX/2001, Law Number 39 of 1999 concerning human rights. However, in reality, the government still takes customary land which is then given to investors to manage. This of course infringes the rights of customary law communities. This problem is exacerbated because in article 5 paragraph (1) of Law number 41 of 1999 concerning Forestry states that customary forests are part of state forests.*

**Keywords:** Customary; Forest; Protection; Rights.

### **A. INTRODUCTION**

All earth, water and space including the natural riches contained therein Being in Indonesian territory is a gift from God Almighty which must be maintained and managed well.<sup>1</sup> Indonesia is also blessed with various tribes and cultures which varies from Sabang to Merauke which is characteristic of a country rich in culture.<sup>2</sup>

Something that is an inseparable basis for the Indonesian nation is the relationship between society and the land, because land is one of the basic sources of life, if this relationship does not work well it will cause the birth of

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1 Agus Wibowo dan Siti Mariam, "Kontekstualisasi Hukum Agraria Dibidang Pertahanan Setelah Otonomi Daerah di Indonesia," *Jurnal Pembangunan Hukum Indonesia*, Vol. 3, No. 3, 2021, page. 396.

2 Nyoman Ayu Putri Lestari, *Modul Pendidikan Kewarganegaraan Untuk Perguruan Tinggi*, Bandung, Nilacakra, 2021, page.17.

poverty for the Indonesian people, injustice even causes disputes and conflicts that may be prolonged.<sup>3</sup>

For customary law communities, land is part of their lives that is controlled and managed jointly with the responsibility given by nature to maintain and protect it, it can be said that customary land is a symbol and source of life for indigenous communities, whose authority is under the customary law association that lives and resides in the customary area. It is prohibited for other people to enjoy the benefits of the customary community association on the customary land.<sup>4</sup>

To avoid land conflicts, Indonesia made a law regulating agrarian, whose legal construction is built from Indonesian customary law, From this statement we can say that customary conceptions are used in developing Indonesian national agrarian law.<sup>5</sup> However, it is not uncommon for indigenous peoples' rights to their customary rights to be sidelined under the pretext of the country's economic interests.

Starting from the problem above, The author has an interest in conducting research Protection Of Customary Law Communities Against The Recognition Of Layat Rights Under Indonesian Agrarian Regulations. This research is new research, This is proven by previous studies written by Eviandi Ibrahim entitled "The Role of Penghulu in *Ulayat* Rights in Minangkabau".<sup>6</sup>

The study only focuses on how the headman can maintain customary rights so that they are not bought and sold, Meanwhile, this research examines the position of customary law communities regarding their customary rights in the regulations in force in Indonesia.

The aim of this study, to provide scientific reading material for general readers regarding the laws governing agrarian issues, especially land issues with customary rights, secondly, to provide contributions to academics and students regarding the problem of recognizing customary rights.

## **B. RESEARCH METHODS**

This article used legal research type and library research by using a statutory regulatory approach (*Statute Approach*) which relate to agrarian legal regulations on customary land rights.

## **C. RESULTS AND DISCUSSION**

### **1. The Provisions on *Ulayat* Rights after the Basic Agrarian Law is issued in Indonesia**

Past customary land laws is a right to own and control a plot of land during the Dutch and Japanese colonial era, as well as during the era

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3 Diyan Isnaeni, Kebijakan Landreform Sebagai Penerapan Politik Pembaharuan Hukum Agraria Yang Berparadikma Pancasila, *JU-Ke: Jurnal Ketahanan Pangan*, Vol. 1, No. 2, 2017, page. 83.

4 Sri Hajati, et al, *Buku Ajar Hukum Adat*, Jakarta, Kencana, 2018, page.111–12.

5 Sri Harini Dwiyatmi, Asas Pemisahan Horizontal (Horizontale Scheiding Beginsel) dan Asas Perlekatan (Vertizale Accessie) Dalam Hukum Agraria Nasional, *Refleksi Hukum: Jurnal Ilmu Hukum*, Vol. 5, No. 1, 2020, page.126.

6 Eviandi Ibrahim, Peran Penghulu Terhadap Hak Ulayat di Miangkabau," *JCH (Jurnal Cendekia Hukum)*, Vol. 6, No. 1, 2020.

of Indonesian independence in 1945 without authentic or written proof of ownership. It is only an acknowledgment that the land has been managed by a group of indigenous people who have lived in the area for generations.<sup>7</sup>

After Indonesia became independent, indigenous peoples were recognized and confirmed in Article 18B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia.<sup>8</sup> Recognize and respect customary law community units as well as 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.<sup>9</sup>

After going through a long process for 15 years after Indonesian independence, On September 24, 1960, Indonesian Agrarian Law was born,<sup>10</sup> with the promulgation of this regulation, then the basic law on agrarian principles applies to the entire territory of Indonesia, and the end of dualism in land law in Indonesia.<sup>11</sup>

