



Dynamics of Customary Land Rights for Public Interest in Indonesia

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Abstract

Customary land which is one part of the customary law community has a large and significant role in the existence of the existence of the customary law community in an area. It is undeniable that land is an important element for meeting the needs and achieving the level of welfare of each person, including customary law communities. Utilization of ulayat land or called ulayat rights owned by indigenous peoples is actually used and intended for the welfare of indigenous peoples. Basically, the use of ulayat land in Indonesia is carried out based on the communal style (togetherness) which is one of the characteristics of customary law communities. Along with the times, with the limited amount of land in the territory of Indonesia, but collided with the increase in the number of people and population density that continues to increase, it has implications for the discovery of customary land uses carried out by other than customary law communities. The dynamics that often become a problem in the utilization of customary land are interesting to be studied in more depth. This type of research belongs to the type of normative juridical, with the research method used in compiling this paper is descriptive-qualitative method.

Keywords: Customary Law Community, Communal Land, Customary Rights

A. Introduction

The customary law is a law broken down by custom. A custom is the behavior of a person who continues to do so, then expands and is followed by the people around him. The custom in the group is then known as the term "adad". From this custom, the custom law is defined as a custom that is accepted and must be implemented in the society concerned.¹ Such a society has been described before, which is then known as the customary law society.

The State recognizes and respects the units of the community of customary law and its traditional rights as long as they are alive and in accordance with the development of the society and the principles of the State of the Union of the Republic of Indonesia, as regulated in the Law. With the existence of an article on the Community of conventional law that is included in the Constitution of the state of Indonesia, the presence of a community of ordinary law becomes clear and guaranteed in national law. One part of the customary law itself concerns the land law, which in it regulates the land of heritage.

Land is land in the possession of a community of customary law. The land in this sense means a land that is customarily or descended from the neighborhood has been dominated by the people of customary law who inhabit the related territory, the heads of the tribe, with such power, then people of ordinary law use the land to meet the needs of their lives, manage

¹ Hilman Hadikusuma, 2014, *Pengantar Ilmu Hukum Adat Indonesia Edisi Revisi*, C.V. Mandar Maju, Bandung, hlm. 1.



and preserve the sustainability of the land of custom that is in the territory of their power. According to the dictionary of the law of land is the land of common ownership believed as a gift or a mysterious power or an ancestral legacy to a group that is a customary law society as the main supporting element of the life and subsistence of the group throughout the time.

The land is a common property which is believed to be a gift of a hidden power or an ancestral legacy to a group that is a customary law society as the primary supporting element for the life and subsistence of the group throughout the time.² The earth is the most important part of life, and it is useful to guarantee the common well-being. Discussing the use of the earth, it will be closely related to the righteousness of the land, which is two things that are inseparable. A customary society is an organized group of societies that operate as a unity, reside in a particular region, has rulers, has customary laws and has its own wealth, whether physical or inherent, and controls natural resources within its range.³ A common law is an organized group of people, settled in a certain area, having their own power and possessing their own wealth, whether visible or invisible, where the members of the unity each experience life in the society as a natural thing according to the standard of nature and none of the members have the mind or tendency to dissolve the bond that has grown or leave it in the sense of freedom from the bond forever.⁴

Muchsin's right of possession is the right of an indigenous community to a certain territory which is the living environment of its citizens to take advantage of natural resources, including land in the territory for its survival and livelihood.⁵ The provisions concerning the right of revocation are contained in article 3 of Act No. 5 of 1960 on the Basic Regulations of Agrarian Trees or the latter shall be referred to as UUPA. In that article it is explained that the exercise of the right to revocation is recognized as long as the relevant common law remains in place, and must be in accordance with the national and state interests based on laws and other higher regulations.

The use of land by the people of customary law is a right that they have or are known with the right of custom. However, with the development of the times, it is not uncommon to find the land of ordinary law that is basically owned by the community customary right is

² Yulia, 2016, *Buku Ajar HUKUM ADAT*, Unimal Press, Lhokseumawe, hlm. 64.

