Recognition Of Ulayat (Indigenous) Land Rights Of The Customary Law Communities In The National Agrarian Law: Between Expectations And Reality

Dwi Kusumo Wardhani[1], Zainal Arifin Hoesein[2]
Email : dosen01655@unpam.ac.id
Universitas Borobudur, Indonesia
[2] Lecturer of Doctoral Law Program of **Universitas Borobudur** Indonesia

ABSTRACT

Land is one of the fundamental assets for the State of Indonesia, this is because it is on land that a nation and state live and develop, for the Indonesian people, the land itself places quite an important position, especially for the people of a customary law. The definition of a community of customary law itself is one of several legal subjects of a country whose existence is recognized in the laws and regulations that apply in Indonesia. Apart from customary rights, customary law communities/groups themselves have a multidimensional relationship, where customary rights are not only limited to an economic resource, but become an inseparable part of the entire life of indigenous and tribal peoples. The enactment of Ulayat (indigenous) land rights began with the presence of Law number 5 of 1960 concerning Agrarian Principles and Regulation of the Minister of Agrarian Affairs/Head of BPN number 5 of 1999 which implicitly provided a hope of justice for the land tenure and ownership of the Customary Law community in Indonesia. It will be said that at present there is still no complete information available regarding the landscape and boundaries of areas covered by these various customary laws, in this case customary rights. This paper concludes that Ulayat (indigenous) land rights in the Indonesian legal system are recognized through the Basic Agrarian Laws, namely Law No. 5 of 1960, in this case the recognition given by the State is conditional and layered because the recognition given to customary law communities and their customary rights.

Keywords: Land, Indigenous Peoples, Ulayat Land

ABSTRAK

Tanah ialah satu dari Asset mendasar bagi Negara Indonesia, hal tersebut dikarenakan di atas tanahlah suatu bangsa dan negara, hidup dan berkembang, bagi masyarakat Indonesia tanah seniri menempatkan posisi cukup penting, terutama oleh masyarakat suatu hukum adat. Define dari masyarakat suatu hukum adat sendiri yakni satu dari beberapa subjek hukum suatu Negara yang diakui keberadaannya didalam Peraturan Perundang-undangan yang berlaku di Indonesia. Selain daripada hak ulayat dengan masyarakat/kelompok hukum adat sendiri memiliki suatu hubungan multidimensi, dimana hak ulayat tidak hanya sebatas sumber ekonomi, tetapi menjadi bagian yang tidak dapat terpisahkan dari seluruh kehidupan masyarakat hukum adat. Diberlakukannya Hak Ulayat dimulai dari hadirnya Undang-Undang nomor 5 tahun 1960 tentang Pokok-Pokok Agraria serta Peraturan Menteri Agraria/ Kepala BPN nomor 5 tahun 1999 yang secara implisit memberikan suatu harapan keadilan bagi penguasaan dan pemilikan tanah masyarakat Hukum Adat di Indonesia. Akant tepati, dewasa ini masih belum tersedia informasi secara lengkap mengenai bentang serta batas-batas wilayah yang dicakup dakam berbagai hukum adat tersebut dalam hal ini hak ulayat. Tulisan ini menyimpulkan bahwa Hak Ulayat dalam tata hukum Indonesia diakui melalui Undang-Undang Pokok Agraria yaitu Undang-Undang No.5 Tahun 1960, dalam hal ini pengakuan yang diberikan Negara bersifat bersyarat dan berlapis karena pengakuan yang diberikan terhadap masyarakat hukum adat dan hak ulayatnya.

