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Regulation of Customary Law Communities' Ulayat Rights in Indonesia

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Abstract
Customary law community customary rights are the right to manage customary land. Customary land is land that is occupied, managed, passed down from each generation of customary law communities who have a connection to the realm of spirituality. Customary land is very important, not only valuable materially, but non-materially or in terms of spiritual relationships. The existence of customary rights is recognized by the highest regulations in Indonesia, however, in lower regulations, customary rights must obey and submit to government rules and policies. Since the promulgation of Law Number 5 of 1960 concerning Basic Agrarian Principles (UUPA) it should be the basis for recognizing customary rights. The provisions of the articles in the UUPA do not regulate in detail regarding customary rights, resulting in the dynamic formation of legislation in the land sector and related matters. The formulation of the problem in this research is how are the customary law communities' customary rights regulated in Indonesia? The research method used in this research is normative legal research, namely a statutory approach and a conceptual approach.

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1. INTRODUCTION

Customary law communities are closely related to land. Land is a very valuable asset for customary law communities because it contains more than just a sum of money, but more than that. Spiritual values and feelings of unity with the land are important factors in the continued existence of traditional law communities. Land ownership in customary law communities is communal, different from ownership in general society which is individual.

The rights to land of customary law communities are called ulayat rights. Customary rights are the right to manage and determine the use of customary land. The importance of regulating customary rights is because the relationship between humans and land is not separated. Good regulations in the field of land rights can provide legal certainty for customary law communities regarding customary land rights. Customary rights to land as a reference for national agrarian law regulations are something that must be considered and protected. Agrarian law becomes the lex generalis of legal rules in the land sector. Customary law as the basis for the formation of Law Number 5 of 1960 concerning Basic Agrarian Principles (UUPA) also regulates the land sector as part of the body of the earth. UUPA provides regulations that integrate the fields of natural resources and land.

The provisions on customary rights are not explained literally in the UUPA because the UUPA is only a lex generalis. More detailed provisions regarding the definition of customary rights can be seen in the Regulation of the Minister of Agrarian Affairs and Spatial Planning/National Land Agency Number 14 of 2024 concerning the Implementation of Land Administration and Registration of Customary Law Communities' Customary

Rights. In fact, the provisions for registering customary law communities have previously been regulated in Minister of Home Affairs Regulation Number 52 of 2014 concerning Guidelines for the Recognition and Protection of Customary Law Communities. Customary rights according to Article 1 point 1 of the Regulation of the Minister of Agrarian Affairs and Spatial Planning/National Land Agency Number 14 of 2024 are the authority which according to customary law is possessed by certain customary law communities over certain areas which are the environment of their citizens to take advantage of natural resources, including land, in that area, for the survival and survival of their lives, which arise from the hereditary and uninterrupted physical and internal relationship between the customary law community and the area concerned. Then in Article 1 number 2 of the Minister of Agrarian Affairs and Spatial Planning/National Land Agency Regulation Number 14 of 2024, it is explained that the Customary Law Community Unit is a group of people who are bound by their customary legal order as citizens together in a legal association because of the same place of residence or on the basis of descent who have customary institutions, have jointly owned assets and/or customary objects, as well as a value system that determines customary institutions and customary legal norms.

The existence of customary rights depends on the development of customary law. The nature of customary law *stretches out* or expands or contracting, resulting in customary law sometimes weakening and strengthening. The strength of customary law depends on the customary law community. The increasing freedom of society to behave has resulted in the weakening of customary law. The greater control of customary law communities with customary rules can strengthen the position of customary law.

The issue of customary rights is currently being complained about by some customary law communities whose customary rights are neglected due to government policies based on implementing national interests. The meaning of customary rights provisions is still accepted by the state as long as they exist and do not conflict with or must be in accordance with national interests, so they must be interpreted wisely. The tendency for the rule of law to be a political product must be understood so that efforts to preserve customary law which have an impact on the genuine protection of customary rights in the national interest can be achieved.

PROBLEM FORMULATION

The formulation of the problem in this research is how are the customary law communities' customary land rights regulated in Indonesia?

2. RESEARCH METHOD

The research method that the author uses in this research is normative legal research methods. Normative legal research discusses legal phenomena through the word's legal rules, legal theory between one rule and another. Normative legal research also examines problems and answers them using deductive methods. This means that this research reasoning interprets something general to specific.

3. RESULTS AND DISCUSSION

The regulation of customary law community customary rights began to be regulated in Article 18 of the 1945 Constitution (UUD 1945) which states that customary law and customary law rights in Indonesia are recognized as long as they still exist. This still existing meaning needs to be studied further in the regulations under the 1945 Constitution. As a starting point for the law in the agrarian and natural resources sector, the UUPA is expected to become the lex generalis of other regulations that will regulate the agrarian sector. Agraria

itself can be translated into earth, water, space and everything contained therein. We can specifically draw the symbol of resources and land from this part of the agrarian definition.