³ Taqwaddin, 2010, *Penguasaan Atas Pengelolaan Hutan Adat oleh Masyarakat Hukum Adat (Mukim) di Provinsi Aceh*, (Disertasi Doktor Ilmu Hukum, Universitas Sumatera Utara), hlm. 3.

⁴ Husein Alting, 2010, *Dinamika Hukum dalam Pengakuan dan Perlindungan Hak Masyarakat Hukum Adat atas Tanah*, Yogyakarta, hlm. 31.

⁵ Hayatul Ismi, 2017, *Tinjauan Hukum Atas Hak Ulayat Dalam Sistem Hukum Pertanahan di Indonesia*, Forum Kerakyatan, hlm. 67.



used by other than the society customary. This has raised controversy, as the rights of indigenous peoples to their land are recognized and protected by the State of Indonesia. Based on these realities, the author will study how the development of the use of reclaimed land with the evolution of the times. Based on this background, then the author draws the formula of the problem how the use of land in accordance with the existing regulations in Indonesia as well as the dynamics faced with the development of the times in Indonesia?

This research aims to find out how the regulation of land use (right of land) in accordance with the existing legislation in Indonesia. Furthermore, this research is also aimed to know how the dynamics encountered in order to make use of land in Indonesia along with the development of the times.

B. Research Method

The type of research used in the preparation of this work is juris-normative. Juris-normative law research is the study of law carried out on the basis of norms and norms of legislative regulations.⁶ The method used to compile this work is the approach to legislation, as well as the analysis of various library studies that include online journals, and electronic books. Then, with this approach, the writing of this journal is processed based on the author's own thinking. The research method used to compile this work is a descriptive-qualitative method. Descriptive law research is an exhibitional legal research aimed at obtaining a complete picture of the legal situation in force in a particular place, or of the existing juridical symptoms, or certain legal events occurring in a society.⁷ A qualitative approach is a method of research that produces descriptive data of analysis, i.e. what is stated by the research objective in question in writing or orally, and real behavior.⁸

C. Results and Discussion

1. Land And Property Rights In The Indonesian Legal System

The land as one of the elements that supports the life of nations and nations has a crucial role because it is closely related to the functions and uses that it contains, among them are the political functions, economic function, social function, and religious function. When then associated with the community of customary law, then

⁶ Zainuddin Ali, 2009, *Metode Penelitian Hukum*, Sinar Grafika, Jakarta, hlm. 25.

⁷ Bachtiar, 2018, *Metode Penelitian Hukum*, UNPAM PRESS, Tangerang Selatan, hlm. 52.

⁸ *Ibid*, hlm. 160.



the land will have a major proportion of its primary function with social, and economic functions that the land belongs to.⁹ Explanation of the importance of the land because of its nature because it is the only object of wealth that, despite the changing circumstances, will remain so even under certain conditions can be more profitable. Whereas land is important because the facts relate to the reality that shows that the presence of land is one of the pillars of the existence and development of a community of customary law. It means that the land of worship is a place of residence for communities, a place where people live, where people bury their deceased members, and a land where the spirits of the ancestors of people live.

On the basis that the land is in the territory of a common law community, then the common law society has a close relationship with the land which is later known as the right of cultivation or the right to cultivation. If there is such a right, it must be accompanied by the fulfilment of the obligations of the community of customary law, which includes respect for all the interests of the indigenous people on the land of custom, the implementation of the customary rules relating to the land, and respect for the rights of other people who are within the scope of the relevant community of ordinary law. When the person has fulfilled his obligations, then he can exercise what is his right as part of the common law society to make use of the land. The object of the right of righteousness is to cover the land, water, plants, and animals within the territory of the rule of law. In order to make use of the land, some of the characteristics of the right are known, namely:¹⁰

- a. The Federation and its members are entitled to use the land, to reap the fruit of everything that is in the land and that grows and lives on the land of worship.
- b. Individual rights covered by federal rights.
- c. The leadership of the federation may decide to declare and use certain areas of land and designated for the general interest, and against this land is not permitted to be laid private rights.
- d. A foreigner who wants to take the yield from the land of worship must first seek permission from the head of the federation and must pay the penalty and after the harvest pay the rent.

