

Law Protection On Ulayat Rights Of Customary Law Community

Adonia Ivonne Laturette

Law Of Faculty, Pattimura University

Putuhena Street Poka Ambon Maluku Indonesia Post Code 97237

Email Correspondence : laturettedony@gmail.com

Abstract: In the customary law community, land is very privileged. Ulayat rights are rights that are given magical aspects as a threatening force and can provide sanctions as a basis for the legitimacy of control over an area or plot of land called ulayat land. Ulayat land is a piece of land that belongs to the community group. Although indigenous peoples have full customary authority to control, cultivate and utilize their traditional land, their authority is not as strong as that of the State juridically formal. This research was a normative juridical study using the statue Approach, conceptual approach, and case approach by looking at the laws and regulations relating to ulayat rights, concepts ulayat rights and protection of ulayat rights. In the midst of the strengthening of the State's dominance over the various authorities of customary law communities and ulayat rights, the existence of indigenous peoples began to be recalculated. All parties both at the National and International level considered the importance of providing a place and protection of the ulayat rights of indigenous peoples.

Keywords: Legal Protection, Ulayat Rights, Customary Law Community

I. INTRODUCTION

1. Background

In Indonesia the use of land and other natural resources contained therein is regulated in the provisions of Article 33 paragraph (3) of the 1945 Constitution which states: "The earth and water and natural resources contained therein are controlled by the State and are used for the greatest prosperity of the people, "This article shows that:

- a. The state controls the earth, water and natural resources contained therein.
- b. The earth, water and natural resources contained therein are used for the greatest prosperity of the people.

The statement explains 2 (two) things, namely

1. The State has strong legitimacy to control land as part of land as part of the earth constitutionally
2. The mastery must be in order for the prosperity of the people.

Through this controlling right from the State, the State as the ruler will be able to always control or direct the management of the functions of the earth, water and space as well as the natural resources contained therein in accordance with existing regulations and policies, namely within the scope of juridical control which is public. ¹The state has power over land in the sense that the state has the authority to regulate all relations to land so that the various dimensions of community needs individually or in groups can be met. The elaboration of Article 33 of the 1945 Constitution became the basis for the birth of Law Number 5 of 1960 concerning Basic Regulations on Agrarian Matters (State Gazette of the Republic of Indonesia Number 104, Supplement to the State Gazette of the Republic of Indonesia

Number 2043) (hereinafter referred to as UUPA). UUPA (Basic Agrarian Law) is a basic regulation, which regulates the control, ownership, designation, use and control of land use aimed at the greatest prosperity of the people. One aspect needed for this purpose is the legal certainty over land, which is the main basis for the legal certainty of land ownership. The state has the right to control the earth, water, space and natural resources contained therein. According to Soedargo Gautama, the meaning of mastering is "regulating and carrying out the designation, use, supply, and maintenance, determine and regulate what can be owned over parts of the earth, water and space (subject matter) and legal actions concerning the earth, water and space."¹

In facing the need for land in development activities that requires extensive land, Ulayat lands that have been controlled by indigenous peoples have begun to be taken for these needs. The problem that occurs in indigenous peoples is that when the regional government as the holder of policy and authority for those who give permission to the parties concerned in this case give permission to entrepreneurs. However, the government do not pay attention to the interests of indigenous and tribal peoples especially those living in coastal areas. This is of course affecting the lives of indigenous and tribal peoples and ultimately making indigenous peoples living in uncertainty. This situation creates an imbalance because there is a strong dominance of the government. Whereas constitutionally, the community of indigenous and tribal peoples are recognized as belonging to the territory of landowner (ulayat) both at sea and on land. This implies that the government in various development policies, especially in the field of law is not consistent and considers the existence and rights of indigenous and tribal peoples as a community that existed before the state was formed. Disregard for the rights and existence of indigenous and tribal peoples will cause an imbalance, which can cause various turmoil in social life. How is the protection of the Ulayat rights of the customary law community

II. DISCUSSION

Rights on Ulayat Land of Customary Law Community.