Apart from regulating agrarian affairs, the UUPA complements all matters concerning agrarian affairs with the history of customary law which is the basis for regulating national agrarian law. How important and appreciated customary law is by the drafters of the UUPA because of the understanding that the agrarian law which is the direction of the Indonesian nation and is most suitable for the character of Indonesian society is customary law. So it is very necessary for this customary law to continue to be truly preserved by using policies and laws that are purely in accordance with the theory of legal justice presented by Hans Kelsen. According to Kelsen, a just law is a law that is made free from outside legal influences, the law is made in such a way that it is always consistent in its making according to good legal standards. Laws are not made only for the interests of some groups and are used to carry out activities that benefit a group of people to the detriment of other people. Law formation activities have been provided with guidelines for the preparation of good statutory regulations, namely Law Number 12 of 2011 concerning the Formation of Legislative Regulations which was then amended by Law Number 15 of 2019 in conjunction with Law 13 of 2020 concerning the Second Amendment to Law Number 12 of 2011 concerning the Formation of Legislative Regulations.

Based on the trias politica theory, state power is separated into executive, legislative and judicial powers. These three powers supervise each other. In the formation of legislative regulations, the authority of the legislative power is very strong. Legislative power has the function of forming regulations in the form of laws. Laws are rules that explain the wishes of more basic rules, namely the 1945 Constitution. Then the next function of the legislature is to supervise the performance of the executive and judicial powers. These two authorities and responsibilities above the legislative power which is manifested in the People's Representative Council, the Regional People's Representative Council, the Regional Representative Council should really make rules and supervise policy makers in the interests of the people.

The executive power which is realized in the President up to ministries and state institutions has the authority and responsibility to implement rules and make laws under the law with the aim of facilitating the implementation of the law. It is necessary to make more technical regulations in the realm of implementers because the statutory regulations are not yet too technically regulated. Several rules and policies of the executive power, hereinafter referred to as the government, are experienced *offside* or even against the law.

Law in Indonesia has provided a means of reviewing rules based on higher rules, namely the Constitutional Court tests laws against the 1945 Constitution, the Supreme Court tests statutory regulations under law against the law. This legal hierarchy can be seen through Law 12 of 2011 concerning the Formation of Legislative Regulations which was then amended by Law Number 15 of 2019 in conjunction with Law 13 of 2020 concerning the Second Amendment to Law Number 12 of 2011 concerning the Formation of Legislative Regulations.

The development of customary rights regulations starts from the provisions of the UUPA, Law Number 41 of 1999 concerning Forestry, Regulation of the Minister of Home Affairs Number 14 of 2014, Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of National Land Agency Number 18 of 2019 concerning Procedures for Administering Ulayat Land of Customary Law Community Units. Then, to make adjustments or changes, in 2024, right after the change of cabinet, the Minister of Agrarian Affairs and Spatial Planning issued regulation Number 14 of 2024 concerning the Implementation of Land Administration and Registration of Land Rights of Customary Law

Communities. Ulayat rights are implemented as long as they in fact still exist according to the provisions of applicable customary law. by customary law communities. Based on Article 33 of the Minister of Agrarian and Spatial Planning/National Land Agency Regulation 14 of 2024, this repeals the Regulation of the Minister of Agrarian and Spatial Planning/Head of the National Land Agency Number 18 of 2019.

The recognition of customary rights in this regulation is different from the provisions in the UUPA. If the UUPA states that customary law is recognized as long as it still exists and must not conflict with higher laws and regulations. In full, Article 3 of the UUPA reads as follows: "By bearing in mind the provisions in articles 1 and 2, the implementation of customary rights and similar rights of customary law communities, as long as they are in accordance with the facts. still exists, must be such that it is in accordance with national and State interests, based on national unity and must not conflict with the law and other higher regulations.

It seems that the provisions of this UUPA are no longer appropriate to the current state of society. Through the provision of not being allowed to conflict with regulations, it turns out that the position of customary rights becomes very weak and does not show that customary rights are the origin of land rights as stated in the UUPA. At the time the UUPA was formed, it was felt that the position of customary rights was highly respected, but as time went by and was followed by the era of modernization which was oriented towards capitalism, it resulted in abuse of power and gave rise to many agrarian conflicts. There are quite a lot of agrarian conflicts in Indonesia, especially those related to customary rights in various regions. Most of the cases that occur are between customary law communities and companies. Indigenous communities protest the activities of companies that hold permits or illegally enter customary rights areas and result in damage to the land and forests of indigenous communities.

