



Legal Protection of Ulayat Lands of Indigenous Peoples Against the Threat of Land Commercialization

Sianny Cindy The; Made Warka; Slamet Suhartono; Endang Prasetyawati

Doctoral Program, Faculty of Law, University of 17 August 1945 Surabaya, Indonesia

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Abstract

The existence of Communal Lands is increasingly threatened by the power of capital through various means which then excludes and even eliminates community access to their customary lands and forests. The issuance of Government Regulation Number 18 of 2021 concerning Management Rights, Land Rights, Flat Units, and Land Registration which states that Customary Land, which in this case is Communal Land, can be granted Management Rights, creates new problems, namely prone to commercialization of the land. The existence of the potential for commercialization will certainly have an impact on the survival of the customary law community in the area. This study will analyze the nature of the protection of the rights of indigenous peoples to customary lands and the urgency of legal protection of customary lands of customary law communities from the potential for commercialization of land. This research is a normative legal research using a statutory approach, a conceptual approach, a historical approach and a philosophical approach. The results of the research conclude that the nature of the protection of the Rights of the Indigenous Law Community on Ulayat Land is to respect and protect local cultural identity and preserve nature in the area and also universally the existence of indigenous peoples has been recognized. The urgency of legal protection of the customary land of customary law communities from land commercialization is to preserve nature and the survival of the indigenous peoples themselves. The existence of normalization of the legal protection of the rights of indigenous peoples over customary land will be able to provide justice in the event of land disputes with large investors.

Keywords: *Communal Land; Indigenous Law Community; Legal Protection; Commercialization*

Introduction

Disputes over land rights occur in many places in almost all of Indonesia, both in remote villages and urban areas, because the land will not increase in the area while the number of human communities is always increasing like an arithmetic progression. Thus the issue of disputes over land rights will never end and will even continue to increase as the number of people themselves increases. Various kinds of disputes over land rights will continue to experience development from time to time, both regarding disputes over rights, disputes over land status, and other forms of disputes. These disputes will involve many community units, including disputes between customary law community units, communities and

the government, communities and other non-governmental institutions, and between communities themselves, which will continue to increase, so the various disputes must find a settlement format.

In the life of indigenous peoples, the land is understood as a geographical and social entity that has been inhabited, controlled, and managed by indigenous peoples for generations both as a support for sources of livelihood and as a marker of social identity inherited from their ancestors, or obtained through gifts and agreements with other indigenous peoples. There is a demand by some people to have land rights. Of course, in the context of a constitutional state, the Indonesian constitution guarantees the equality of every citizen before the law as one of the basic principles demanded in the life of the nation and state. Based on this principle, every citizen has the right to obtain legal remedies as well as remedies for violations of the rights they have suffered as well as fair legal settlements. In this case, the state is obligated to ensure the fulfillment of these rights. Based on such citizens' rights, it is fundamental in nature to guarantee access to justice which is a constitutional guarantee of human rights (Badan Pembinaan Hukum Nasional 2013).

One of the fundamental principles in Article 18 paragraph (2) of the amended 1945 Constitution is recognition and respect for customary law community units and their traditional rights, including the rights to management of natural resources, which are closely related to the existence of indigenous peoples. The existence of indigenous peoples is constitutionally recognized. However, the existence of indigenous peoples whose existence is recognized is, in fact, sometimes contradictory when it comes to the interests of development and investors who prioritize legal certainty and the status of land rights. In positive law in Indonesia, the existence of indigenous peoples and their traditional rights are recognized by the state (Fatchul Achmadi 2016).

The existence of customary law community rights to land, especially ulayat rights, is legally sourced both constitutionally and in Indonesian land law with certain restrictive requirements so that customary law is positioned as a complementary law, therefore related to the existence of customary law community rights to land, especially ulayat rights with conditions Ulayat rights are recognized as long as in reality they still exist, and there is certain authority from customary law communities to manage their customary lands. Thus, customary law communities have full customary authority over the control and use or management of their customary lands. However, formally, their authority is less strong than that of the State as stipulated in the UUPA (Togatorop 2020).

The existence of Ulayat Land is increasingly being threatened by the power of capital which, through various methods, then excludes and even eliminates community access to their customary land and forests. According to Derek Hall et al., There are 4 (four) forces that are interrelated and formed by power relations that displace people from the land, namely regulations related to state rules and those that apply in society; the market (market) through unequal economic relations excludes society; legitimacy (legitimation) through the government's claim to implement governance with economic, political and moral justification reasons; and coercion from the State's military security apparatus as well as violence against non-state actors (Derek Hall; Philip Hirsch; Tania Murray Li 2011).

