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National Law Relations with Customary Law in the Establishing of Regulation of the Recognition of Indigenous Peoples Rights to the Land of Ulayat

Ardiansyah[1]; Lalu Sabardi[2]; Widodo Dwi Putro[2]

[1] Graduate Program Student in Notary, Faculty of Law, Mataram University, Indonesia

[2] Lecturer on Graduate Program in Notary, Faculty of Law, Mataram University, Indonesia

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Abstract

This study examines and analyzes the relation of state law with customary law and the regulation of the recognition of indigenous peoples rights to the land of Ulayat. This type of research is normative legal research using a statutory approach and a conceptual approach. The types and sources of legal materials in this study are primary legal materials, skunder law materials, and tertiary legal materials. Collected legal materials are then analyzed using historical, systematics and authentic interpretations to construct arguments with deductive frameworks. State legal relations with customary law in the renewal of law in the field of agrarian and land has not been in accordance with the spirit of the nation's soul and philosophy of customary law which is the basis of the establishment of national land law. The establishment of legislation in the field of land has not demonstrated harmony in the regulations. The regulation on land rights determination only in the form of certificates issued by National Land Agency (*hereinafter referred to as BPN*) has not been as expected by the indigenous peoples, because the policy has not set the protective mechanisms against the legal object of indigenous law communities. Given the communal rights of customary Law society is not to be likened to other land rights. This can be a minimum of horizontal and vertical resistance in the community, particularly in relation to customary rights in ensuring the legal protection certainty of indigenous legal objects.

Keywords: *Legal Relations; Confession; Land Ulayat*

Introduction

Between the country and the culture, it is essentially not to be appeared as a form of view that is dualism, but is a unity in a circle of relations systems, adaptations and competitions that are in harmony. In relation to the country of law, the culture of society becomes important, because the true value of living in society can be a benchmark of the enforcement of state law. The philosophy of living Pancasila which as well as *staatfundamentalnorm* or the basic rule of the Indonesian legal system is often closely related to the ideology adopted by a country.

National legal policy is challenged to be able to realize the legal system by functioning national law in the form of written law or legislation as a reformer force based on the *volkgeist* (*spirit of the nation*) and values of Pancasila that can effectively encourage life change, from the form of local communities with agrarian and new life scale that is more urban, in the format and scope of the national.[1]

The implementation of article 33 paragraph (3) Constitution of Indonesian Republic State 1945 as a constitutional foundation is placed on the concept of country's mastery with aims to realize the overall welfare of all Indonesians are not yet in accordance with the expectations of the people of Indonesia. And the validity of the Agrarian Main Law that is expected to be a living law nationally in its application is not infrequently violate the philosophy of customary law or soul and spirit Agrarian Main Law.

National Land law should be understood as a system of norms based on traditional law philosophy, so any legislation that is highest to the lowest regulation must be a parallel and complementary legal system (*concretization*).[2] The relationship between Customary Law in the framework of national law development is a "*hincsional*" relationship, which means customary law as the main source of taking the necessary materials in the development of national law.[3]

Regulations related to the rights of Ulayat until now still spread sporadicly and state recognition of customary rights of indigenous peoples in various laws and regulations have not been in accordance with the expectations of society, all of which are done in an excuse to provide legal protection against the rights of Ulayat. But it becomes unclear and raises inadequate interpretation with its purpose, even negating and detrimental to indigenous peoples rights.[4]

Regarding to Indonesian state recognition of indigenous peoples rights, it is more firmly contained in the Indonesian Constitution, i.e. Constitution 1945 Amendment IV of article 18B (paragraph 2) stated:

> "*The State recognizes and respects the unity of indigenous peoples and their traditional rights throughout the life and in accordance with the development of the people and principles of the unitary Republic of Indonesia, which is governed by the law*."

