

THE LEGAL POSITION OF CUSTOMARY LAND IN NATIONAL LAND LAW AFTER THE ENACTMENT OF ATR/BPN MINISTERIAL REGULATION NUMBER 18 OF 2019

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ABSTRACT

Abstract: The purpose of this study is to determine the status and position of customary land in national law after the enactment of the Regulation of the Minister of ATR / BPN Number 18 of 2019 concerning procedures for administering customary land unitary customary law communities. This is done so that there is legal certainty regarding regulations on customary land rights, so as not to become controversial. The research method used in this study is the normative juridical research method. The type of approach chosen to answer the problem formulation is the statute approach (the approach of using laws and regulations and draft laws and regulations), namely with various rules or legal products related to matters governing land in Indonesia relating to indigenous peoples. The results of this study are that: The legal position of customary land after the enactment of Regulation of ATR No. 18 of 2019, juridically does not affect the existence of communal rights over land, as long as it does not conflict with the regulations of the Unitary State of the Republic of Indonesia and its regulatory procedures.

Keywords: Law; Customary Land; Ulayat; Permen No. 18 of 2018

Introduction

Land for the majority of Indonesians is very important in their lives. The journey of life of Indonesian people depends on the existence of the land they cultivate both in the form of agriculture, plantations and livestock and establish a place to live for themselves and their descendants.

Soil has a very important role in human life. Every aspect of human life requires land. Man needs plots of land for the purposes of finding a source of livelihood, for the purpose of establishing a dwelling. Land and humans have a very close correlation, where every human activity requires land. That is, human beings are inseparable from the land. (Usman, 2020) (Mangar & Ridho, 2022)

Land is one of the objects of Agrarian Law. In Indonesia before the enactment of the Basic Agrarian Law, there was a dualism of agrarian law, even pluralism of agrarian law. On the one hand, customary agrarian law applies to indigenous Indonesian people, which are of various forms, on the other hand, western civil agrarian law applies to people who submit themselves to western civil law, which has many levels. In addition to the enactment of customary law and western civil law on land, according to Supriadi, in his book *Agrarian Law*, "The Swapraja government also created laws on land that apply in its area, such as the Sultan grant. With the existence of three regulations regarding land rights, there arises "pluralistic" land rights in Indonesia." (Supriadi, 2007)

The term for land intended for these activities in customary law communities in Indonesia is known as "Tanah Ulayat" which is briefly interpreted as land belonging to the common law community and in it there is a right called "Hak Ulayat" which means ownership of a group of customary law communities over a land. (Yogatiyana, Hidayatullah, Sultan, & Tirtayasa, 2022)

Basic ownership of all land in Indonesia is held by the state. This is as contained in Article 33 paragraph 3 (three) of the 1945 NRI Constitution. It is stated that "Earth and water and the wealth contained therein are controlled by the state and used for the greatest prosperity of the people". This means, the state has legal ownership of natural wealth, both in the form of water, air, mines, minerals and so on, including land and what it contains. (Arum Ayu Lestary, 2022)

In fact, just as customary law is unwritten, so too are land rights based on customary law in the control of its owners not supported by written evidence. Unlike the case with land rights based on civil law, from the beginning of control by the owner must be registered at the cadastral office and then written evidence of the land rights concerned is issued.

In 2019 the Ministry of ATR BPN of the Republic of Indonesia issued ATR Regulation No. 18 of 2019 concerning "Procedures for Administering Customary Land of the Unity of Customary Law Peoples", considering that "national land law provides recognition and respect for the rights of traditional communities from the unity of customary law communities or similar, as long as in fact they still exist and are in accordance with the development of society and the principles of the Republic of Indonesia."

However, the reality is that until now there is still customary land unitary of customary law communities whose management, control and use are based on the provisions of local customary law and recognized by the unitary residents of the customary law community concerned". The issuance of Regulation of ATR No. 18 of 2019 which regulates customary land, previously the regulation on customary land had been revoked by the Minister of ATR / Head of BPN No. 10 of 2016 concerning the regulation of communal rights over land, the government in this case the Minister of Agrarian Affairs and Spatial Planning / Head of the National Land Agency of the Republic of Indonesia. However, ATR Regulation No. 10 of 2016, as Article 8 of ATR Regulation No. 18 of 2019 has been revoked.

Based on the description above, this research is very important to be carried out on the legal status of customary land and how the legal position of customary land in

national land law is related to the Minister of ATR / BPN Number 18 of 2019 concerning Procedures for Customary Land Administration of the Unity of Customary Law Peoples

Research Method

The type of research used in this scientific work is the normative juridical research method. Normative juridical research is "examining or examining law in terms of its normative nature, substance, and regulatory rules." In relation to normative juridical research, the type of approach chosen to answer the problem formulation is the [\(Education & Advice, 2018\)](#) *statute* approach (the approach of using laws and regulations and draft laws and regulations), namely with various rules or legal products related to matters governing land in Indonesia relating to indigenous peoples.