Kata kunci : Tanah, Masyarakat adat, Tanah Ulayat

A. Introduction.

Customary law has an important meaning in the history of the formation of national agrarian law with the spirit of breaking away from legal dualism which is thick with nuances of capitalism that occurred before Indonesia's independence, the formation of the Basic Agrarian Laws (BAL) makes customary law a complementary source and the best source. Referring to the BAL, customary law itself has special features, namely national agrarian law politics, the mention of "customary law" can be seen in the Preamble under the word "opinion" in letter a, General Explanation of number III (1), Article 5 and its explanation, Explanation of Article 16, Article 56, Article 58 explicitly explains that as long as the regulations in the enforcement of this Law have not been enforced, then instead of that the existing regulations in Indonesia, whether listed in writing or not contained in writing, talk about earth and water and the whole the natural resources contained therein as well as all rights regarding land, since the enactment of this regulation, will still be enforced as long as it is in accordance with the spirit of a rule in the said Law and is given a meaning in accordance with the applicable regulations.

The main key for the development of national agrarian law is based on the conception and principles of customary law which are formulated in the articles contained in the Basic Agrarian Laws (BAL), including religious communalistic conceptions, communalistic meaning means that land can be owned individually but still contains elements of togetherness, it is stated in Article 1 paragraph (1) of the Basic Agrarian Law (BAL) that the entire land which is in an Indonesian area is said to be joint land belonging to all Indonesian citizens who form a unified Indonesian nation.

Complementary sources in national land regulations, namely customary law, the intention is to complement agrarian regulations to become a source of written law, contained in Article 5 "Agrarian law that applies to earth, water and space is customary law, as long as it does not conflict with national and state interests, which is based on national unity, with Indonesian socialism and with the regulations contained in this Law and with other laws and regulations, all with due observance of the elements that rely on religious law", therefore a regional/customary rule which in general what is commonly used is customary law which has indeed been carried out in a saneer/filtered manner, abolished its regional characteristics which are thick with feudalism, and are still maintained which are in favor of national interests.

The general elaboration in the BAL explains about the power of a state over land, that a state is only permitted to hand over land only to a person/individual or it can also be a legal entity which according to regulations has fulfilled the requirements that a right is according to its designation and necessity. An example is that given

to a ruling Agency (department, service or autonomous region) which is then used in carrying out their respective duties. In this case regarding how a state has power over these lands, which has more or less been given the limitations contained in the customary rights of a legal community unit, while taking into account the fact that customary rights still exist.[1] Through HM, HGU, HGB, HP or give it under management.

In Indonesia itself this matter is reaffirmed in the state constitution or what is called the Constitution of the Republic of Indonesia where the existence of customary law is acknowledged, which is contained in Article 18B of the 1945 Constitution which states that the State respects and recognizes legal community units. customs and their traditional rights, as long as they are still alive and in accordance with the development of the life of the nation, society and the principles of the Unitary State of the Republic of Indonesia which have indeed been regulated in laws and regulations. Recognition and respect for customary rights can be seen from the point of view of human rights which are also implicitly regulated in Article 28I paragraph (3) of the 1945 Constitution, stating that the identity of a culture and the rights of traditional communities are highly respected in line with the development of an era and civilization, then in the results of the fourth amendment to the 1945 Constitution, in Article 32 paragraph (1) that the State advances Indonesian national culture in the midst of world civilization by guaranteeing the freedom of the people in maintaining and developing their cultural values. A.P Parlindungan argues about the existence of ulayat (indigenous) land rights, expert A.P Parlindungan argues that the existence of ulayat (indigenous) land rights until now has been running as it should, and has been complied with as an institution or rule within the community, but indeed the existence of ulayat (indigenous) land rights itself must be in harmony with a national, state and Indonesian nation.[2]

Recognition of customary rights is also implied in the 1945 Constitution Article 18B paragraph (2). While the existence of the existence of customary rights contained in the Forestry Law does not implicitly explain the regulation of the existence of the customary rights themselves. However, this regulation only regulates customary forest and customary law community groups, even though the essence of customary forest is state forest which is in a community area, although it is known that the forestry law is a special law while the Basic Agrarian Laws (BAL) is a regulation that general. Apart from that, there is also not a small amount of forest utilization that is carried out intentionally without permission, in which