In general, indigenous peoples with low social capital cannot escape the power of capitalism which for years undermined the socio-economic system of society and changed the value system over land. Customary lands and forests prioritizing social values and functions have turned into commercial commodity resources and contested ownership claims by certain groups or individuals. Market bondage to their family's subsistence needs brings them into economic complications. It is not uncommon for subsistence pressures to force them to make forced decisions by selling commercial land, customary forests, and other commercial properties that have sales value to capital owners.

Usep Setiawan said that in the context of capitalistic development, there must never be a priority for a sense of social justice, and there must be nothing to promote people's rights over agrarian resources" (Setiawan 2008). In capitalism, there is a commercialization of agrarian relations and a concentration of

control over production, which cuts directly off the skin covering subsistence customs and traditional social rights and replaces them with uniform contracts, markets, and laws. It is unsurprising that structural agrarian conflict is a reality that we routinely face. Structural agrarian conflicts involve the population dealing with the power of state capital and/or instruments. The position of the State, represented by government agencies, state/regional-owned enterprises, military institutions, and private companies, often appears as the "opponent" of the people in various types of disputes.

Conflicts between indigenous peoples and commercial forces present in an area are nothing new in Indonesia. Differences in interests and the impact of modernization that enters an indigenous territory and seizes customary lands often trigger the emergence of various social resistance movements. On the one hand, the entry of industrial activity into a region is a way out and a breakthrough to accelerate efforts to reduce poverty and underdevelopment. However, on the other hand, the industrialization and investment of various commercial powers that are carried out arbitrarily often result in processes of marginalization and ecological damage and are not in accordance with the needs of local communities.

UUPA contains noble values in defending the people's interests, but at the implementation level, it experiences many political, economic, and social obstacles. Many hierarchical regulations under laws have been issued, but the complete success of this expectation has yet to be seen. Even implementing regulations on agrarian affairs so far has not provided guarantees of legal certainty, legal protection, justice, and prosperity for local communities whose other parties are exploiting agrarian and natural resources.

Along with the enactment of Government Regulation Number 18 of 2021 concerning Management Rights, Land Rights, Flats Units, and Land Registration regarding customary land, its existence is increasingly being emphasized. In Article 1 point 13 Government Regulation Number 18 of 2021 it is stated that Ulayat Land is land in the territory of the customary law community, which demands that the reality is that it still exists and is not attached to any land rights. Furthermore, regarding this Ulayat Land, at this time, along with the enactment of Government Regulation Number 18 of 2021 may be granted Management Rights. In Article 5, paragraph (2) Government Regulation Number 18 of 2021 it is stated that Management Rights originating from Ulayat Land are assigned to customary law communities.

A new regulation stating that customary land, which in this case is customary land, can be given management rights has created a new problem: the land is prone to commercialization. The potential for commercialization will certainly impact the survival of the indigenous peoples in the area. Based on the introduction mentioned above, the formulation of the problem can be stated as follows the essence of protecting the rights of indigenous peoples over customary lands, and the urgency for legal protection of customary law community land from the potential for commercializing land.

Methods

The present study uses a normative legal research method that is conducted in finding solutions for legal matters (Isnaini and Utomo 2019). The research approach used is the statute approach, conceptual approaches, historical approach and philosophical approach.

Discussion

In the legal sense, land has a very important role in human life because it can determine the existence and continuity of legal relations and actions, both in terms of the individual and the impact on other people. To prevent land issues from causing conflicts of interest in society, it is necessary to regulate, control, and use land, in other words, and it is called land law (Saleh 1985).

The strategic function of land above because land basically has 2 (two) very important meanings in human life, namely:

1. Land as a social asset is a means of binding unity among the social environment for life and life.
2. Land as a capital asset is under construction and has grown as a very important economic object, a trading material, and an object of speculation (Rubaie 2000).

The relationship between land and humans has a specific character. This specific character is the basis for the birth of the legal relationship between humans and land, as is the case in a society that still recognizes and implements customary law. Along with the development of the population to date, it demands a person's need for land as land for residence and land for his life. Everyone and community groups certainly need land, not only in their lives but even for death, humans still need land. The amount of land that can be controlled by humans is very limited, while the number of people who desire land is increasing. The unequal condition between the supply of land and the need for land has given rise to various problems and cases of land disputes which require a good and correct resolution and provide protection and legal certainty, and justice for everyone and law community units, especially for the law community (Gayo 2018).