⁹ Tolib Setiady, 2018, *Intisari Hukum Adat Indonesia dalam Kajian Kepustakaan*, ALFABETA, Bandung, hlm. 288.

¹⁰ *Ibid*, hlm. 289.



- e. The Federation is responsible for everything that happens on the surrounding land.
- f. It is forbidden to isolate land that belongs to the estate.

In addition to the above characteristics, customary rights also have inherent characteristics, namely that customary rights are inwardly (applicable) and customary rights are outwardly (applicable). In relation to their internal nature, it is interpreted that customary rights guarantee the survival of indigenous peoples in relation to the use of the products of the land and the animals and plants found on customary lands. This nature is not only limited to the maximum use of customary land and only for consumption and economic purposes, but can also be based on the agreement of the customary community to use it as an environment for village rice fields, bengkok land and local cemetery areas. The internal application of ulayat rights is carried out by agreement of the customary community and is fully supervised by the customary head. Meanwhile, the nature of ulayat rights that apply externally means that persons outside the relevant customary community are prohibited from using and benefiting from ulayat land within the territory of a customary community. The foreigner must pay a sum of money and obtain permission from the local customary head, which is the result of a collective agreement of the customary community. In this case, customary communities with customary rights are of course responsible for anything that might happen to foreigners within their customary jurisdiction. Ulayat rights can be summarised as consisting of rights and obligations over one's own (private) land, rights and obligations towards members of the community, and rights and obligations towards people from outside the community.

2. Ulayat Land Usage in Indonesia

Self-righteousness is the name given by the legal experts to the legal institutions and the concrete legal relationship between indigenous law communities with land within their indigenous law territory. According to Boedi Harsono, the rule of rule is a set of powers and obligations of an indigenous law society, relating to the land located in its territory which is the main support for the livelihood and life of the community concerned throughout the "Lebensraum" period. When referring to Article 1 para. 1 of the Regulation of the Minister of State of Agriculture/Head of the National Farming Agency No. 5 of 1999 on Guidelines for the Settlement of



Problems of Civil Rights of the Indigenous Law Society, then the right of ration is the authority which according to the customary law belongs to a particular indigeno-law community over a particular territory that is the environment of its citizens to take advantage of the natural resources, including land, in the area, for the survival and survival, which arise from the natural and inherent relationship descending and uninterrupted between such indigent law society and the territory concerned.

The enjoyment of land in Indonesia or the right of enjoyment has a requirement regulated in Article 3 UUPA which indicates that the right to enjoyment from a community of customary law is recognised as long as it still exists according to the facts, in accordance with the national and state interests, and does not conflict with higher laws and regulations. The meaning of the article is that the exercise of the right by a community has limitations and conditions that may imply that if not fulfilled will affect the existence and existence of the community of conventional law concerned.

With regard to the first requirement point stating that the right of recourse is recognized as existing as long as, according to the facts, there is still intended that the exercise of the right is closely related to the existence of a community of customary law that is true still exists and lives in a particular territory. Some elements that must exist in order to be able to meet the criteria as a society of ordinary law recognized its existence are as follows:¹¹

- a. His society is still in the form of a paguyuban. (rechtsgemeenschap);
- b. There is an institution in the form of a customary ruler's device.;
- c. There's a clear customary jurisdiction.;
- d. There are precepts and instruments of law, especially customary justice, which is still observed.;
- e. still holding harvests in the surrounding forests for the daily needs.

The second point relates to the recognition of the right of the people, which states that the use of the rights of the indigenous people in accordance with the national interests and the State is closely related to the right to control by the State over the Natural Resources (SDA) in which includes the field of agriculture or land. The right to rule over this country is based on mandate UUD 1945 Article 33

¹¹ Bagian Penjelasan Pasal 67 Undang-Undang Nomor 41 Tahun 1999 tentang Kehutanan.



paragraph (3) which reads “The earth and water and the natural wealth contained therein are controlled by the State and used for the greatest prosperity of the people”. However, the exercise of the right of sovereignty by this State has a broader scope. The widespread use of Article 33 paragraph (3) is that the State as an organization consisting of citizens as its members have power in the conception of public law by equating such power with the principle of people's sovereignty. The existence of the principle of the sovereignty of the people would come into contact with the basic principle that democracy can be defined by a doctrine, namely, "from the people, by the people and for the people".¹² The exercise of the right of the State to rule under article 33, paragraph (3), is indeed undergoing progress, and such progress is seen in three rulings of the Constitutional Court as a result of the test of the Law. (Judicial Review).