[1] Lilik mulyadi, Eksistensi, *Dinamika Dan Perlindungan Hukum Terhadap Hak atas Tanah Ulayat di Indonesia*, PT Alumni Bandung, Bandung, 2022, page. 10.
[2] A.P Parlindungan, *Komentar Atas Undang-Undang Pokok Agraria*, CV Mandar Maju, Bandung, 1998. page. 63.

there are customary forests or commonly known as customary forests which are an embodiment of the customary rights of the local customary law community. However, there are still frequent violations of customary rights that occur because of a regulation that contradicts one another, until now there has been no regulation regarding collective ownership of land, this can lead to unclear procedures for recognizing indigenous peoples' collective rights to land, Therefore, if there is a communal land dispute, it is necessary to resolve land disputes through deliberations or settlements through non-litigation channels in order to prevent prolonged conflicts.

B. Focus of Problem

Based on what has been described in the background, the main problems can be identified as follows: How is the legal recognition and protection to Ulayat (indigenous) land rights of customary law communities in Indonesia?

C. Research Methodology

Research in Recognition of customary law community customary rights in national agrarian law: between expectations and reality is normative legal research. In normative research itself, the main material is material obtained from a literature study. In the source of the literature it is said that the law of data sources is legal material. In this normative research, examines and analyzes a legal material which is divided into several, including:

1) Primary legal materials;
2) Secondary legal materials; and
3) Legal materials are tertiary in nature.

D. Finding and Discussion

Recognition and Protection of Indigenous Peoples' Land Rights in Indonesia

Referring to the view of customary law that ha of land is divided into 2 (two) types of rights to land, namely:

a. The right to control the land itself means that the land is not owned individually or individually, the right to control the land is known as customary rights where it is the community/customary law group that controls, the form of the customary rights themselves are: titian land, irrigation land, treasury land village, crooked land and so on. Land owned by this type of community cannot easily be certified. If there is a certificate, it means that the customary law community uses the exchange method (ruislag) or it can also be through the customary head to release the land rights first.

b. Individual rights to land, or it can also be said as "Former Customary Ownership" land which is known by another name, namely girik land, girik land itself was born from a customary land or other land which has not been transmuted into one of certain rights including, (rights ownership, building use rights, usufructuary rights or usufructuary rights) and have not been registered or made in the form of a certificate issued by the local land office. Girik land has various kinds of terms, including: girik, petok, details, ketitir and so on.

Talking about customary rights, when viewed from the perspective of legislative policy, the principle of customary rights includes dimensions regarding:

1) Legal partnership rights (gemeenschappen), community rights are one rather than joint ownership rights and/or can be called collective rights where only certain customary law communities have them, to a certain area which is the environment for the growth and development of its citizens, and cannot be separated until at any time and are not allowed to be owned only by individuals;

2) Includes rights in accordance with laws and regulations for the use of land, forests, waters, plants that live freely and animals that live freely on it and; and

3) Ulayat land is born from a bond physically and spiritually as well as hereditary and cannot be separated between a group of customary law communities and related areas.

According to a custom in the Minangkabau area of West Sumatra, the people there explain that ulayat land itself is one of the characteristics of a group, and that group has the right to that area and is responsible for protecting it. In Minangkabau customary law, they are aware that ulayat (indigenous) land rights are the highest rights in land.[3]

The characteristics of customary rights are the existence of a legal community as the subject, then the area between certain boundaries as the object, the existence of authority, the nature of the relationship between customary rights that are eternal, hereditary, and related to legal groups as the basis. Land relations with indigenous peoples contain a public element, namely the task of regulating/managing the allotment, use and utilization of communal land collectively for the common good

[3] Nova yarsina, *Perlindungan Terhadap Tanah Ulayat Yang Telah Bersetifikat Dikota Bukkittinggi*, Jurnal Cendikia Hukum, Vol.3, No.2, 2018, page. 169.

as well, while the civil element consists of joint ownership of related customary land, in which a lot of individualization processes take place.