Since 1998, with the rolling of the reform movement, there have been changes in the constitution of this country, one of which is with the Amendments to the 1945 Constitution (Isnaini and Utomo 2019). This amendment to the 1945 Constitution is inseparable from provisions relating to the existence of indigenous peoples, namely, after the 1945 Amendment to the 1945 Constitution, the state's recognition and respect for the rights of indigenous peoples the rights of indigenous peoples are further enhanced. Precisely after the Second Amendment of the Constitution in 2000, these values were elevated and made into separate article formulations in the Body because after the amendment to the Constitution, there was no further explanation (Isnaini and Wanda 2017).

The provisions of Article 18B paragraph (1) and paragraph (2) of the 1945 Constitution (second amendment), which contain recognition and respect for customary rights, are as follows:

- (1)The state recognizes and respects special or special regional government units which are regulated by law;
- (2)The state recognizes and respects customary law community units along with their traditional rights as long as they are still alive and in accordance with community development and the Principles of the Unitary State of the Republic of Indonesia, which are regulated in law (Utomo 2020).

Article 6 of Law Number 39 of 1999 Concerning Human Rights states:

- (1)In the context of upholding human rights, the differences and needs of the customary law community must be considered and protected by law, society, and the government.
- (2)The cultural identity of indigenous and tribal peoples, including their rights to communal land, is protected in accordance with the times.

Furthermore, in the explanation section of Article 6 of the Human Rights Law, it is explained as follows:

- (1)Customary rights that are still valid and upheld within the customary law community must be respected and protected in the context of protecting and upholding human rights in the community concerned by considering laws and statutory regulations.
- (2)In the context of upholding human rights, the national cultural identity of indigenous peoples, customary rights which are still strictly adhered to by the local customary law community, are respected and protected as long as they do not conflict with the principles of the rule of law with the core of justice and people welfare.

The rights of customary law communities include traditional rights, which are rights born of the community as legitimized by their customary law (innate rights) and other rights granted by the state. Among the traditional rights that exist in customary law communities are customary rights, also called by various other names. Article 3 of Law Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA) states that the recognition of these customary rights, as long as, in reality, they still exist, is in accordance with national and state interests, based on national unity, and may not conflict with regulations. Other higher legislation. In line with the broad scope of the agrarian concept in the UUPA, which includes land, water, and the natural resources contained therein, the recognition of customary rights as stated in Article 3 of the UUPA also applies to customary rights practiced in the territories of indigenous peoples (Hatta 2020).

The relationship is close and domineering, utilizes the land, collects products from the plants that live on the land, and hunts the animals that live on the land. These legal community rights to land are called landlord rights or customary rights (Bushar 2006). The term customary rights were first introduced by Van Vollenhoven, a Dutch legal expert named *beschikkingsrecht*, which describes the relationship between the legal community and the land itself (Pribadi and others 2019).

With regard to the rights of indigenous peoples over certain areas or what is commonly referred to as customary rights, the discussion refers to geographical units. Meanwhile, when talking about rights, what is included in authority or authority is based on the will to do or not do something over the customary territory (Titahelu 2008). Thus customary rights refer to a relationship between indigenous peoples and certain areas. The relationship between customary law communities and their ulayat land gives rise to ulayat rights and the relationship between individuals over land (Harsono 2005).

Regarding this relationship, Ter Haar stated that the living relationship between human beings is orderly structured and related to each other on the one hand and the land, on the other hand, namely the land where they live, the land that feeds them, the land where they are buried and the land where they live. The residence of the spiritual guardians along with their ancestral spirits, the land where the vital forces are permeated, including the life of the people and therefore depending on it, then such a connection that is felt and rooted in mind "all in pairs" (*participierend Denken*) is properly considered as a legal affinity (*rechtssbetrekking*) of mankind to land. Legal alliances (*rectsgemeenschappen*) are "organized groups that are permanent in nature with their power, as well as their own wealth in the form of visible and invisible objects" (Ter Haar 2000).

According to Maria S.W. Sumardjono, customary rights can be said to exist if the following three criteria are met cumulatively:

- a. The existence of customary law communities that fulfill certain characteristics as the subject of customary rights;
- b. The existence of land regarding areas with certain boundaries as the main supporter of life and livelihood as well as the environment (*lebensraum*), which is the object of customary rights;
- c. There is the authority of customary law communities to carry out certain actions as described above (Sumardjono 2012).

In Boedi Harsono's opinion, to be able to state that a customary right in a certain place still exists, three main elements must be met, namely:

- a. Elements of society, namely a group of people who feel related by their customary legal order as joint citizens of a certain legal alliance who recognize and apply the provisions of the association in their daily lives;
- b. The territorial element, namely the existence of certain customary land which becomes the living environment for the members of the legal alliance, as well as a place for members of the customary law community concerned to take their daily needs and;

- c. Elements of the relationship between customary law communities and their territory, namely the existence of customary law arrangements regarding management, control, and use of their customary lands, are still valid and obeyed by the members of the legal alliance concerned (Harsono 2005).