The right to land for the traditional community is very important because it relates to the excitation, freedom and the value as human beings.[5] Recognition of the rights of indigenous peoples of natural resources that become the *Labenstraum* can certainly be interpreted as an affirmation of indigenous peoples existence. The natural resource is a symbol or representation of indigenous peoples existence. It can be stated, that the country's recognition of indigenous peoples rights is in fact a reflection of the willingness of the state's people to recognize the rights of indigenous peoples laws on land and all natural resources that are above and/or contained in the Earth to ensure the physical and nonphysical sustainability of the society.[6] As in article 5 of the Agrarian Main Law (UUPA) stated that:

> "*Customary law, as long as it does not contradict the interests of the national and State based on the unity of the nation, with Indonesian socialism and with the regulations set forth in this law and with other legislation, all things by heeding the elements that rely on religious law*"

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[1] Anang Husni, *Pluralisme Hukum Pertanahan*, printed: I, Mataram University Press, Mataram, 2019, p. 12.

[2] Widhi Handoko, *Kebijakan Hukum Pertanahan: Sebuah Refleksi Keadilan Hukum Progresif*, Cetakan I, Thafa Media, Yogyakarta, 2014, p. 37.

[3] Sri Sudaryani, *Peranan Hukum Adat dalam Pembangunan Hukum Nasional di Era Globalisasi*, Jurnal MMH, Jilid 41, No. 4, 2012, p. 579.

[4] Rosnidar Sembiring, *Hukum Pertanahan Adat*, Edisi Pertama, Cetakan I, Rajawali Press, Depok, 2017, hlm. 25.

[5] Muh. Afif Mahfud, *et All, Hak Atas Tanah Bagi Masyarakat Tradisional di Pantai: Prespektif Hak Asasi Manusia*, Jurnal Mimbar Hukum, Volumen 31, Number 3, Oktober 2019, p. 355.

[6] *Ibid*, p. 84.

As implementing the provisions of article 5 of UUPA, Ministry of Agrarian and Spatial/Head of National Land agency issued Ministerial Regulation No. 18 of 2019 concerning the administration of land administration Ulayat of customary law community as a form of recognition on the right of indigenous peoples rights to the land of Ulayat, as long as there is exist, done by the unity of customary law community in accordance with that contained in Regulation No. 18 of 2019 about the administration of the land administration Ulayat of customary law community unity.

Based on the background can be withdrawn a problem is how the legal relationship of the State with customary law and the form of recognition of indigenous peoples ' rights to the Ulayat Land.

This type of research is normative (legal research) legal research using a of approach, conceptual approach. The types and sources of legal materials in this study are the primary legal material comprising the Constitution 1945, Constitution Number 5 of 1960 concerning Basic Agrarian Regulations, Law number 32 of 2004 about local government, and regulation of the Minister of Agrarian and Spatial/Head of national Land Agency of the Republic of Indonesia number 18 f 2019 about the administration of land administration ulayat customary Law community unity, a secondary law consisting of literature that is relevant to the issues studied and the tertiary legal material consists of legal and non-legal dictionaries, the technique of collecting legal materials by conducting a search to find relevant legal materials with research studies then analyzed using historical interpretation, systematics and authentic to build argumentation with deductive frameworks.

Discussion

Property Rights and Customary Rights of Adat Law Society

Concept of Rights and Rights of Ulayat

According to Satjipto Rahardjo, the legal presence in the community is to integrate and coordinate the interests that can clash with each other, by the law integrated in such a way that the collisions can be suppressed detail. The law protects a person's interests by allocating a power to him to act in order for his interests. This allocation of power is carried out regularly, in a sense, determined in its flexibility and depth. Such power is called Right. Thus, not every power in society can be called a right, but only certain powers, that is, given by law to a person or legal subject.[7]

An interest is the object of right, not just because it is protected by law, but also by recognition of it. When an animal enjoys protection by law, it means the beast has the right to enjoy the protection. As was the case submitted by Sutjipto Rahardjo that:[8]

> "*Right is apparently not only contains protection and interests, but also wills. If I have a plot of land, then the law gives me the right to me in the sense that my interest in the land was protected. But that protection is not only aimed at my own interests, but rather to my will about the land. I can give or bequeath the land to others and it may belong to my right. In this case it is not only my benefit of protection, but also my will*."