Ulayat (indigenous) land rights reside in the hearts of customary law groups and their customary law nuances. It is known that between customary law community groups and customary land have a legal relationship that is used in order to create a right, which then gives it to the community as a legal group to use the land for the benefit of the community.[4] Land controlled by customary law groups is called ulayat land which is used for necessities of life such as cultivating land, hunting and so on.[5] When examined from the opinion of C. Van Vollenhoven [6] actually there are 9 (seven) foundations of customary law namely:

1. Legal partnership (rechtsgemeeinschappen)
2. Customary rights/customary land rights (beschikkingsrecht)
3. Customary law area (rechtskringen custom)
4. The agreement is a concrete action (in concreto)
5. Customary law does not recognize a juridical construction, which is abstract (abstracto)
6. Customary law "make sensory perception the basis of legal categories and distinctions"
7. The nature of the family structure and clan

The creation of ulayat (indigenous) land rights for customary law groups was due to a gap, originally the main customary law group then became a new customary group that stands alone with half of its parent area as its ulayat land.[7] So that an area is formed in which the legal community exists in power and grows by looking at the common property that must be defended and/or defended to maintain their lives.[8]

Ulayat (indigenous) land rights for customary law communities have their own significance in that customary rights are to preserve the identity, characteristics and way of life of indigenous peoples, because they have strong ties to the land in their territory, the surrounding natural resources are like a bond that has a cosmic-religious nature, which means that customary rights for community groups in a customary law cannot be separated from their fellowship, as well as their source of

[4] Ari Sukanti Hutagalung, *Program Redistribusi Tanah di Indonesia*. CV Rajawali, Jakarta, 1985, page. 21.
[5] R. Soepomo, *Bab-bab Tentang Hukum Adat*, Jakarta, Pradnya Paramita, 2003, page. 56.
[6] Mahadi, *Uraian Singkat Tentang Hukum Adat, Perpustakaan*, FH-USU, Medan, 1997, page. 66.
[7] John Salindeho, *Masalah Tanah Dalam Pembangunan*, Sinar Grafika, Jakarta, 1993, page. 278.
[8] *Ibid*. page. 270.

livelihood. Ulayat (indigenous) land rights have a definition in law which means that a series of powers and rights and obligations of customary law groups over a certain area which is its territory, is considered as a living environment for its citizens to take advantage of existing natural resources, in this case including land that is in the area.

From the perspective of existence and regulation, ulayat (indigenous) land rights were actually recognized and regulated for the first time in customary land law. Customary law as a system constructs humans (Indonesia) which are limited to a certain time and place so that in essence the system is limited and closed.[9] The existence of customary rights is regulated in the constitution of the 1945 Constitution. It is explained in the provisions of article 18 of the 1945 Constitution which reads "the division of Indonesian regions into large and small areas, with the form of government structure determined by law, taking into account and bearing in mind the basis of deliberation in the government system state, and the rights of origin in areas that are special in nature". Maria S.W. Sumardjono also stated that recognition of customary rights could be reviewed in statutory regulations, one of which was Law No. 21 concerning Papua's Special Autonomy, Law No. 7 of 2004 concerning water resources, law No 41 of 1999 concerning forestry and others.[10]

Basically, the provisions of Article 18 of the 1945 Constitution before the amendment revealed that there are rights regarding origins in an area that is said to be special, namely the division of large and small areas, where the composition of government is contained in statutory regulations by considering and remembering that deliberation as the basis for a meeting of the government of a country and rights, origins in areas that are special. Broadly speaking, this article does not implicitly explain the existence and respect for community groups of a customary law for their rights in casu ulayat (indigenous) land rights, but what is contained in the elucidation of Article 18 of the 1945 Constitution describes an acknowledgment of a community group of a customary law. where there are no less than 250 zelbesturende landschappen and voksgemeenschappen such as clans, villages and nagari which have original systematics, therefore it can be said to be an area that is given a privilege. The Republic of Indonesia respects the position of a special area with various state regulations regarding the area which will remember the origin of the area.