Land has a very important position in human life, especially for customary law communities. The relationship between the land and the community itself always occurs in a variety of interests, the land used as a place of settlement, for the purpose of making fields, a place to take crops, a place to gather with fellow people and used as a place of worship. The customary law community and the land they occupy have a close and religious-magical relationship. It means that natural wealth is the wealth bestowed by God Almighty to the customary law community. Before the coming into effect of the UUPA, customary lands were still the property of a partnership and an individual. They use the customary land in accordance with their needs in utilizing and cultivating the land. In addition, taking action to use customary land must first be known or ask permission from the customary head. Before the UUPA came into force, customary land still belonged to members of the legal alliance,

¹ Soedarga Gaotama, *Tafsiran Undang-Undang Pokok Agraria*, Alumni, Bandung, 1993, hal 92.

who had the right to cultivate it without any party banning it. The legal community's right to land is called land rights or Ulayat rights.² It consisted of the close and controlling relationship of the land, utilizing the land, collecting the results of plants that live on the land and hunting for animals that live there.

With regard to the rights of indigenous peoples to certain areas or what is commonly referred to as Ulayat rights, the talks refer to geographical units. Meanwhile, when talking about rights, it covers the authorities that are based on the will to do or not do something above the Ulayat area.³ According to customary law in Indonesia, there are 2 types of rights arising from

land, among others, namely:

1. Partnership rights, namely the rights that are owned, controlled, utilized, enjoyed and cultivated by a group of people who live in a certain area called the legal community (legal alliance). Furthermore, the rights of partnership are often referred to as Ulayat rights, landowner rights, ancient rights, and communal rights or *beschikingsrecht*.
2. Individual rights, namely the rights that are owned, controlled, used, enjoyed, and cultivated by a member of a certain partnership.

The relationship that exists between customary law communities and land is as a unity that cannot be separated as a legal alliance. The legal alliance (*rechtsgemeenschappen*) is "a regular horde is permanent with its own power, also its own wealth in the form of visible and invisible objects". It is clearly seen that to be called a legal alliance must meet several elements, namely: 1) the existence of unity; 2) has a fixed area; 3) has own power; 4) has its own wealth in the form of objects both visible and invisible.

Ulayat rights are basically a right of alliance on occupied land, while the implementation is carried out both by the community itself and by the head of the alliance on behalf of the alliance. In general, the ulayat land area is an area in which there are parts which naturally manifest in a unity that is interrelated and inseparable. By this naturally formed geographical condition, the objects of these ulayat rights consist of land space, waters which includes lakes, rivers and coastal and marine waters, plants that live wild (trees that can be used either for firewood or for carpentry needs). Ulayat areas in customary law community units in Indonesia are generally located in stretch of land both in the plains, mountains, and includes rivers, lakes, hills and valleys to the coastal areas of the sea and even the surrounding islands.

Ronald Titahelu stated that the ulayat authority owned by the customary law community over all who were within the scope of their ulayat rights as follows :

- a. The right to freely use land, including grove, as a place of settlement, agriculture, grazing, hunting, the coast, the seashore to a certain depth, the river or parts of the lake, the right to capture the crops in it, with inward and outward regulation.

² Bushar Muhammad, *Pokok-Pokok Hukum Adat*, Pradnya Paramita, Jakarta 2006 hal, 103

³ Ronald.Z. Titahelu, *Asas-asas Penguasaan Tanah Ulayat Dalam Sistem Hukum Nasional*, Disampaikan dalam kerangka mempersiapkan Naskah Akademik Peraturan Daerah Kabupaten Halmahera Utara, Provinsi Maluku Utara, Juni 2008

- b. The right to demand payment of a sum of money (recognitie) for non-members of the customary law community who use the land.
- c. Obligated to bear responsibility for the crime that occurred in the area of ulayat rights, if the perpetrators of the crime are unknown.
- d. Obligation to safeguard the wealth of the community of customary law alliance, especially on land by means of prohibiting or preventing the occurrence of, or negating acts that intend to spend the wealthy of customary law alliance community.