The application and interpretation of Article 33 paragraph (3) contained in MK Decision No. 36/Law-X/2012 on the Testing of the Law No. 22 of 2001 on Oil and Gas on the Basic Law gives rise to a new interpretation stating that the form of “government of the State” is a cross-cutting action based on the ability of the state to realize the prosperity of the people.¹³ The first step which forms the foundation of the sovereignty of the state is the direct management of the SDA in Indonesia, the second step is that the state formulates the policy and management of SDA management in order to the goal of the greatest prosperity of the people, and the last step is the state performs the regulatory and supervisory functions of SDI in Indonesia. It means that, when it is later associated with the exploitation of land in Indonesia, it must surely go before the public interest and in its exploitation it must aim to be used as a means towards the prosperity of the Indonesian people.

Next is the discussion of the third point which is conditional on the existence of the right of the people to exercise customary law that is not contrary to the Law and higher regulations. The meaning of the sentence is that the exploitation of land in this territory of Indonesia must indeed be compatible with the rules in force in this

¹² Rahadyan Fajar Harris, 2022, *Evolusi Pemaknaan Frasa “Penguasaan Oleh Negara” Pada Pasal 33 ayat (3) Konsitusi*, Heylaw.edu, diakses pada 17 Juni 2022 Pukul 21.47 WIB.
<https://heylawedu.id/blog/evolusi-pemaknaan-frasa-penguasaan-oleh-negara-pada-pasal-33-ayat-3-konstitusi>

¹³ *Ibid.*



country, because although customary law society recognized its existence in the Constitution, and various legal products in Indonesia, but the customary legal society with various things in it is indeed part of the State of the Union of the Republic of Indonesia which is a state of law. The State of Indonesia as a law state is understood that everything that is carried out and running in this State has rules governing it, as well as all elements within this state of Indonesia are subject to the rules of law in force. When then associated with the enjoyment of the right of use as well as the rights of use that are owned by communities of customary law, in accordance with Article 18 UUPA which states "For the general interest, including the interests of the nation and the State and the common interest of the people, the rights to the land may be revoked, with compensation for a reasonable loss and in the manner prescribed by the Law".

According to the article, then the exploitation of the land and the rights of the people of customary law can be continued when in accordance with the legal product of the Law or regulation of the law that regulates the use of such land, and the thing to bear in mind is that when at any time for the common interest and used to the purpose of the State, the right to the land can be revoked, including the right on the land of such a land, by giving due damages and in conformity with the regulations in force.

3. Dynamics of Land Use for Public Interest

The ongoing development of an era involving the problem of an ever-increasing human population has an impact on the availability of land or land in various regions of the world globally, and in particular in the territory of Indonesia itself. In order to meet the needs of land use in general for development, it is necessary to have a mature plan and efficiency by the parties involved, and in this case the government acts as the party that has the "power" to be able to regulate the course of land utilization in Indonesia through various means, one of which is regulation, and rigorous monitoring mechanisms to ensure legal certainty and usability in Indonesia. Regarding the government's efforts to manage the land properly, the government has a number of ministers, directors, officers or agencies or institutions whose task is to assist the government in conducting its governance



process. (government process).¹⁴ In connection with this, Bappeda (Regional Development Planning Agency) and PU (General Works) and various other agencies have a major role in land use in various regions of Indonesia.

Related to the acquisition of land for the public interest, or in this case is the land of righteousness must be landed with good faith and agreement between the two parties. The use of this land is permitted to be carried out by the Government, legal entities, or individuals outside the common law community as regulated in Article 4 paragraph (1) of the Regulation of the Minister of Agriculture/Head of the National Farming Agency No. 5 of 1999 on the Guidelines for the Settlement of Problems of Public Service Rights Or Ordinary Law or later referred to as the Permenag No.5/1999. In Article 4, paragraph (2) of the permenag no. 5/1999 it is explained that the release of land for agricultural purposes and other uses that require the right of use of enterprise (HGU) or rights of use can be done by common law society with the surrender of the use of land within a certain period of time, and when such period is expired, then the HGU and the right to use against it will be deleted, if to continue then it is required to make a new agreement with the association of relevant common law.