Regarding the term of the Ulayat rights, there is no obvious understanding of the rights of Ulayat right. In article 3 the Constitution only gives assurance that the rights of Ulayat or similar rights are in fact still recognized its existence so that further ulayat rights must be considered and respected. In the

[7] Satjipto Rahardjo, *Ilmu Hukum*, printed: VII, PT. Citra Aditya Bakti, Bandung, 2012, p. 53-54.
[8] *Ibid*.

explanation of article 3 UUPA, it is also mentioned that the rights of Ulayat and similar rights are "*Beschikkingsrecht*"[9].

Ter Haar formulates "*Beschikkingsrecht*" is the right of Community law, which is a collective right and not an individual's right that can be owned by a person or family. Hazarin formulates the Ulayat rights of a customary legal community is the right to the whole community of customary law concerned that will never be isolated to other people or groups, or removed from the permanent generation will be the collective rights of indigenous peoples on the land of the customary jurisdiction.

According to J.C. T Simorangkir directly, the right of Ulayat is the right of the law or Community Alliance to cultivate the lands around their region for the sake of the fellowship of the law or to the outside people who want to work on the land by giving a portion of the results to the community.[10]

As Imam Sudiyat find out that the notion of Ulayat right is the right that belongs to a tribe/clan, gens, Stam, a village Union (*Dorpendbord*) or usually by a village only to control all of the land in its territory.[11]

Based on the explanation above, it can be noted that indigenous people's rights are not confined to the soil, including everything on the ground as well. The land referred to in the above sense includes mainland land, beaches including coastal waters, even inland waters (*rivers, lakes*).[12] Because the scope of rights of Ulayat covering all agrarian resources in its territory and land is the main object of Ulayat rights.[13]

Traditional Legal Community Concept

The term indigenous peoples and indigenous people have different histories and pursuits. The term customary law community itself was born and used by indigenous legal experts, who is more enabled for academic theoretical purposes, as the term is used to identify the indigenous people who possess the system and its own legal traditions, to distinguish it from the European and the Far East who possess the system and the tradition of written law. Lekat with the adagium of Markus Tullius Cicero, namely where there is a community there is a law (*ubi societas Ibi ius*), as well as in indigenous peoples, there are also indigenous law communities. In the perspective of national law, trimonology of indigenous peoples originated from the *term rechts gemeenchappen* of B. Ter Haar BZN which in the perspective of colonial law the term indigenous *Rechts Gemeenchappen* is recognized as a legal subject (*legal standing*) indigenous peoples are governed in the decentralization of *Wet* and *Inlanse Gemeente Ordonansi*.[14]

Indigenous peoples by B. Teer Haar Bzn are listed as:[15]

> "*Throughout the Indonesian archipelago at the level of the commoners, the association lives in the groups that behave as a unity against the outside world, the inner birth. The classes or groups have a fixed and eternal order, and the people of that class are as appropriate, in terms of the*

[9] Rosnindar Sembiring, *Op.Cit*, p. 10-11.

[10] *Ibid.*

[11] *Ibid.*

[12] *Ibid.*

[13] Ilyas Ismail, *Kedudukan dan Pengakuan Hak Ulayat dalam Sistem Hukum Agrarian Nasional*. Kanun Jurnal Ilmu Hukum, Volume 12 No. 1 Edisi April 2010, p. 53.

[14] Lilik Mulyadi, *Eksistensi, Dinamika dan Perlindungan HUkum Terhadap Hak Atas Tanah Ulayat Masyarakat Adat di Indonesia*, Cetakan I, PT. Alumni, Bandung, 2017, hlm. 35.