As a result of the UUPA which became the grundnorm of regulations in the agrarian sector, including Law Number 41 of 1999 concerning Forestry which regulates the position of customary rights under the state and the existence of a statement that customary land is state land, this resulted in several articles in Law Number 41 of 1999 being subjected to Judicial Review at the Constitutional Court and ending in the revocation and deemed invalid of these articles. Decision of the Constitutional Court (MK) No. 35/PUU-X/2012 which in its decision annulled several provisions in Law Number 41 of 1999, namely:

1. The word state in Article 1 number 6 of Law Number 41 of 1999 concerning Forestry (State Gazette of the Republic of Indonesia of 1999 Number 167, Supplement to the State Gazette of the Republic of Indonesia Number 3888) is contrary to the 1945 Constitution of the Republic of Indonesia.
2. The words of the State in Article 1 number 6 of Law Number 41 of 1999 concerning Forestry (State Gazette of the Republic of Indonesia of 1999 Number 167, Supplement to State Gazette of the Republic of Indonesia Number 3888) do not have binding legal force, so that Article 1 number 6 of Law Number 41 of 1999 concerning Forestry is referred to as "Customary forests are forests within the territory of customary law communities".
3. Article 4 paragraph (3) of Law Number 41 of 1999 concerning Forestry (State Gazette of the Republic of Indonesia of 1999 Number 167, Supplement to State Gazette of the Republic of Indonesia Number 3888) is contrary to the Constitution of the Republic of Indonesia of 1945 as long as it is not interpreted as "control of forests by the state still takes into account the rights of customary law communities, as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia as regulated in law.

4. Article 4 paragraph (3) of Law Number 41 of 1999 concerning Forestry (State Gazette of the Republic of Indonesia of 1999 Number 186167, Supplement to State Gazette of the Republic of Indonesia Number 3888) does not have binding legal force as long as it is not interpreted as "control of forests by the state while still taking into account the rights of customary law communities, as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia as regulated in law.
5. Article 5 paragraph (1) of Law Number 41 of 1999 concerning Forestry (State Gazette of the Republic of Indonesia of 1999 Number 167, Supplement to State Gazette of the Republic of Indonesia Number 3888) is contrary to the 1945 Constitution of the Republic of Indonesia as long as it is not interpreted as "State Forest as referred to in paragraph (1) letter a, does not include customary forests".
6. Article 5 paragraph (1) of Law Number 41 of 1999 concerning Forestry (State Gazette of the Republic of Indonesia of 1999 Number 167, Supplement to State Gazette of the Republic of Indonesia Number 3888) does not have binding legal force as long as it is not interpreted as "State Forest as referred to in paragraph (1) letter a, does not include customary forests".
7. Explanation of Article 5 paragraph (1) of Law Number 41 of 1999 concerning Forestry (State Gazette of the Republic of Indonesia of 1999 Number 167, Supplement to State Gazette of the Republic of Indonesia Number 3888) is contrary to the 1945 Constitution of the Republic of Indonesia.
8. Elucidation of Article 5 paragraph (1) of Law Number 41 of 1999 concerning Forestry (State Gazette of the Republic of Indonesia of 1999 Number 167, Supplement to State Gazette of the Republic of Indonesia Number 3888) does not have binding legal force.
9. Article 5 paragraph (2) of Law Number 41 of 1999 concerning Forestry (State Gazette of the Republic of Indonesia of 1999 Number 167, Supplement to State Gazette of the Republic of Indonesia Number 3888) is contrary to the 1945 Constitution of the Republic of Indonesia.
10. Article 5 paragraph (2) of Law Number 41 of 1999 concerning Forestry (State Gazette of the Republic of Indonesia of 1999 Number 167, Supplement to State Gazette of the Republic of Indonesia Number 3888) does not have binding legal force.
11. The phrase "and paragraph (2)" in Article 5 paragraph (3) of Law Number 41 of 1999 concerning Forestry (State Gazette of the Republic of Indonesia of 1999 Number 167, Supplement to the State Gazette of the Republic of Indonesia Number 3888) is contrary to the 1945 Constitution of the Republic of Indonesia.
12. The phrase "and paragraph (2)" in Article 5 paragraph (3) of Law Number 41 of 1999 concerning Forestry (State Gazette of the Republic of Indonesia of 1999 Number 167, Supplement to State Gazette of the Republic of Indonesia Number 3888) does not have binding legal force, so that Article 5 paragraph (3) of Law Number 41 of 1999 concerning Forestry is meant to be "The government shall determine the status of forests as referred to in paragraph (1); and customary forests are determined as long as the relevant customary law community still exists and its existence is recognized."