As a legal alliance in defending their ulayat rights, basically the customary law community still practices habits repeatedly accompanied by certain sanctions, in utilizing the natural resources in them, both on land and on the coast, which are needed for their life. Activities that utilize natural resources both on land and in coastal areas on the surface and in the ground show a tendency for environmental maintenance to damage, habits that are practiced repeatedly in various regions show variations that tend to be individualistic, although in some villages it still shows communal character.

Ulayat Rights Ownership of Customary Law Community.

In reality, between customary law communities and the land they occupy, they have a very close and inseparable relationship. The relationship between customary law communities and land gives birth to ulayat rights, the legal relationship between the state and land gives birth to the right to control land by the state while the relationship between individuals and land gives birth to individual rights over land. The relationship among the three rights is harmonious and balanced. It means that the three rights have the same position and power and do not harm each other. It can be argued that the meaning of the relationship between humans and land is something that is permanent and eternal while the use, utilization, control and ownership can change according to developments in society. Koesnoe⁷, described a people's mythos about humans and their environment, which started from the existence of two phenomena, each of which differed in principle. The first is the sky, and the second is the earth or land, the sky is the father of the universe and the earth is the mother. Marriage of heaven and earth is the same as marriage between father and mother. The marriage produces children. Children are all that is on earth, among other things, inanimate objects, plants, all kinds of animals, including those that are human. In mythos, it can be seen that there is a view of how the relationship of humans with the land of the environment in which they live and undergo their lives and what and how human relationships with everything that is in the environment in which humans live and undergo their lives. In this mythos, it is clearly illustrated that the earth or land where he was born and lived and undergo his life is seen as his mother, everything that is around him is his children from his mother and father. Relationship between humans and the land environment where they live and undergo their lives. It is clear that Koesnoe wants to illustrate through the mythos about the relationship between land and humans, is how people view the land where they are born, raised and undergo their lives, how they view land and its meaning for them. The existence of an inner attitude that shows about the relationship between the people with the land environment where they stay and live. Land is widely understood to encompass all

elements, earth, water, air, natural and human resources, as well as spirits which are considered to have complete supernatural powers embraced as a whole, so that it can be understood that there is a relationship between land and elements that have been put forward.

Thus, the concept of land in customary law includes elements such as in the concept of natural resources which includes:

1. relationship with the surface of the earth including water
2. relationship with air and space
3. relationship with the natural wealth and the body of the earth
4. relationship with spirits (supernatural)
5. the relationship between human beings as the center

The term property according to Ter Haar⁸ is rarely found in customary law communities. However, the concept that describes "rights" is indeed known so that the term "property rights" is commonly used in the context of customary philosophy, however, the use of the concept of "rights" is usually always associated with the concept of "belonging". Thus, the meaning of the "rights" becomes relative" when it is linked individually mastery. This means that rights are born based on the reality of control, which is fixed on the land that is recognized and is false because it can change. Evidence of relativity of "rights and "property" is the existence of individual rights that are still tied to the power of family and society.

Protection of Ulayat Rights of Customary Law Community

The legal protection of the ulayat rights of customary communities has been regulated in various laws and regulations. However, in reality, there are still many violations of the customary rights of indigenous peoples. These violations were not only committed by investors but also by the government because recognition and protection of indigenous and tribal peoples can be said to be conditional recognition as contained in General Explanation II number 3 of Law No. 5 of 1960 UUPA related to Article 3 which stipulates that "The implementation of ulayat rights and similar rights of indigenous peoples, as long as in reality they still exist, must be in accordance with national and state interests based on national unity and must not contradict other higher laws and regulations. Conditional recognition is also provided by legislation governing ulayat rights, by providing conditional legal protection similar to what is regulated in Article 3 of the UUPA

Related to conditional recognition in the Dutch legislation Article 11 *Algemene Bepalingen van Wetheling* which is also set forth in Article 75 Regerings Reglements governing;

