



Legality and Legal Certainty of Ulayat Land for Indigenous Law Communities (Analysis of Decision Number 1430 K/Pdt/2022)

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ABSTRACT

Land disputes in Indonesia are still very high, including land disputes that occur on ulayat lands. In the settlement of land disputes in court, sometimes indigenous peoples have to lose in defending their rights due to the weakness of the legality factor of land ownership rights on ulayat land. The research method used is normative legal research. The ulayat land of the customary community unit has received recognition regarding its existence, but in the implementing regulations, Head of BPN Number 18 of 2019 there is still a legal vacuum that results in weak aspects of protection and legal certainty for the existence of ulayat land. The existence of customary law institutions that do not yet have legality becomes a barrier for customary law community units in defending their rights in ulayat land disputes. The existence of ulayat lands cannot be separated from the recognition of customary communities who are part of the existence of ulayat lands. Legal certainty in providing protection for ulayat lands of customary community units is very necessary to maintain the existence of ulayat lands through new regulations as a basis for inventory and recognition of ulayat land

Keywords: Indigenous Law Community; Legality; Legal certainty; Ulayat Land

1. Introduction

Regulations in the field of land in Indonesia after the independence of the Republic of Indonesia have been regulated in the Basic Agrarian Law (UUPA). The objectives of the promulgation of the Basic Agrarian Law are: 1) laying the foundations for the preparation of a national agrarian law, which is a tool to bring prosperity, happiness and justice to the state and people, especially the peasants, in the framework of a just and prosperous society; 2) laying the foundations for unity and simplicity in land law; 3) laying the foundations to provide legal certainty regarding land rights for the whole people.

The enactment of the UUPA, as well as providing a basis for customary law in which customary law is the foundation of the UUPA itself, as stated in the UUPA which regulates ulayat rights, which means customary community land tenure rights, namely ulayat land (Tanuramba, 2019). Although the Basic Agrarian Law has regulated the ulayat rights of customary law communities, the Basic Agrarian Law also regulates the right of control over other lands that can be owned by legal subjects, both individuals and legal entities.

Under Article 3 of the Basic Agrarian Law, ulayat rights are recognized "as long as in reality they still exist". This is often a problem with land law in the community. Land disputes often occur between two parties, namely indigenous law communities and local governments, indigenous law communities and companies, or between indigenous law communities and individual communities.

In the settlement of land disputes in court, sometimes indigenous peoples have to lose in defending their rights due to the weakness of the legality factor of land ownership rights on ulayat land. Although the Basic

Agrarian Law has recognized the existence of ulayat land for customary law communities, there are still many ulayat lands that have not been registered so that they have weaknesses in terms of legality.

The problem with land regulations governing ulayat lands is that there has not been a law that comprehensively regulates ulayat rights (sitorus, 2019). In the theory of legal certainty, a statutory regulation must provide legal certainty, if in a regulation there is still a legal vacuum, it is certain that the regulation has not provided legal certainty. Two aspects that need to be comprehensively regulated are indigenous peoples and the legality of their customary institutions and control over customary lands of indigenous peoples. These two things are important because the control of ulayat rights cannot be separated from the legal subject, namely the customary law community. Article 5 paragraph (2) Government Regulation Number 18 of 2021, management rights originating from Communal Land are assigned to customary law communities, while what is meant by "customary law communities" are customary law communities that control Ulayat Land, their existence has been recognized and determined in accordance with laws and regulations that contain institutions in the apparatus of customary rulers, customary law areas, institutions, or legal instruments that are still adhered to. So that the legal aspect of the existence of customary communities and institutions is important in the legal aspect.

So far, there is no legal certainty for customary land in land registration. It is only respected but at the level of implementation in the form of certificate evidence as a land registration process is not recognized. So that the customary land of the customary law community is between life and death (Afriandedy, 2020). The legality of the legal institutions of indigenous peoples is often an obstacle when indigenous peoples want to defend their rights to their customary lands in court. Often, the Indigenous Law Community becomes the defeated party because it is considered that the customary institution has not been registered or has no legality. Ulayat land, formally the ulayat rights of indigenous law communities have a place in the national land law (UUPA), but at the level of "law in action" they still lack legal protection when dealing with development interests (Kunu, 2010). Based on the description above, this article will discuss how is the legality of the customary rights of indigenous peoples?; and how is the legal certainty of the ulayat rights of indigenous law communities?

2. Method

The research method used is normative legal research, which is a library research by examining library materials related to the object under study. This research uses a statutory approach. The statutory approach is used to review and analyze all laws and regulations related to the legality of customary lands of indigenous peoples. The analysis used is descriptive qualitative analysis, namely the analysis of legal materials by providing a description of the findings to answer the formulation of the problem under study.