Agrarian law does not only regulate land.<sup>12</sup> However, a small part is regulated in agrarian law. Agrarian law is land law that regulates control over land, which means the surface of the earth.<sup>13</sup> Recognition of customary law communities' customary rights is regulated in Article 3 of Law Number 5 of 1960 concerning Basic Agrarian Principles Regulations.<sup>14</sup>

Implementation of customary rights and similar rights of customary law communities, as long as in reality it still exists, must be such that it is in accordance with national and state interests, which is based on national unity and must not conflict with laws and other higher regulations.<sup>15</sup>

The regulations above recognize the existence of customary law communities and their customary rights indicates that customary law communities occupy a special position in Indonesia, so that in several regulations the existence of customary law communities is emphasized and their customary rights are recognized as long as the customary community still exists.<sup>16</sup>

## **2. The Protection of Customary Law Communities regarding *Ulayat* Rights**

Customary law communities have customary lands on which

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7 Supriadi, *Hukum Agraria*, Jakarta, Sinar Grafika, 2006, page.10.

8 Herman Budi Sasono dan Ahmad Gamal, *Manajemen Penebangan Hutan*, Yogyakarta, CV Andi Offset, 2022, page.64.

9 "Pasal 18B Ayat (2) Undang-Undang Dasar Republik Indonesia," t.t.

10 Ady Purwoto, et al, *Hukum Agraria*, 1 ed., Padang, PT Global Eksekutif Teknologi, 2023.

11 Vani Wirawan, Kajian Tertib Administrasi Pertanahan Tanah Kesultanan dan Tanah Kadipaten Setelah Berlakunya Perda's Yogyakarta, *Jurnal Ilmiah Penegakan Hukum*, Vol. 6, No. 2, 2019, page. 162.

12 M. Arba, *Hukum Agraria Indonesia*, 6 ed., Jakarta, Sinar Grafika, 2019, page.6.

13 Arina Novizas Shebubakar dan Marie Remfan Raniah, Hukum Tanah Adat/Ulayat, *Jurnal Megister Ilmu Hukum*, Vol. 4, No. 1, 2019, page.15.

14 "Pasal 3 Undang-Undang No. 5 Tahun 1960 Tentang Dasar Pokok-Pokok Agraria," t.t.

15 Arina Novizas Shebubakar dan Marie Remfan Raniah, "Hukum Tanah Adat/Ulayat."

16 Arif Rahmadi, Urgensi Penetapan Hak Ulayat Masyarakat Hukum Adat Terkait Kebijakan Pelayanan Pertanahan di Papua, *Jurnal Tunas Agraria*, Vol. 5, No. 1, 2022, page.21.

customary rights are encumbered, where they have the authority and obligations regarding these rights related to the land located within their territorial environment as a support for their lives, Customary rights do not only cover land that has been cultivated, However, it includes customary forests as long as they are still used for the survival of customary law communities.<sup>17</sup>

Agrarian conflicts are also experienced by indigenous peoples, As of 2018, there were 326 natural resource conflicts and agrarian affairs throughout Indonesia involving areas covering an area of 2,101,858 hectares with total victims reaching 186,631 people Of the total victims, 176,637 of them came from indigenous communities, This shows that indigenous peoples are one of those who are vulnerable to agrarian conflict problems.<sup>18</sup>

The existence of customary forests is currently increasingly depleting. This is due to government policies that distance the existence of customary rights, such as with the Ministry of Forestry's forest use policy which has designated around 133.7 million hectares of Indonesian land as a forest area. This recognition as a state forest is possible to make it easier for the government to obtain fresh funds from granting permits for forest use, What's sad is that the permits are used for oil palm plantations and mining.<sup>19</sup>

This is made worse by the existence of provisions in the explanation of article 5 paragraph (1) of Law number 41 of 1999 concerning Forestry which states that customary forests are part of state forests, so that indigenous peoples are only given management rights.<sup>20</sup>

This act of taking customary land carried out by the government In fact, it is contrary to our country's constitution which recognizes customary law communities with their customary rights which is confirmed in article 18B Paragraph (2) of the 1945 Constitution.<sup>21</sup> Likewise, it is contradictory with article 3 of Law Number 5 of 1960 concerning Basic Agrarian Principles Regulations.<sup>22</sup>

Even though the government has implemented Article 5 of the UUPA has positioned customary law as agrarian law applicable to earth, water and space, This means that it can be said that customary law communities and customary law have a high position in national agrarian

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17 Febri Andika, Sukirno, dan Adya Pramita Prabandari, Peralihan Hak Ulayat Di Kabupaten Dharmasraya, *Notarius*, Vol. 12, No. 2, 2019, page.861.

18 Raden Muhammad Arvy Ilyasa, Prinsip Pembangunan Infrastruktur Yang Berlandaskan Hak Asasi Manusia Terhadap Eksistensi Masyarakat Hukum Adat di Indonesia, *SASI*, Vol. 26, No. 3, 2020, page.381.