“Except in cases where indigenous peoples or similar persons voluntarily submit to the provisions of civil law and European commercial law, or in the case of such provisions or other statutory provisions stated for them, then for these people remain in force and by the bumiputera judge treated religious regulations, institutions and habits of the people concerned as long as it does not conflict with the generally accepted principles regarding *billijkheid* and *rechtvaardigheid*”

It is clear from the regulation above that religious regulations, institutions and customs of the people concerned are treated as long as they do not conflict with the generally recognized principles regarding *billijkheid* and *rechtvaardigheid*

The same thing also found in the recognition of customary law communities in the 1945 Constitution that also raises a very dilemma problem. One side is the spirit of recognition to protect the customary law community and its rights, but on the other hand, the state has a very large role so that it is more concerned with the interests of the State rather than the interests of indigenous and tribal peoples. Budi Hardiman stated that Article 18B paragraph (2) and Article 28 I paragraph (3) illustrating that the state has a major role in formulating, acknowledging and legitimating the existence of indigenous and tribal peoples as long as they are in accordance with the national regulations. This paradigm is incompatible with the principles of equality and autonomy which are democratic.

If we look at the contents of Article 18B paragraph (2) and Article 28 I paragraph (3), it appears that there are two laws governing indigenous peoples. On the one hand, Article 18B paragraph (2), recognition of the existence of indigenous and tribal peoples is included in the realm of laws relating to regional government, while Law 28 I paragraph (3) will be regulated in the Human Rights Act . However, the existence of Article 18B paragraph (2) of the 1945 Constitution has revealed good things for the practice of protecting indigenous peoples and their traditional rights (ulayat rights). the existence of this article means that there is a strong constitutional foundation for the customary law community and its traditional rights that have been neglected. Legal protection of human rights clearly demands equality before the law without discriminating against anyone. *With the similarity will avoid the attitudes and action of arbitrary parties who feel higher position, because if this is allowed to occur violations of human rights and cause what is regulated by the Act becomes meaningless*⁴

Recognition and respect for ulayat rights is contained in various Regulations including Regional Regulations (PERDA) that use the legal basis relating to the authority to make a Regional Regulation and the legal basis relating to the material regulated in the Regional Regulation. Examples of some Regions that regulate recognition and respect for ulayat rights are Regional Regulation of Kampar District Number 12 of 1999 concerning Ulayat Rights; Lebak Regency Regulation No. 32/2001 concerning protection of the Baduy Communities' ulayat rights; West Sumatra Regional Regulation No, 6 of 2008 concerning Ulayat Land. And several regions that are currently drafting Tobelo's Ulayat Rights Regional Regulation, North Halmahera Ulayat Rights Regional Regulation and Article 6 of Law N0. 39 of 1999 concerning Human Rights. In the reform era, the opportunity to provide protection to indigenous and tribal peoples and their traditional rights (hak ulayat) began to appear. Protection of indigenous and tribal peoples is not only stated in Article 18B paragraph (2) and Article 28 I paragraph (3) of the 1945 Constitution, the second amendment of 2000, but also listed in Article 41 of MPR (People's Consultative Assembly) Decree Number XVII / MPR / 1998 concerning Human Rights, MPR Decree No.IXMMPR / 2001 concerning Agrarian Reform and Natural Resource Management, Article 5 paragraph (3), Article 6 paragraph (1) and Article 6 paragraph (2), Law No. 39 of 1999 concerning Human Rights, and Regulation of the Minister of State / Head of BPN (National Land Agency) No. 5 of 1999 concerning Guidelines for Settlement of Customary Rights of the Customary Law Community. However,

⁴ Adonia Ivonne Laturette, *Settlement of indemnification of Customary Community Land in Land Procurement for developers for Public Interest* Journal of Law, Policy and Globalization, Vol 94 2020

recognition of the legal community and its traditional rights cannot be immediately followed up. This is due to the current positive national legal system that does not provide a legal position for indigenous and tribal peoples with a variety of policies, regulations and decisions which naturally limit the existence of indigenous and tribal peoples and their traditional rights..