3. Result and Discussion

The existence of ulayat lands of customary law community units cannot be separated from the aspects of legality and legal certainty as a means to provide legal protection for the interests of indigenous peoples in Indonesia. this will be described as follows:

3.1 The Legality of Ulayat Land of indigenous Law communities

The constitution has mandated the state to recognize and respect the unity of indigenous peoples and all their rights. The Constitution of the Republic of Indonesia, recognizing the existence of customary law communities, is contained in Article 18B paragraph (2) of the 1945 Constitution which states:

The state recognizes and respects indigenous law community units and their traditional rights 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, which are regulated by law.

In the Basic Agrarian Law recognizing the existence of ulayat rights, this is regulated in Article 3 of the Basic Agrarian Law, the contents of article 3 acknowledging the existence of ulayat land:

With regard to the provisions in Articles 1 and 2, the implementation of ulayat rights and similar rights from indigenous law requirements, as long as the facts still exist, must be in such a way that it is in accordance with the national and state interests, which is based on national unity and must not conflict with other higher laws and regulations".

Article 3 of the Basic Agrarian Law mandates the recognition of ulayat rights in national land law. Ulayat land is the highest right of control within certain indigenous law communities over land which is the joint property of its citizens (Arta at al., 2021).

In Government Regulation Number 24 of 1997 concerning Land Registration, ulayat land is not included in the object of land registration, in this regulation it is clear that it does not provide legal protection and certainty for the existence of ulayat land of customary law community units. PP No. 24 of 1997 has been revoked by Government Regulation Number 18 of 2021 concerning Management Rights, Land Rights, Flat Units, and Land Registration.

Peraturan Pemerintah Nomor 18 Tahun 2021 menyatakan, tanah ulayat adalah tanah yang berada dalam wilayah penguasaan masyarakat hukum adat yang pada kenyataannya masih ada dan tidak terikat dengan hak atas tanah.

The ulayat rights of indigenous law communities are considered to still exist according to Article 2 paragraph (2) of the Minister of Agrarian Affairs/Head of the National Land Agency Number 5 of 1999, if:

- a. there is a group of people who still feel bound by their customary law order as joint citizens of a certain legal alliance, who recognize and apply the provisions of these partnerships in their daily life.
- b. There is a certain ulayat land which is the living environment of the members of the legal alliance and the place where they take their daily needs.
- c. There is a customary law order regarding the management, control, and use of ulayat land that is valid and obeyed by the citizens of the legal alliance.

In the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 18 of 2019 concerning Procedures for Administrative Land of indigenous Law Community Units, the Ulayat Rights of indigenous Law Communities are considered to still exist according to Article 2 paragraph (2) must meet certain criteria including elements of the existence of:

- 1) Community and indigenous Law institutions;
- 2) The area where the customary rights take place;
- 3) The relationship, linkage, and dependence of the Indigenous Law Community Unit with its territory; and
- 4) The authority to jointly regulate the use of land in the territory of the relevant indigenous law community unit, based on customary law that is still valid and adhered to by the community.

The control of ulayat rights cannot be separated from the legal subject, namely the indigenous law community. The subject of ulayat rights are indigenous law communities, both those which are legal alliances based on the similarity of residence (territorial) or those based on descent (geneology) known by various names that are unique to the area concerned (Muldjabar, 2018). So that the existence of ulayat land in addition to the existence of ulayat land, there must also be legal subjects who have management rights over ulayat land.

Recognition of the existence of indigenous law communities is very important to maintain the existence of ulayat resistance which is a right from generation to generation. To find out whether there is a legal community in the context of an effort to give recognition, the following are the criteria for indigenous law communities according to several experts:

H.M. Koesnoe (Sembiring, 2018) stated that to find out whether there are indigenous peoples or not, it can be answered by taking into account the following matters: 1) is there any group in the territory concerned which is an organized unit?; 2) as such a group, is the organization managed by a board that is obeyed by its members?; 3) since when has the group existed in the soil environment in question (obviously how many generations have it been)?; 4) does the group follow a homogeneous tradition in its life, so that the group can be said to be a legal alliance?; 5) What is the tradition according to the origin of the group so that it is a unity in the soil environment?

Ter Haar provides 4 (four) criteria regarding the existence of an indigenous community, namely: 1) there is a group of people; 2) which is subject to an order or order; 3) have their own government; and 4) own assets, both material and immaterial (Sembiring, 2018).