The method of approach to the community of customary law on which the land is to be used, is implemented by the method of separation of land with the involvement of the parties concerned as a whole and is based on fair negotiations and benefits for both sides. The methods of such approach, can be seen through Article 12 paragraph (1) of the Law No. 39 of 2014 on Farming which states that when the land necessary for planting is the land of the right of the community, then the planting entrepreneur must negotiate with the communities of ordinary law who have such right to obtain agreement on the surrender of the land and the compensation that will be received.

In order to make use of such land, two forms of land acquisition recognized by the Indonesian Agrarian Law are carried out, namely, by release or surrender of the right to land (liberation of the land right), and by way of withdrawal of the rights to land.¹⁵ The main difference between the two forms of land acquisition is that land

¹⁴ Sarkawi, *Hukum Pembebasan Tanah Hak Milik Adat Untuk Pembangunan Kepentingan Umum*, GRAHA ILMU, Yogyakarta, hlm. 16.

¹⁵ Direktorat Utama Pembinaan dan Pengembangan Hukum BPK (Ditama Binbangkum), *Pengadaan Tanah Untuk Kepentingan Umum*, diakses pada 18 Juni 2022, pukul 10.13 WIB.



liberation is carried out on the basis of a grant to obtain a profit, while the withdrawal of rights is a form of forced land appropriation. In accordance with article 1, paragraph (1) of the Ministry of the Interior Regulation No. 15 of 1975 concerning the Provisions on the Procedure of Land Liberation, the term "land liberation" refers to the release of the legal relationship originally existing between the owner of the land by means of compensation for damages. The liberation of this land itself is carried out by the Land Liberation Commission with its guidelines are various related regulations and are based on the basis of concession as well as the general price of local land.

The process that has to be undertaken in the liberation of land is no different when compared with the process of liberation in general which refers to the Law No. 2 of 2012 on Land Procurement for Public Interest and the Presidential Decree No. 71 of 2012 concerning the Maintenance of Land Provision for Development for General Interest.¹⁶ The mechanism of the process is as follows:

1. Land Liberation Applications and Location Permissions;
2. Establishment of Land Liberation Team;
3. Establishment of a losses assessment committee;
4. Introduction to the local community (tempat tanah yang hendak dibebaskan berada);
5. Inventory related to land to be released;
6. Ground measurement;
7. The price and the size of the settlement will replace the loss.;
8. Payment of damages and discharge of land rights
9. Request for land rights;
10. Letter of Decision on Granting Rights.

Indeed, the dynamics of the use of land for the public interest are due to the main factor of the need for land to meet the infrastructure needs of the Indonesian people themselves. Relating to the liberation of land for the development of the common interest must be based on mutual agreement between the parties and based on the basis of separation and justice. Implementation of land use by parties outside

(<https://jdih.bpk.go.id/wp-content/uploads/2011/03/PengadaanTanah.pdf>).

¹⁶ Sarkawi, *Op.cit*, hlm. 76.



the indigenous community should be carried out intensively and pay attention to the various rules, directives, and mechanisms that have been established by the existing legal products in Indonesia, as well as respect for the various uniqueness and provisions set by the local customary law community.

D. Conclusion

The right to exploit or withdraw the yields of the land of a community of customary law is also owned by a foreigner or a person from outside the community of ordinary law with the consequences he has to pay a number of fees established by the local community of conventional law. Along with the evolution of the times that imply the need to use land or land by all elements in Indonesia, including the government.