[15] *Ibid p. 37.*

> *natural nature. No one of them has the thought of the possibility of the dissolution of the group. The human group has its own officers and possessions, belonging to the land and property of the unseen. Such classes are of legal fellowship."*

Soerjono Soekanto said that the indigenous peoples according to the foundation are divided into two groups, which are based on genealogical and regional (*territorial*) association. Then, from the perspective of the form, the customary law community there is a stand-alone, become a higher customary part or consist of some lesser indigenous peoples, and is a union of the equal indigenous peoples. Furthermore, it can be said that each form of customary Law society can be named as Indigenous Law Society that resides, and continues.[16]

Soekanto said that the "*complex of customs that are not being led, not in the Codifiser, is coercion and sanctioned, so having a legal consequences, that is called customary law*". So that what is considered customary law is a law that only the community has and runs its laws. The law is developed and hereditary without being able to be learned through books or scripture. Can only be learned through habits that are applied and held continuously by the community. Thus the continuity of a customary law in a particular society depends on the ability to create habits in the community environment.

The customary legal aspect that is specifically related to agrarian is what is known as the "*Ulayat Iight*". The term was originally derived from indigenous peoples in Minangkabau, but by the UUPA was appointed up nationally to refer to, or represent, similar rights in various indigenous law communities throughout Indonesia. This is the right to the community as a whole (*fellowship of life or Customary Law Society*) on occupied land, over trees, ponds, and objects that are under and above the ground, in a region in which it is mastered.

National Law Relation with Customary Law and the Recognition of Indigenous Peoples ' Rights to the Land of Ulayat

Indonesia is an archipelago with a wide variety of ethnic and cultural people and is scattered throughout the archipelago. Indonesia is also a legal state, which means that the law has a high position in Indonesia. All aspects of people's lives and governments are set up in national law. Neither the Constitution nor the regulations in other legislation. This includes agrarian law in the outline governing the land, water, and space. However, agrarian law can not be applied completely to the local community in Indonesia. This is because in Indonesia there is still a certain community known as indigenous peoples. The indigenous peoples have their own laws that different from the national laws of Indonesia. Agrarian law is poured in Law No. 5 of 1960 about basic agrarian Regulations or abbreviated with UUPA. In the form of legislation has the basis of the Constitution is contained in the Constitution 1945 article 33 paragraph (3) "*The Earth of water and natural wealth contained therein is controlled by the state and used for the maximum prosperity of the people*".

The recognition of the Customary Law on the Constitution is contained in article 18B paragraph (2) Constitution 1945 stated that:

> "*The State recognizes and respects the unity of indigenous peoples and their traditional rights throughout the life and in accordance with the development of the Community and principles of the unitary Republic of Indonesia, which is governed by the law*".

Referring to these provisions there are some important things that can be withdrawn in relation to the customary legal position in the Constitution. That the State recognizes the existence of indigenous

[16] *Ibid p. 38.*

legal community unity in Indonesia constitutionally its rights. And of course, in this case, the law that lives in it is the customary law itself. Recognition of such rights can be considered as an acknowledgement of the right to indigenous peoples regarding their existence. In the sense of the Society of indigenous peoples constitutionally protected Constitution, and the existence of the society and all that lives in the life of society including in this case is the customary law itself that became part of the community of customary law.

In addition, recognition and respect by the State prevails throughout the existence of indigenous legal communities are still alive. In the sense of recognition the country should be a record for the nation of Indonesia to maintain the preservation of indigenous peoples and their instruments as the noble heritage of Indonesia that has been through the long history, considering the degradation of indigenous peoples currently in the midst of the undisturbed and the cast of globalization.[17]

In the legal pluralism theory which was expressed by John Griffiths that legal and emphasizes the existence of a common legal order, whether written law (*state law*) and unwritten Law (*customary law*) and customary laws that live in a community. In order to be established the relationship between the law of the country and the customary law of mutual relations, adaptation and cooperation in the ideals of law for the sake of the welfare of the people. It is characterized by the philosophical birth of the law of the State based on a mutual agreement in a sovereign state in which there is a variety of cultures and customs, but still in one unity as a single *Bhinneka Ika* with the spirit and purpose based on the ideology of Pancasila (*Staffundamentalnorm*) and Constitution 1945 (*Staffgrundnorm*). From the relationship the state can not be separated from the law that lives in the community (*living Law*) as the most important part to realize the people's true in development. Thus, the legal values found in the norms must realize the mandate of the Constitution.