The consequence of all of these arises a variety of conflicts in various regions in the country related to ulayat land. These conflicts arise because indigenous peoples want to retain their ulayat rights, which results in conflict with the Government and investors who have obtained various forms of licensing to use or utilize ulayat land of customary law community. *Although indigenous peoples have full customary authority to control , manage and utilize their ulayat lands, their legal jurisdiction is not as powerful as the state.*⁵

Developments supporting the recognition of indigenous and tribal peoples and their traditional rights continue. The KAT Empowerment Expert Forum meeting on April 2, 2009, discussing the multiyears approach in KAT empowerment needs to be reconsidered as a process of continuous change for KAT. However, the multiyears approach should be applied based on the KAT typology that was developed. Thus, not all targets are empowered based on relatively long periods of time, but are determined by their empowerment patterns. This forum recommends the need for specific strategies to accelerate the settlement of KAT (Remote Indigenous communities), especially responding to the polemic that often occurs in understanding KAT empowerment by relying on human rights, democratization, and decentralization. The multiyears approach (an uninterrupted approach must be sustainable and not completed within one year) in KAT empowerment needs to be reconsidered as a process of continuous change for KAT. Based on Presidential Decree No. 111 of 1999 concerning the Development of Social Welfare of the Most Remote Indigenous Communities and isolated communities are social and cultural groups that are local and scattered and less or not involved in networks and services both socially, economically and politically. However, we need to realize that isolated communities are clearly part of customary law communities whose rights must be recognized and protected. At the international level, juridical recognition of indigenous and tribal peoples is contained in ILO Convention No. 169 of 1989 concerning Indigenous and Tribal Peoples in Independent Countries (indigenous peoples and tribal peoples in independent countries) defines indigenous peoples as ethnic groups who live in independent countries whose social, cultural and economic conditions differ from those of groups another society. In general, the ILO Convention recognizes that indigenous peoples and tribal peoples are recognized and guaranteed their rights to decide for themselves various priorities in the development process that affects their lives, beliefs, institutions and welfare and the lands and territories (ulayat) which they inhabit or that they use must be protected. Besides, the rights of the inhabitants concerned to use lands that are not exclusively occupied by them, but traditionally they have had access to their traditional livelihoods and activities must also be protected, and to exercise control, until possible limits, to their economic, social and cultural development. However, it was realized that despite the legal protection of the customary law community in various laws and regulations, in reality

⁵ Adonia Ivonne Laturette, *Ulayat Right of Customary law*, Pattimura Low Journal, Vol 1 Issue 2, March 2017

there were still many exceptions to the ulayat rights of the customary law community by the Government and Investors. This is because the protection of the ulayat rights of indigenous and tribal peoples still adheres to conditional recognition. Therefore, there are deviations from the legislation that should provide protection. Recognition of customary law by state law also brings problems around legal certainty. Understanding the principle of legal certainty in customary law is not the same as the principle of legal certainty which is understood in the state legal system. Another case with the recognition of state law on written legal systems of custom, such as Islamic religious law, Christian religious law, and Hindu religious law which usually does not cause problems legal certainty as caused by the recognition of state law in an unwritten customary legal system.

III. CONCLUSION

Basically, indigenous peoples have a very close relationship with their ulayat land, especially regarding patterns of control and use. Initially, it must be recognized that indigenous peoples have authority that can be said to be very autonomous and absolute in the control and utilization of ulayat land and various agrarian resources within it. However, over time and the strengthening of the role of the state in various fields, the role of indigenous peoples in its development has faced various challenges and is increasingly weakening before the state. The strengthening of the role of the state was strengthened by the inclusion of the concept of "Right to Control the State". which is constitutionally based on Article 33 paragraph (3) of the 1945 Constitution and is the basis of national control, as well as various positive laws under it such as the UUPA and other positive laws enacted after UUPA, are sectorally related to agrarian resources such as the Forestry Law, Law mining laws, oil and gas laws. The state on the constitutional basis then claims the lands that have been controlled by the customary law community on the grounds that the ulayat land area needs to be protected for environmental preservation and safety or on the grounds that in the ulayat land area there is a very vital natural resource potential to support the interests of the country. In the midst of the strengthening of the state's dominance over the various authorities of indigenous peoples and their ulayat rights, the existence of indigenous peoples has begun to be recalculated because of the struggle of Non-Government Organizations (NGOs) and the awareness of all parties both at the National level and at the International level who consider the importance of providing a place and protection of the ulayat rights of indigenous and tribal peoples who are the indigenous people of a country. It is expected that there will be earnest and not half-hearted efforts to study academically by involving experts in the fields of law, sociology, economics and land related to indigenous and tribal peoples, traditional leaders, and indigenous community activists who are Non-Government Organizations to better understand the philosophical aspects and the existence of indigenous and tribal peoples who will later be used as input for the improvement of laws and regulations which, of course, will provide protection for the rights of indigenous peoples.