19 Muhammad Syukur, Analisis Yuridis Permenag Nomor 5 Tahun 1999 Tentang Eksistensi Hak Ulayat Dalam Hukum Agraria Nasional, *Dinamika: Jurnal Ilmiah Huum*, Vol. 26, No. 8, 2020, page.954.

20 "Penjelasan Pasal 5 Ayat (1) Undang-Undang Nomor 41 Tahun 1999 Tentang Kehutanan," t.t.

21 Harniawati, Peralihan Hak Ulayat Menurut Undang-Undang Nomor 18 Tahun 200, *Ensiklopedia Social Review*, Vol. 1, No. 3, 2019, page.392.

22 Jabaruddin dan Karmila, Kewenangan Pemerintah Daerah Untuk Penetapan Tanah Ulayat Dalam Peraturan Daerah, *Sibatik Journal*, Vol. 1, No. 3, 2022, page.191.

law, this also describes the state as the highest organization recognize the rights of customary law communities to their rights, especially customary rights.<sup>23</sup>

However, judging from the case of conflict over customary rights as explained above shows that the customary rights of indigenous peoples only depend on unilateral government action, because in reality in the field today, The rulers of this country only prioritize the interests of investors over indigenous peoples. Mochtar Kusuma Atmadja concluded that the government had ignored the interests of indigenous peoples so that this action is contrary to the fifth principle of Pancasila "social justice for all Indonesian people".<sup>24</sup>

Although the concept of controlling state land in Indonesia is explained in article 33 paragraph (3) of the 1945 Constitution said that the earth, water and natural resources contained therein controlled by the state.<sup>25</sup> According to the author, this provision cannot be used as a justification for usurping customary rights, because the article also explains that this control is solely for the prosperity of the people.

J. Rachbini who gave an example in Taiwan which is government to achieve people's prosperity implementing a technical agricultural program accompanied by improving the legal relationship between land owners and land tenants.<sup>26</sup> Special Chairman for Land Acquisition Law Daryanto Mardiyanto also said that land control was for the prosperity of the people.<sup>27</sup> The customary law communities live and make a living from customary land, So it is appropriate for the government to recognize and protect their rights, especially regarding customary rights.

Reform of national agrarian law must be carried out with the condition that it must reflect the values of Pancasila, namely social justice, because currently there is inequality in society regarding land control, Some people have land that is perhaps half the size of the land in Indonesia.<sup>28</sup> Principles that encourage respect for community land rights, especially indigenous communities, the affirmation and adjustment required is not just a recognition of its existence, but also empowering communities to regulate and manage their own lands and customary territories within the framework of the existence of indigenous communities as part of the Indonesian nation.<sup>29</sup>

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23 *Ibid.*

24 Verlia Kristiani, Hukum Yang Berkeadilan Bagi Hak Ulayat Masyarakat Hukum Adat (Kajian dan Implementasi), *ADIL: Jurnal Hukum*, Vol. 11, No. 1, 2020, page.154.

25 Muhammad Bakri, *Hak Menguasai Tanah Oleh Negara (Paradigma Baru Untuk Reforma Agraria)*, Malang: Universitas Brawijaya Press, UB Press, 2011, page.1.

26 Ronald Z. Titahelu, *Penetapan Asas-Asas Hukum Umum Dalam Penggunaan Tanah Untuk Sebesar-Besarnya Kemakmuran Rakyat*, 2 ed., Yogyakarta, CV. Budi Utama, 2015, page.12.

27 RR. Meiti Asmorowati, Konsep Kepentingan Umum Dalam Pengadaan Tanah Dhubungkan Dengan Kepastian Hukum, *Jurnal Hukum Jurnal Justitia*, Vol. 6, No. 1, 2020, page. 42.

28 Aris Yulia, Pembaharuan Hukum Agraria Nasional Yang Berkeadilan, *Supremasi Jurnal Hukum*, Vol. 1, No. 1, 2018, page.5.

29 Maria S.W. Sumarjadjono, *Kebijakan Pertanahan Antara Regulasi dan Implementasi*, 3 ed., Jakarta, PT Kompas Media Nusantara, 2005, page.223.

## D. CONCLUSION

Legal standing of customary law communities contained in Article 18B Paragraph 2 of the 1945 Constitution, Article 3 of Law Number 5 of 1960 concerning Agrarian Principles, article 4 letter J TAP MPR No. IX/2001, article 6 paragraph (2) Law Number 39 of 1999 concerning human rights. However, agrarian conflicts are experienced by indigenous peoples. As of 2018, there were 326 natural resource and agrarian conflicts throughout Indonesia which involved an area of 2,101,858 hectares with a total of 186,631 victims out of a total of 176,637 victims. However, it seems that this regulation is only written. This is because there are still many incidents of customary land being taken by the government for development purposes. It is necessary to revise the UUPA with the emphasis that customary land cannot be contested and give full authority to them to regulate and manage their own land and customary territories.

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