As a manifestation of article 18B UUD 1945 the relationship of agrarian law with the customary law stated in article 3 of the Main Agrarian Law, namely:

> "*By remembering the provisions of article 1 and 2 of the implementation of Ulayat and similar rights of those of indigenous peoples, as long as the fact is still there, must be such that it is in accordance with national and state interests, based on the unity of the nation and should not contradict the laws and other higher rules*".

And in Article 5 Main Agrarian law stated that:

> "*Agrarian law that applies to the Earth, water and space is customary law, as long as not contrary to national and state interests, based on the unity of the nation, with Indonesian socialism and with the regulations contained in this law and other legislation, all things by heed the elements that rely on the law of religion*".

In that Article confirms that the customary law is the basis of the establishment of national agrarian law and other legislation, especially related to the customary rights of indigenous peoples. If it sees the principle of mastery by the state that confirms that the earth, water, and natural wealth are ruled by the state, it cannot be construed that the State has full rights to the land of Ulayat, but the principle of the country's mastery is a form of control and protection against the customary rights of customary Law Society. Because however, the rights of Ulayat are part of the way to realize the ideals of people's prosperity and well-being. And in Law No. 23 of 2014 concerning local government, has authorized the

[17] Muskibah, *Kedudukan Hukum Adat dalam Sistem Hukum Indonesia*, Arthicel, accessed by https://metrojambi.com/, on 5 Maret 2020, at 11.00 WITA, in Mataram.

regional autonomy to regulate and manage its own affairs of government and interests in accordance with the unitary State system of the Republic of Indonesia.

The implementation of article 3 and article 5 of the Main Agrarian Law is a form of acknowledgement of the right of Ulayat which is further set forth in the Minister of Home Affairs that the excitation of ulayat soil is contained in article 4 of the Ministry of Home Affairs No. 52 of2014 on guidelines for recognition and protection of indigenous peoples 's law. And is also regulated by the Ministerial regulation of agrarian and spatial/Head of national Land Agency of the Republic of Indonesia number 18 of 2019 concerning the administration of land administration Ulayat of customary Law Society. The previous one has also issued several ministerial regulations related to indigenous peoples, but it is felt that it has not been in accordance with the expectations of Indigenous Law Society. The existence of The Regulatio of The Agrarian Minister and the spatial/Head of national Land Agency of the Republic of Indonesia number 18 of 2019 about the administrative procedures of the land of customary law community unity is to carry out the land affairs in relation to the settlement of rights that are still alive and maintained.

The implementation of land rights assignment of customary legal community has been set forth in article 2 paragraph (1) of regulation of the Minister of Agrarian and Spatial/Head of national Land Agency of the Republic of Indonesia No. 18 of 2019 on administrative procedures of soil administration Ulayat of indigenous peoples's unity. However, in the stipulation provisions must fulfill certain criteria that include the elements:

1. Society and customary law institutions.
2. Territory where Ulayat rights take place.
3. The relationship, linkage, and dependence of indigenous peoples's unity with its territory.
4. The authority to jointly regulate the utilization of land in the territory of the Adat law community concerned, based on customary laws that are still valid and obeyed the people.

The relationship, linkage, and dependence of indigenous peoples unity with the eligible Territories are:

1. In real life, both territorial, genealogical, and functional;
2. in accordance with the development of society; and
3. in accordance with the principles of the unitary Republic of Indonesia.