For those who want to use the land of the indigenous people to meet their needs, the first step to be taken is to find out the intricacies of the land, as well as to open up communications and discussions with the people of the customary law concerned. Since it is true that the communities of customary law in various regions of Indonesia will be very open to discussions on various matters, mainly in this case is the exploitation of religious land used for the development of the common interest. The subsequent approach to the exploitation of indigenous land is one of the alternatives adopted to meet the need in terms of the increasingly limited availability of land. The implementation of the land liberation to obtain the right to the land shall be carried out in agreement with the local community of customary law in order to get the outcome of an agreement that is beneficial to both sides and avoid land disputes tolerance, carry out the agreement based on good faith, and advance justice will produce a deal that benefits both parties and reflect the values of the Indonesian nation.

BIBLIOGRAPHY

- Ali, Zainuddin. 2009. *Metode Penelitian Hukum*. Jakarta : Sinar Grafika.
- Alting, Husein. 2010. *Dinamika Hukum Dalam Pengakuan Dan Perlindungan Hak Masyarakat Hukum Adat Atas Tanah*. Yogyakarta.
- Bachtiar. 2018. *Metode Penelitian Hukum*. Tangerang Selatan : Unpam Press.
- Direktorat Utama Pembinaan Dan Pengembangan Hukum Bpk (Ditama Binbangkum). June 18th. 2022. “*Pengadaan Tanah Untuk Kepentingan Umum*” Available On Website : <https://jdih.bpk.go.id/Wp-Content/Uploads/2011/03/Pengadaantanah.Pdf>



- Hadikusuma, Hilman. 2014. *Pengantar Ilmu Hukum Adat Indonesia Edisi Revisi*. Bandung : C.V. Mandar Maju.
- Harsono, Boedi. 2015. *Hukum Agraria Indonesia Sejarah Pembentukan Undang-Undang Pokok Agraria, Isi Dan Pelaksanaannya*. Jakarta : Penerbit Universitas Trisakti.
- Ismi, Hayatul. 2017. *Tinjauan Hukum Atas Hak Ulayat Dalam Sistem Hukum Pertanahan Di Indonesia*. Forum Kerakyatan.
- M Marwan Dan Jimmy P. 2009. *Kamus Hukum*. Surabaya : Reality Publisher.
- Rahadyan, Fajar Harris. June 17th. 2022. *Evolusi Pemaknaan Frasa “Penguasaan Oleh Negara” Pada Pasal 33 Ayat (3) Konsititusi*. 2022. Available On Website : <https://Heylawedu.Id/Blog/Evolusi-Pemaknaan-Frasa-Penguasaan-Oleh-Negara-Pada-Pasal-33-Ayat-3-Konstitusi>
- Sarkawi. *Hukum Pembebasan Tanah Hak Milik Adat Untuk Pembangunan Kepentingan Umum*. Yogyakarta : Graha Ilmu.
- Setiady, Tolib. 2018. , *Intisari Hukum Adat Indonesia Dalam Kajian Kepustakaan*. Bandung : Alfabeta.
- Taqwaddin. 2010. *Penguasaan Atas Pengelolaan Hutan Adat Oleh Masyarakat Hukum Adat (Mukim) Di Provinsi Aceh*. (Disertasi Doktor Ilmu Hukum, Universitas Sumatera Utara).
- Yulia. 2016. *Buku Ajar Hukum Adat*. Lhokseumawe :Unimal Press.
- Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.
- Undang Undang Nomor 5 Tahun 1960 Tentang Peraturan Dasar Pokok-Pokok Agraria.
- Undang-Undang Nomor 39 Tahun 2014 Tentang Perkebunan
- Undang-Undang Nomor 2 Tahun 2012 Tentang Pengadaan Tanah Untuk Kepentingan Umum
- Undang Undang Nomor 41 Tahun 1999 Tentang Kehutanan.
- Peraturan Presiden Nomor 71 Tahun 2012 Tentang Penyelenggaraan Pengadaan Tanah Bagi Pembangunan Untuk Kepentingan Umum.
- Peraturan Menteri Agraria/Kepala Badan Pertanahan Nasional Nomor 5 Tahun 1999 Tentang Pedoman Penyelesaian Masalah Hak Ulayat Masyarakat Hukum Adat.
- Putusan Mahkamah Konstitusi Nomor. 36/Puu-X/2012 Tentang Pengujian Undang-Undang Nomor 22 Tahun 2001 Tentang Minyak Dan Gas Bumi Terhadap Undang Undang Dasar