Based on these two opinions, the subject, object, and legal relationship between the subject and the object of customary/ulayat land can determine whether or not there is a customary right over the land in question (Suhartono and Wijayanti 2017). If the three elements of land mentioned above are met, customary/ulayat land rights still exist. Because they still exist, the customary law community that controls the customary land in question can carry out their rights and obligations, including protecting and defending the existence of their customary land.

The existence of customary law community rights to land, especially ulayat rights, is legally sourced both constitutionally and in Indonesian land law with certain restrictive requirements so that customary Law is positioned as a complementary law, therefore related to the existence of customary law community rights to land, especially ulayat rights with conditions Ulayat rights are recognized as long as in reality they still exist, and there is certain authority from customary law communities to manage their customary lands (Prasetyawati 2012). Thus, customary law communities have full customary authority over the control and use or management of their customary lands, however, formally, the authority they have is not as strong as that of the State as stipulated in the UUPA (Togatorop 2020)

Law as a means of development can function in three ways, namely: First, Law as an instrument of order (ordering). In the context of law enforcement, it can create a framework for making political decisions and resolving disputes that may arise through a good process. It can also lay a good legal basis for the use of force. Second, the Law is a means of maintaining balance (balancing) (Bukit and others 2018). The function of Law can maintain balance and harmony between the interests of the State, public interests, and individual interests. Third, Law is a catalyst. As a legal catalyst, it can help to facilitate the process of change through legal reform (law reform) with creative assistance in the field of the legal profession (Bethan 2008). In order for the Law to fulfill its function as a changer in society, the Law must be included in changes in society. Law is not static but must be dynamic, moving towards achieving a just and prosperous society, as reflected in the Preamble to the 1945 Constitution of the Republic of Indonesia.

Indigenous peoples as an entity that has been universally recognized by various names. This is, for example, expressed in a document issued by NZ Human Rights entitled "The Rights of Indigenous Peoples: What you Need to Know," which states, "Around the world, indigenous peoples may be known by names such as tangata whenua, aboriginal, first nations, 'native' or 'tribal' peoples." The establishment of international standards regarding indigenous peoples marks the acceptance of the existence of indigenous peoples globally. The United Nations has established a "Declaration on the Rights of Indigenous Peoples," which contains a comprehensive international human rights document regarding the rights of indigenous peoples (indigenous peoples). It contains minimum standards that guarantee the survival, dignity, welfare, and rights of indigenous peoples in the world. These provisions are the minimum standards that UN member states must apply. These standards must be treated equally to all members of indigenous peoples.

Indigenous peoples have rights that must be respected, protected, and fulfilled by every country where these communities are located. The document issued by NZ Human Rights stated 37 (thirty-seven) rights of indigenous peoples, of which there are 2 (two) rights mentioned, namely: Recognition and protection of their lands and resources and Fair processes for dealing with their rights to lands and resources.

The subject of customary rights is certain customary law communities that can be genealogical in nature and are not individuals and not heads of customary associations. The head of the customary association is the executor of the authority of the customary law community in his position as the officer of the legal community concerned. While many customary rights are areas in the form of the environment where the customary law community seeks and derives results for their daily lives. Thus there is a relationship, attachment, and dependence regarding customary law with its territory, and the utilization of products from the land, waters, plants, and animals in the territory of the customary law community concerned is to meet the needs of daily life and not for commercial purposes.

Ulayat rights are not exclusive because, in addition to owning land/territory, which gives rise to the authority of indigenous peoples to regulate the use of their land, in addition to the rights that every citizen owns, customary law communities also have obligations, namely to take part in protecting the environment and comply with statutory regulations. Applicable. The authority to jointly regulate the use of land, waters, plants, and animals within the territory of the customary law community is carried out according to customary law, namely the norms that exist in the customary law community that are still valid, obeyed, and have sanctions. Recognition and protection of customary rights are carried out through self-identification of customary law communities and the Government and Regional Governments, with the participation of all related parties to carry out verification. The existence of customary law communities and their customary rights is confirmed in a Regional Regulation.

Conclusion

The essence of protecting the rights of customary law communities over customary land tenure is to protect the local cultural identity and preserve nature in the area. The existence of protection for the rights of indigenous peoples to customary land is based on the consideration that it has been universally accepted that indigenous peoples have rights to the land, territories, and resources available in their territories. The urgency of the legal protection of customary law community land from land commercialization is to preserve nature and the survival of the customary law community itself. The existence of norms for legal protection of the rights of customary law communities over communal land will be able to provide justice when land disputes occur with large investors.

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