Ulayat land is defined as a plot of land on which there are ulayat rights of a certain indigenous law community (Simangunson, 2013). According to Boedi Harsono, what is meant by ulayat rights of indigenous law community are a series of authorities and obligations of a indigenous law community, which relates to land located within its territory (Santoso, 2014).

The existence of ulayat lands cannot be separated from the recognition of indigenous law communities who are part of the existence of ulayat lands. Recognition and protection of indigenous law communities must involve government participation, recognition and protection of indigenous peoples is carried out through the following stages: 1) identification of indigenous peoples; 2) verification and validation of Indigenous Peoples; and 3) determination of indigenous law communities.

Recognition of indigenous law communities over land leads to the notion of recognition from the state/government both politically and legally. The acknowledgment shows that the state/government has recognized, declared legal/true or declared that the indigenous law community has the right to the natural resources it owns and obliges the government to protect these rights from threats/interference from other parties. This recognition is an acknowledgment that is formulated in the form of state law on the rights of indigenous peoples to land and other natural resources (Ismi, 2012).

The conditional recognition that has been applied by the government, as stated in the 1945 Constitution of the Republic of Indonesia, "*as long as it exists and does not conflict with the laws and regulations*", is very detrimental to the existence of indigenous peoples (Muazzin, 2014). Especially for indigenous peoples who do not have recognition and/or direct stipulation from the government and the existence of ulayat lands that have not been recorded.

The customary law community unit must meet the following requirements: 1) It is actually still alive, whether it is territorial, genealogical, or functional; 2) In accordance with the development of society; 3) In accordance with the principles of the Unitary State of the Republic of Indonesia.

Article 3 of the Basic Agrarian Law contains a statement of acknowledgment of the existence of ulayat rights of indigenous law communities as long as in reality they still exist, meaning that if they do not exist, then these ulayat rights will not be revived, and new ulayat rights will not be created. Ulayat rights are left to be regulated by their respective indigenous communities (Santoso, 2014).

The definition of "as long as the fact still exists" contained in these provisions, is in reality difficult to prove considering the delematic nature of ulayat rights (Mudjiono , 2004).

Research and determination of the existence of ulayat rights are carried out by local governments by involving experts on customary law, indigenous law communities in the area concerned, non-governmental organizations, and agencies that manage natural resources. The existence of extant ulayat lands of indigenous peoples is stated in the basic map of land registration by affixing a cartographic sign, and if possible describing its boundaries and recording it in the land register.

3.2 Legal Certainty of Ulayat Land for Indigenous Law Communities Units

The existence of ulayat lands of indigenous law community units must be protected and obtain legal certainty as with other land tenure rights. However, in reality there are still many ulayat lands that have not received legal protection so that they often lose in defending their rights in court.

In the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 18 of 2019 concerning Procedures for Administrative Ulayat Land of Indigenous Law Community Units, article 3 states that the stipulation of recognition and protection of Customary Law Community Units is carried out in accordance with the provisions of laws and regulations.

According to Gustav Radbruch, law has three aspects, namely justice, finality, and legal certainty. In the aspect of legal certainty, it aims to provide a guarantee that a regulation or law really really functions as a regulation that is implemented and obeyed. Legal certainty as a legal operational framework so that a regulation is made and promulgated with certainty because it regulates clearly and logically (Arta at al, 2021).

Legal certainty can only be answered normatively, not sociologically, legal certainty is normative when a regulation is made and promulgated with certainty because it regulates clearly and clearly. It is clear in the sense

that it does not cause doubt (multi-interpretation) and logical in the sense that it becomes a norm system with other norms so that it does not clash or cause norm conflicts. Norm conflicts that arise from uncertainty in the rules can take the form of norm congestion, norm reduction, or norm distortion. Legal certainty refers to the implementation of a clear, permanent, consistent and consequent law whose implementation cannot be influenced by subjective circumstances (Muliawan, 2016).

Legal certainty in providing protection for ulayat lands of indigenous law community units is very necessary to maintain the existence of ulayat lands. The government must organize the administration of the customary law community unit lands throughout the territory of the republic of Indonesia to ensure legal certainty.

Rika Lestari and Djoko Sukisno in their research stated that the regulation on the recognition and protection of customary land rights of indigenous law communities contained in the legislation in force in Indonesia has not been able to provide legal protection because the legal politics of recognizing ulayat land rights is still carried out half-heartedly, pseudo and ambivalent (Lestari & Sukisno, 2021)

Legal certainty of customary land administration includes measurement, mapping, and recording in the land register. The community and indigenous law institutions must submit an application for the administration of the Ulayat Land to the Head of the local Land Office.