REFERENCES.

- [1]. Adonia Ivonne Laturette, *Settlement of indemnification of Customary Community Land in Land Procurement for developers for Public Interest* Journal of Law, Policy and Globalization, Vol 94 2020
- [2]. Adonia Ivonne Laturette, *Ulayat Right of Customary law*, Pattimura Low Journal, Vol 1 Issue 2, March 2017
- [3]. Bushar Muhammad, *Pokok-Pokok Hukum Adat [Customary Law Principles]*, Pradnya Paramita, Jakarta 2006
- [4]. Budi Hardiman, *The Structural Position of Ethnic Groups*
- [5]. Moh.Koesnoe, *Kapita Selekta Hukum Adat Suatu pemikiran baru [Capita Selekta Customary Law A new thought]*, varia Peradilan-ikatan Hakim Indonesia, Jakarta, 2002
- [6]. Muhamad Bakri, *Hak Menguasai Tanah Oleh Negara (Paradigma Baru Untuk Reformasi Agraria)* [The Right to Control Land by the State (New Paradigm for Agrarian Reform)], Citra Media, Yogyakarta, Tahun 2007
- [7]. Ronald.Z. Titahelu, *Asas-asas Penguasaan Tanah Ulayat Dalam Sistem Hukum Nasional [Principles of Customary Land Tenure in the National Legal System]*, Disampaikan dalam kerangka mempersiapkan Naskah Akademik Peraturan Daerah Kabupaten Halmahera Utara, Provinsi Maluku Utara, Juni 2008
- [8]. Ter Haar, Bzn-K Ng Soebekti Poesponoto (Penterjemah), *Asas-asas dan Susunan Hukum Adat [Principles and Structure of Customary Law]*, Pradnya Paramita, Jakarta, hal
- [9]. Artikel Departemen Sosial, Pertemuan Forum Pakar Pemberdayaan KAT, Jakarta, 2009

LIST OF LAWS

PROVISION OF THE MPR

Decree of the People's Consultative Assembly of the Republic of Indonesia Number IX / MPR / 2001 concerning Agrarian Reform and Natural Resource Management

Decree of the People's Consultative Assembly of the Republic of Indonesia Number XVII / MPR / 1998 concerning Human Rights, About Human Rights,

CONSTITUTION

1945 Constitution, Amendments

Law Number 5 of 1960, Regarding Basic Regulations on Agrarian Principles (State Gazette of the Republic of Indonesia of 1960 Number 104, Supplement to State Gazette 2043)

Law Number 39 of 1999, Regarding Human Rights

PRESIDENTIAL DECREE

Presidential Decree No. 111 of 1999 concerning the Development of Social Welfare of the Remote Indigenous Communities

REGULATION OF THE MINISTER / REGULATION OF THE HEAD OF BPN

Regulation of Minister of State / Head of BPN No. 5 of 1999 concerning Guidelines for Settlement of Customary Rights of the Customary Community.

LOCAL REGULATION

Regulation of Kampar Regency Number 12 of 1999 concerning Ulayat Land Rights (Regional Gazette 2000-1)

Regulation of Lebak Regency Number 32 Year 2001 Regarding Protection of the Land Rights of the Baduy People (State Gazette 2001-5)