The impact of this decision is likely to be followed by subsequent rule makers to regulate customary rights. Including the Ministry of Agrarian Affairs and Spatial Planning. Based on Article 1 number 1 of the Minister of Agrarian Affairs and Spatial Planning/National Land Agency Regulation 14 of 2024, it defines customary law rights or something similar from customary law communities, hereinafter referred to as Ulayat Rights, as the authority which according to customary law is possessed by certain customary law communities over certain

areas which constitute the environment of their citizens to take advantage of natural resources, including land, in that area, for the survival and survival of their lives, which arise from the hereditary and unbroken relationship between the communities physically and mentally. customary law of the area concerned. Then in Article 2 paragraph (1) of the above rules it is stated that customary rights are implemented as long as in reality they still exist according to the provisions of customary law in force by customary law communities. There are still rules according to customary law and by customary law communities the meaning of which is explained in Article 2 paragraph (2) of the above rules if:

1. There is a group of people who still feel bound by their customary legal order which recognizes and applies the provisions of the association in their daily lives.
2. There is a certain Ulayat Land that is the living environment of its citizens and a place to take daily life needs; and/or
3. There is an order of customary law regarding the management, control, and use of Tanah Ulayat that applies and is obeyed by its citizens.

It is very unfortunate that the provisions regarding customary rights have been reduced and seem to have returned to the same rules as before the amendment to the forestry law. Based on Article 3 of the Minister of Agrarian and Spatial Planning/National Land Agency Regulation 14 of 2024, the implementation of Ulayat Rights by customary law communities as intended in Article 2 paragraph (1) is not carried out. in terms of land plots:

1. Already owned by an individual or legal entity with a right to the land.
2. Is a plot of land that has been used as a public facility/social facility.
3. Is a plot of land that has been acquired or acquired by a government agency, legal entity or individual in accordance with applicable provisions and procedures; and/or
4. Self-employed land and former self-employed land which have been abolished by the Conversion Provisions in Law Number 5 of 1960 concerning Basic Agrarian Principles Regulations.

How important customary rights are for the continuation of customary law communities in managing customary land because they provide authority including:

1. Organize and carry out land use (settlements, agriculture, etc.), inventory (construction of new settlements/farms) and land management.
2. Determine and establish the legal bond between individuals and land.
3. The Basic Agrarian Law (UUPA) regulates and establishes the legal framework for relationships between people and legal activities related to land.

According to the statutory definition, customary rights are "authorities" relating to customary areas. Article 1 paragraph 6 of Law Number 30 of 2014 concerning Government Administration states that Government Authority, hereinafter referred to as Authority, is the power of Government Agencies and/or Officials or other state administrators to act in the realm of public law. The word "authority" in the Big Indonesian Dictionary (KBBI) means: a) The right and power to act; b) The power to make decisions, command and delegate responsibility to others; and c) Functions that may not be carried out. Authority is often equated with the term authority. The term authority is used in the form of a noun and is often equated with the term "bevoegdheid" in Dutch legal terms. According to Philipus M. Hadjon, if you look closely there is a slight difference between the term authority and the term "bevoegdheid". The difference lies in the legal character. The term "bevoegdheid" is used in the concept of public law as well as in private law. In our concept, the term authority or authority should be used in the concept of public law. Regarding the meaning of authority in the provisions regarding customary rights, this must be re-understood because according to legal regulations, authority arises from the existence of legal provisions or gifts.

The status of customary rights does not only apply to members of the traditional community, but also to parties outside the traditional community. If parties outside the customary community want to use the customary area, then there needs to be approval from the indigenous community in accordance with customary rules. Usually, parties outside the indigenous community are given permission to carry out activities within the customary area by providing compensation and partnerships

Customary rights are the collective rights of traditional communities or are communal in nature. The characteristics of collective rights are as follows:

1. Customary communities and their members have the right to freely use the bush within their territory, including the freedom to clear land, collect plants, hunt, keep livestock.
2. These rights can also be exercised by people who are not members of customary law communities. The mechanism must pay an approval fee or approve (agree after fulfilling obligations) with prior approval from the leader of the customary law community.
3. Customary law communities cannot permanently sell or transfer collective rights.

4. CLOSURE

CONCLUSION

Ulayat Rights are rights that give customary law communities authority over their customary areas. This authority includes the use and utilization of garden land, forests and rivers with the aim of ensuring the survival of indigenous communities. The source of authority arises because of the hereditary nature of the traditional community, which is communal, not individual. The regulation of customary rights which is equated with authority does not seem appropriate because authority is more synonymous with state organizations. The many legal regulations that relate to customary rights have different histories and meanings regarding customary rights and ultimately give rise to conflict. One of the conflicts resulted in a judicial review of Law Number 41 of 1999 concerning Forestry which abolished and declared invalid several articles regulating the identity of customary land. After the above review, the rules regarding customary rights changed in accordance with the decision of the Constitutional Court, but in the end customary rights still have a weak side in terms of government policy products.

5. SUGGESTION

It is necessary to create a law that covers all the basic rules regarding earth, water, space and everything contained therein because according to the author the UUPA is no longer relevant.

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