3.3 Recognition of Indigenous/Ulayat Land in Decision Number 1430 K/Pdt/2022

In the decision of the Supreme Court Number 1430 K/Pdt/2022, the plaintiff, namely the management of a customary institution who received a mandate from indigenous peoples, could not defend their ulayat land which was the object of the dispute, the Supreme Court judge's decision at the cassation level won the defendant's favor. This is due to several factors including:

- a. Customary institutions are considered to have no legitimacy and legal basis regulated by regulation to be stipulated through regional regulations;
- b. Customary land does not have boundaries in the form of clear dimensions
- c. Lawsuit of the less party plaintiffs (exceptio plurium litis consortium)
- d. Indigenous/Cultural Land has not been registered
- e. The lawsuit is considered blurred

In the customary land dispute, the plaintiff filed a lawsuit on the basis of customary land ownership of 50 hectares, namely based on a certificate of customary land issued by the village head and approved by the sub-district head in 1973.

Disputes over customary/ulayat lands often occur where the object of the dispute is customary/ulayat land, the parties to the dispute are between customary law communities and individuals. If the origin of the emergence of communal land disputes is due to the fact that part of the customary land parcels are registered as property rights, however, the court wins the individual party who registers their land as property rights on the pretext of obtaining the rights from generation to generation, on the other hand the legal standing of the legal institution and the existence of customary land is considered weak, then the court's decision has the consequence that other customary lands similar to the case will gradually turn into land owned by individuals with the status of land tenure rights, namely freehold land.

Supreme Court Decision Number 1430 K/Pdt/2022 needs to be measured using the theory of legal objectives. The purpose of law according to Gustav Radbruch is to achieve justice, legal certainty and expediency. The decision prioritizes legal objectives, namely legal certainty from regulations that have not provided legal certainty for customary land arrangements. On the other hand, the judge's decision has the consequences of increasingly weakening the existence of ulayat land, a fact that customary lands will soon turn into ownership land that is listing through the National Land Agency (BPN). Land disputes between indigenous peoples and individuals are predicted to occur a lot and must be completed through a judiciary. So it needs preventive legal protection from the government and related non-governmental institutions.

4. Conclusion

The ulayat land of indigenous law communities has been regulated in the Basic Law of Agraria, even though its existence has been recognized in the Indonesian constitution, but in the implementing regulations there is still a vacancy in the book, existing regulations do not provide legal certainty and legal protection for the existence of customary rights of customary law communities. not registered. The state should carry out an inventory of the ulayat lands of indigenous law communities that have not been registered.

The existence of indigenous law institutions that do not yet have legality becomes a barrier for indigenous law community units in defending their rights in ulayat land disputes. The existence of ulayat lands cannot be separated from the recognition of indigenous law communities who are part of the existence of ulayat lands.