Based on the provisions of Article 3 of the Basic Agrarian Laws (BAL), it does not provide an implicit definition of customary rights, it only provides a strong position

[9] Hulman Hadikusuma, *Pengantar Ilmu Hukum Adat Indoensia*, Mandar Maju, Bandung, 1992, page. 11-12.

[10] Rosalina, *Eksistensi Hak Ulayat di Indonesia*, Jurnal sasi, Vol.16, No. 3, 2010, page. 49.

towards customary rights. By reviewing a provision contained in Articles 1 and 2 regarding the application of customary rights and rights that are indeed the same as those of customary law communities, as long as in reality they still exist, it must be in such a way as to comply with national interests which refer to national unity. , and of course in harmony with other laws and regulations which are hierarchically above.

The regulations from article 3 cannot be separated from articles 1 and 2 of the Basic Agrarian Laws (BAL) which are considered, this is because this article is one of the foundations of national agrarian law. Among them it is explained that the principle of divinity, the principle of nationality, and the principle of insight into the archipelago recognize and see that earth, water and space are gifts from God Almighty. highest which is eternal. Thus, as long as the Indonesian nation still exists and as long as the earth, water and space still exist, there will be no other powers.

Based on the provisions of Article 5 Basic Agrarian Laws (BAL) regulates the recognition of arrangements regarding customary rights which states that:

"Agrarian law that applies to land, water and space is customary law, as long as it does not conflict with national and state interests, which is based on national unity, with Indonesian socialism and with the regulations contained in this law with other laws and regulations. , everything by heeding the elements that rely on religious law".

From the perspective of the Basic Agrarian Laws (BAL), it is explained that individual rights to the land of customary law community groups are already contained in it, are respected and can be converted. The right of this conversion is in the form of affirming individual rights to become property rights, or use rights, or according to the designation or characteristics of these rights. Strictly speaking, citizens of a customary law community, without having to undergo a process of handing over land rights based on customary law, without having to go through the process of granting these rights from the state. the provisions of article Basic Agrarian Laws (BAL) paragraph (1) the provisions of the Basic Agrarian Laws (BAL) Conversion emphasize individual rights in the form of property rights.

According to Prof. Budi Harsono, the Basic Agrarian Laws (BAL) deliberately did not make arrangements in the form of statutory regulations regarding customary rights, and let the arrangements continue to be enforced based on local customary law, because according to the policy makers it would hinder the natural development of customary rights which in fact are getting weaker, because the phenomenon is getting stronger individual rights which then apply for and register

their rights to obtain land certificates, because it is hoped that the weakening of customary rights will be accommodated by the existence of state control rights, which are expected to replace the position of traditional elders or customary law communities who have links in a relationship with the land that has been granted rights individually by the relevant indigenous peoples.

The definition of customary rights can be seen in PMNA.KA BPN No. 5 of 1999 concerning guidelines for solving the problem of customary law community customary rights, in article 1 it states that customary rights are an authority based on customary law owned by certain customary law groups over an area which is an environment where its citizens carry out a life activity in order to derive a benefit. which is obtained from the surrounding natural resources including land, to support the survival of its citizens, this comes from a relationship that is externally and internally carried out from generation to generation and cannot be separated between customary law groups and related areas.

Apart from that there is also a rule namely Law No. 41 of 1999 concerning Forestry which has a special section that discusses customary law communities, but there is no mention of ulayat (indigenous) land rights in its articles, in other words this law does not implicitly recognize the right of citizens or customary law groups to be able to clear forests. their ulayat as well as working on the ex-forest land he cleared. Article 68 of this law reveals that communities living in and around forests have the right to obtain compensation or compensation for the loss of access to forests as a source of work where to fulfill survival resulting from the determination of forest areas, compensation can be in the form of a new livelihoods and involvement in efforts to exploit the surrounding forests.