The form of recognition of indigenous peoples rights in the customary land is implemented based on the determination of recognition and protection of customary legal community unity implemented in accordance with the provisions of legislation. The application of the land administration of customary Law Society is submitted to the head of local land office. The administration of the Ulayat Land of indigenous peoples unity, including measurement, mapping, and listing of land.

Measurement is carried out against the boundaries of the land field of customary legal community unity that has been established. After that, a measurement of the next process mapping over the land field Ulayat unitary customary law community in land registration map. Measurement and mapping carried out in accordance with the rules of measurement and mapping of land field, the last is given identification number of land field with Regency/city unit of land in the field of customary law community unity. And the land of customary legal community unity is recorded in the list of lands.

In the presence of evidence of land ownership of customary legal community unity, in itself also customary law community get protection administratively. However, it is not quite adequate with a variety of conflicts of interest relating to the land of customary legal community. This means that the protection should also provide repressive protection when the soil is taken over by the opposing party, not

merely preventive against the soil, but the law and policy of the Government should be able to conduct affirmations in the form of action on the recognition of the overall rights of the customary Law Society.

As Philipus M Hadjon stated the legal protection of the people includes two things, namely the protection of preventive law, which is a form of legal protection in which the people are given the opportunity to raise their objections or opinions before a government decision gets a definitive form and Represif legal protection, which is a form of legal protection which is more aimed at resolving disputes.[18] This means that the recognition of indigenous peoples rights to customary land must obtain preventive and repressive protection.

Recognition and protection of indigenous peoples on the land, namely the regulatory rights and obligations of the Government in providing respect, opportunity and protection for the development of indigenous law communities and the traditional rights owned in the frame of the unitary Republic of Indonesia. The acknowledgement indicates that the state or government has acknowledged, stating the right or stating the customary legal community is entitled to the natural resources it belongs to and obliging the Government to rival those rights of the threat/disruption of the other party. This recognition is a formulated in the form of the state law on the right of indigenous peoples rights to the land and other natural resources.[19] This is in line with John Austin's acknowledgment through the law of the State the positive law, according to Austin as interpreted as the law is made by a person or institution that has sovereignty, and the recognition is imposed on the independent political Society members. The members of the community acknowledge the sovereignty or supremity that belongs to the person or institution of the relevant law. Accordingly, the habit should only apply as law if the law requires or expressly declares the validity of the habit.[20]

Based on the explanation, the recognition of indigenous peoples rights to customary land is implemented based on the determination of recognition and protection of indigenous customary law community unity. However, it is not able to provide protection to the indigenous peoples overall law as a public system in the community. Accordingly, the law and government policy should pay special attention to the rights of the Customary Law Society, which is implemntatif.

Conclusion

Legal relations of the State with customary law in the renewal of law in the field of agrarian and land is not in accordance with the spirit of the nation's soul and philosophy of customary law that is the basis of the establishment of national land law. The development of legislation in the field of land has not demonstrated harmony in its regulation. The regulation on land rights determination only in the form of certificates issued by National Land Agency has not been as expected by the indigenous peoples, because the policy has not set the protective mechanisms against the legal object of indigenous law communities. Given the communal rights of customary Law society is not to be likened to other land rights. This can be a minimum of horizontal and vertical resistance in the community, especially in relation to customary rights in ensuring the legal protection certainty of the legal object of indigenous law.

[18] Philipus M. Hadjon, *Perlindungan Bagi Rakyat di Indonesia*, Bina Ilmu, Surabaya, 1987, p. 4-5.
[19] Hayatul Ismi, *Pengakuan dan Perlindungan Hukum Hak Masyarakat Adat Atas Tanah Ulayat Dalam Upaya Pembaharuan Hukum Nasional*, Jurnal Ilmu Hukum, Volume 3 No. 1.
[20] Otje Salman Soema Diningrat, *Rekonseptualisasi Hukum Adat Kontemporer*, Alumni, Bandung, 2002, p.2.

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