References

- Afrianedy, R. (2020), *Kepastian Hukum Bagi Tanah Ulayat Masyarakat Minangkabau di Sumatera Barat*. Available at <https://www.pa-cilegon.go.id/artikel/252-kepastian-hukum-bagi-tanah-ulayat-masyarakat-minangkabau-di-sumatera-barat>
- Arta, I.K.W., Suhariningsih, & Qurbani, I.D., (2021), Kepastian Hukum Atas Penunjukan Desa Pakraman di Provinsi Bali Sebagai Subjek Hak Pemilikan Bersama (Comunal) Atas Tanah Sesuai Dengan Pasal II Ayat 1 Konversi UUPA, *Jurnal IUS Kajian Hukum Dan Keadilan*, 9(1), Available at https://jurnalius.ac.id/ojs/index.php/jurnalIUS/article/view/778/pdf_192
- Eliana. (2019). Kepastian Hukum Kepemilikan Tanah Ulayat Kaum Adat Badui, *Pamulang Law Journal*, 2(2), available at <http://openjournal.unpam.ac.id/index.php/palrev/article/view/5428>
- Hairan. (2017), Kedudukan Tanah Ulayat dalam Perspektif Konstitusi Indonesia (Undang-Undang Dasar Negara Republik Indonesia Tahun 1945), *Yuriska: Jurnal Ilmiah Hukum*, 9(1), Available at <http://journal.uwgm.ac.id/index.php/yuriska/article/view/44>
- Ismi, H. (2012), Pengakuan Dan Perlindungan Hukum Hak Masyarakat Adat Atas Tanah Ulayat Dalam Upaya Pembaharuan Hukum Nasional, *Jurnal Ilmu Hukum*, 3(1), Availabe at <https://jih.ejournal.unri.ac.id/index.php/JIH/article/view/1024/1017>
- Koesnoe, H.M. (2000). *Prinsip-Prinsip Hukum Adat Tentang Tanah*, Surabaya: Penerbit Ubhara Press.
- Kunu, A.B.D. (2010). Kedudukan Hak Ulayat Masyarakat Adat dalam Hukum Tanah Nasional, *Inspirasi*, 1(10), Available at <http://jurnal.untad.ac.id/jurnal/index.php/INSP/article/view/2794>
- Lestari, R., & Sukisno,D. (2021), Kajian Hak Ulayat Di Kabupaten Kampar dalam Perspektif Peraturan Perundang-Undangan Dan Hukum Adat, *Jurnal Hukum Ius Qula Iustum*, 28(1), Available at <https://journal.uui.ac.id/IUSTUM/article/view/15850/11087>
- Muazzin. (2014). Hak Masyarakat Adat (Indigenous Peoples) atas Sumber Daya Alam: Perspektif Hukum Internasional, *Padjadjaran Jurnal Ilmu Hukum*, 1(2), Availabe at <http://jurnal.unpad.ac.id/pjih/article/view/7072/3292>
- Mudjiono. (2004). Eksistensi Hak Ulayat Dalam Pembangunan Daerah, *Jurnal Hukum IUS QUIA IUSTUM*, 11(26), Hal 155, Availble at <https://journal.uui.ac.id/IUSTUM/article/view/4961/4396>
- Muldjabar, O., (2018), Prinsip Tanah Walaka Pada Masyarakat Hukum Adat Tolaki Dalam Sistem Pertanahan, *Jurnal Hukum Volkgeist*, 3(1), Hal 64-65 Avilable at <http://www.jurnal-umbuton.ac.id/index.php/Volkgeist/article/view/95/81>
- Muliawan, J.W. (2016). *Cara Mudah PahamiPengadaan Tanah Untuk Pembangunan*, Buku Litera Yogyakarta
- Peraturan Menteri Agraria Nomor 18 Tahun 2019 tentang Tata Cara Penatausahaan Tanah Ulayat Kesatuan Masyarakat Hukum Adat
- Peraturan Pemerintah Nomor 18 Tahun 2021 tentang Hak Pengelolaan, Hak atas Tanah, Satuan Rumah Susun, dan Pendaftaran Tanah
- Peraturan Pemerintah Nomor 24 Tahun 1997 tentang Pendaftaran Tanah

- Permen Agraria/Kepala BPN Nomor 10 tahun 2016 tentang Tata Cara Penetapan Hak Komunal Atas Tanah Masyarakat Hukum Adat Dan Masyarakat Yang Berada Dalam Kawasan Tertentu
- Permendagri Nomor 52 Tahun 2014 tentang Pedoman Pengakuan dan Perlindungan Masyarakat Hukum Adat
- Ramadhani, R. (2019). Eksistensi Hak Komunal Masyarakat Hukum Adat Dalam Pengadaan Tanah Untuk Kepentingan Umum (Indigenous legal Communal Rights in the Land Acquisition for Public Purpose), *Jurnal Penelitian Hukum De Jure*, Available at <https://ejournal.balitbangham.go.id/index.php/dejure/article/view/549/pdf>
- Santoso, U. (2014). *Hukum Agraria Kajian Komprehensif*, Jakarta: Prenadamedia Group
- Sembiring, J. (2018). *Dinamika Pengaturan dan Permasalahan Tanah Ulayat*, Yogyakarta: STPN Press
- Sitorus, A. (2019), Kondisi Aktual Penguasaan Tanah Ulayat Di Maluku: Telaah Terhadap Gagasan Pendaftaran Tanahnya, *BHUMI: Jurnal Agraria dan Pertanahan*, 5(2), Available at <https://jurnalbhumi.stpn.ac.id/index.php/JB/article/view/373>
- Subroto, A. (2019), Peran Negara Dalam Menjaga Eksistensi Masyarakat Hukum Adat, *Yuriska: Jurnal Ilmiah Hukum*, 11(1), Available at <http://journal.uwgm.ac.id/index.php/yuriska/article/view/457>
- Tanuramba, R.R. (2019), Legalitas Kepemilikan Masyarakat Adat Atas Tanah Ulayat Menurut Hukum Agraria, *Lex Privatum*, 7(5), Available at <https://ejournal.unsrat.ac.id/index.php/lexprivatum/article/view/26985>
- Undang-Undang Dasar Negara Republik Indonesia Tahun 1945
- Undang-Undang Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-Pokok Agraria