In Article 2 of Permendagri (Minister of Home Affairs Regulations) No. 52 of 2014 concerning guidelines for the recognition and protection of customary law communities stipulates that government officials such as Governors and Regents/Mayors are required to recognize and provide protection for customary law communities/groups, where the rules must be set forth in the form of a Regional Head Decree. While the Forestry Law provides a condition that the community in a customary law area must be given recognition of its existence in the form of a regional regulation.

Then there is what is referred to as the administration of a communal land of a customary law community unit which can be submitted to the Head of the local Land Office, for measurement, mapping and recording in the land register which previously had to receive recognition and determination of the local Regent/Walkot

(Permen ATR/BPN No. 18 of 2019 concerning procedures for administering customary land for customary law community units).

Apart from that, Article 127 of the Job Creation Law basically regulates that land managed by a land bank is given management rights, which can then be given usufructuary rights, building use rights, and usufructuary rights (HP) for a period of time. 90 (ninety) years. The provision of this period regulated in the law is considered excessive and rivals the colonial-made law which regulates the granting of erfpacht rights with a period of 75 years. This can become a serious problem, looking at increasing welfare by facilitating an investment, Cultivation Rights are present above the HPL for 1 decade, which can then take the rights of the middle to lower class people, instead of the Cultivation Rights being used for a road business in the field of plantations and agriculture in order to increase the standard of living of all Indonesian people, but in fact it is most likely that the Cultivation Rights are controlled by a group of people who have their own interests in this case it does not rule out the possibility of foreigners who then the results of what is obtained will be used to fulfill all food needs of their country of origin.

It is feared that the principle of nationalism contained in the Basic Agrarian Laws (BAL) will be sidelined by the existence of the provisions above. Where the rights of the Indonesian nation contained in Article 1 of the Basic Agrarian Laws (BAL) emphasize that land, water and space within the territory of the Republic of Indonesia are the rights of all Indonesian people without exception, thus explaining that it is not only the rights of the landowners concerned, while not citizens. Indonesia is only allowed to control land that is in Indonesian territory with broad usufructuary rights and a limited time.

Likewise with regard to national land law originating from customary law which has become an inheritance from our ancestors through a process of filtering and eliminating its regional character, which is considered outdated. In its journey, there have been many shifts in ownership of customary rights and are controlled by entrepreneurs because of land ownership with usufructuary rights.

If the company grants usufructuary rights, in this case it can be interpreted that the government is considered inappropriate in implementing the right to control by the state which has been regulated in laws and regulations with the aim of achieving a prosperity and welfare of the community, but this is more to the neglect of a protection and recognition of customary rights of indigenous peoples.

E. Conclusion

Forms of legal protection for indigenous and tribal peoples are spread across various sectoral laws. There are many regulations in the legislation regarding customary law communities that are inconsistent and contradictory, in the Forestry Law, for example, there is a provision abolishing criminal reasons against indigenous peoples. Geothermal and Mining Law do not apply. So that the policy is still partial with different qualities and objectives.

From the perspective of the BAL, individual rights to the land of customary law community members are recognized, respected and can be converted. The nature of this conversion is in the form of affirming individual rights to property rights, or usufructuary rights, or according to the designation or character of these rights. Strictly speaking, members of customary law communities do not have to go through the process of granting land rights based on customary law, without having to go through the process of granting these rights from the state. the provisions of article Basic Agrarian Laws (BAL) paragraph (1) the provisions of the Basic Agrarian Laws (BAL) Conversion emphasize individual rights in the form of property rights.

F. Recommendation

The government pays more attention to aspects of legal development in terms of the Agrarian Law of indigenous peoples. We call on the Indonesian state legislature to design customary law community customary rights. Law on Ulayat (indigenous) land rights which focuses more on the interests of the community. This paper hopes that the customary law community can obtain the justice they should receive, and enjoy their rights which have been arranged for generations without any inconsistent regulations.

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