In this study, the author examines and analyzes the position of customary land law in national land law in connection with the Minister of ATR / BPN Number 18 of 2019 concerning Procedures for Customary Land Administration of the Unity of Customary Law Peoples. The method of searching for materials carried out to complete the preparation of this research is *library research*. The author will use the *library research* method, which is a study on literature as a guideline for writing scientific papers.

With the study of literature in the form of sources of books and laws and regulations, the author can control and affirm the theoretical framework on which the author is based. Research will also be carried out by collecting and documenting a number of data that if relevant to the problems discussed, to obtain material carried out by browsing the literature and regulatory regulations related to existing problems. The type of legal material in this study is focused on Secondary Data, which consists of primary, secondary and tertiary legal materials.

Result And Discussion

Customary Land Law Arrangements

Customary law cannot be separated from legal and social developments in a country, including Indonesia. Generally, the source of customary law comes from unwritten law that grows and develops, and is maintained with legal awareness in the community so that customary law has the ability to adapt and be flexible. Customary law has a very important role in building national law, so it is realized by the existence of Article 18B Paragraph (20) of the Indonesian constitution of the Republic of Indonesia (UUDNRI) Year 1945 which reads, "The State recognizes and respects the unity of indigenous peoples and their traditional rights as long as they are alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, stipulated in the law.

The Constitution of the State is only part of the basic law of that country. The Basic Law is a written basic law, while in addition to the Basic Law there is also an unwritten basic law, namely basic rules that arise and are maintained in the practice of state administration even though they are not written. [\(Randy Zethdan Pellokila, 2021\)](#)

Land is very important in Customary Law (it can be referred to as Customary Land Law). The relationship between humans and land is very related, namely land as a place

for humans to live and continue their lives. Customary land belongs to customary law communities that have long been controlled. The position of the state in relation to land regulation is only in charge of regulating and carrying out the use, supply, allocation and maintenance of earth, water and ruan. Regulate and determine legal relationships between individuals in various legal acts. (Munandar, Talib, Junus, & Journal, 2020)

Land law that applies to Indonesian people, in general, is land law that is still guided by the customary law of each tribe living throughout the archipelago, which is called customary rights. Hak ulayat is a term introduced in customary law literature with different titles and/or names in each customary law area and is the highest tenure right in a customary law area because it is land shared by certain indigenous peoples. (Hafid, 2022)

The development of law in Indonesia cannot be separated from the existence of customary law communities who continue to maintain and develop laws that live in their living environment. This society will then always develop to form a legal society. (Made Oka Cahyadi, 2019)

Customary land law is a law that regulates land rights that apply in each region. As we know, customary land law is still often used in transactions in buying and selling land in Indonesia. Customary rights are rights owned by a customary law alliance, to control land and all its contents within the territory of the alliance. Customary rights are the highest land rights in customary law. Land cultivation by the community in the alliance if it is done jointly under the head of the alliance or carried out by individual residents. (Arina Novizas Shebubakar Marie Remfan Raniah, 2019)

Recognition of customary rights of indigenous peoples is a mandate from Article 33 paragraph (3) of the 1945 Constitution. This article is in Chapter IV on the National Economy and Social Welfare. For the regulation on the recognition of customary rights of indigenous peoples, it should be understood as recognition of the economic sovereignty of indigenous peoples over their lands and natural resources. The aim is to realize social welfare for all citizens of indigenous peoples.

The rights of indigenous peoples in this regulation are rights to land and natural resources, including customary rights and individual rights of the citizens of the customary law communities concerned. Regarding customary rights in practice, the mention of the term customary rights also varies, so the mention of ulayat is also intended as another right with any name whose customary law community authority is the same as customary rights.

Regulation of Agrarian Principles

The regulation of land rights is one of the obligations of the state to regulate it in order to realize legal certainty and maintain the rights of each party. In addition to legal certainty, the existing legal rules in this country also provide legal protection for the recognition of the rights of its citizens.

The provision as a state of law (rechstaat) has strong and clear reasons for the interests of the citizens themselves. According to Gustav Radbruch, a German legal phi-

philosopher taught the concept of three basic legal element ideas which some experts identify as the three objectives of law, namely justice, expediency and legal certainty. (Achmad Ali, 2008)

Since independence, the Basic Agrarian Law No. 5 of 1960 has ended the diversity of legal instruments governing land parcels, which are based on customary law and unify land tenure rights, both land rights and land security rights, the establishment of the Basic Agrarian Law based on customary law, giving meaning as recognition of customary law communities and Ulayat Rights. During the colonial period regulated the rights of land has been dualism, one side with the arrangement of Western law with *Agrarische Wet*, and for the natives applies their own customary law. (In, Daily, & Samosir, 2021)

Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles, clearly stated in Article 19 paragraph (1) of the UUPA that to ensure legal certainty by the Government, land registration is held throughout the territory of the Republic of Indonesia according to the provisions regulated by Government Regulations. Furthermore, with the mandate of this law, the government issued Government Regulation Number 10 of 1960 concerning Land Registration which was later revised with Peme Regulation Article 3 of the Regulation of the Minister of Agriculture and Agrarian Affairs Number 2 of 1962 concerning Affirmation of Conversion and Registration of Former Indonesian Land Rights stating that this article regulates rights that are not described in a land rights letter, Therefore, it is submitted:

1. Proof of rights, namely proof of Indonesian verponding tax letters or proof of rights granting letters by authorized agencies (if any, the measuring letter is also included).
2. Certificate of the Village Head corroborated by the Wedana assistant (camat) who:
3. Justifying the letter or letter of proof of that right.
4. Explain whether the land is residential land or agricultural land.
5. Explain who has the right, if any, accompanied by derivative letters of sale and purchase of land.
6. Proof of valid citizenship of the rightful person. (Regulation of the Minister of Agriculture and Agrarian Affairs Number 2 of 1962)

From the provisions of this Article 3, specifically for lands that are subject to Customary Law but are not registered in the conversion provisions as land that can be converted to a land right according to the provisions of the UUPA, but the land is recognized as customary rights, then it is taken by an effort of "Affirmation of Rights" submitted to the Head of the local Land Registration Office followed by preliminary evidence such as tax proof, a letter of sale made before the enactment of the Law and a letter confirming the rights of a person and explaining also the land for housing or for agriculture and the person's nationality statement.

The constitution and national agrarian law have given the state supreme power to regulate and control the allocation, use, and distribution of agrarian elements. Thus the national agrarian development policy becomes an instrument of the state to exercise its

power in regulating problems arising from the agrarian field. National development policy in the agrarian sector must be based on the objectives of the UUPA. (As Diktat, Teach, Lecture, Agrarian, & Sharia, 2020)

The customary land parcel although not included in the various land rights as referred to in Article 16 paragraph (1) of the UUPA including property rights, business use rights, building use rights, use rights, lease rights, land clearing rights, forest product collection rights, other rights that are not included in the above rights which will be determined by law and temporary rights as mentioned in article 53.

The customary right to land referred to is the customary right to land as referred to in Article 3 of the UUPA that bearing in mind the provisions in articles 1 and 2 the exercise of customary rights and similar rights of customary law communities, as long as they exist, must be such that they are in accordance with national interests and the State, which are based on national unity and must not conflict with other laws and regulations that higher.

The Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia recently issued Regulation of ATR No. 18 of 2019 concerning "Procedures for Administering Customary Land Unity of Customary Law Peoples", considering that "national land law provides recognition and respect for the rights of traditional communities from the unity of customary law communities or similar, as long as in fact they still exist and are in accordance with the development of society and principles NKRI".

Legal Position of Customary Land After the Enactment of Agrarian Minister Regulation Number 18 of 2019

To find out what the position of indigenous peoples' land law is in national land law in Indonesia, it cannot be separated from knowledge about the early history of the development of national land law which at first the subject matter of land there was dualism and even plurilistic in its regulation. Before Indonesia proclaimed its independence, within indigenous peoples there was already control and ownership of land that was regulated in accordance with the provisions of customary law in force in the community. The provisions governing the control of land in our society were once characterized by "Unwritten".

After the independence of the Republic of Indonesia, these land issues were made a unification of land law, better known as the Basic Agrarian Law (Law No. 5 of 1960 concerning Basic Regulations of Agrarian Principles), which came into force on September 24, 1960. In order to realize the unification (unity) of law, the Customary Law on land is used as the basis for the formation of national Agrarian Law. Customary law is used as a basis because the law is adopted by most Indonesian people, so customary law on land has a privileged position in the formation of national agrarian law. ([Arvita Hastarini & Gusti Fadhil Fithrian Luthfan, 2022](#))

In the Basic Agrarian Undang-Undang (UUPA) contained several principles of national agrarian law. These principles serve as the basis and must animate the implementation of the Basic Agrarian Law and all its implementing regulations. In the UUPA it is stated that all regions of Indonesia are the unity of the homeland of all Indonesian people. This shows that land for the Indonesian people has a communalistic nature, meaning that all land in the territory of the Republic of Indonesia is land with the Indonesian people who are united as an Indonesian nation. (As Diktat et al., 2020)

According to customary law, there are two rights to land, namely the right of alliance over land, or also called customary rights, and individual rights to land. In the Basic Agrarian Law, customary land and customary rights are not strictly separated. Tanah Ulayat is a land of common property that is believed to be a gift of a supernatural power or a relic of ancestors to a group that is a customary law community as the main supporting element for the life and livelihood of the group throughout the ages. This is where the religious nature of the legal relationship between customary law communities and their customary land appears. (Helmy Panuh, 2012)

The regulation of land rights still raises many problems in relation to sectoral, departmental, and local (regional) activities. In his assessment this occurred due to a discrepancy between the provisions of the UUPA and other laws, such as mining, forestry, spatial planning, and investment, as well as between these laws, such as forestry and mining. (Salamat, 2016)

The unification of land law stipulated in the UUPA and UUPA aims to organize land law in order to have the greatest prosperity, so it is natural that the customary rights of indigenous peoples get an honorable place in the national land law order. The substance of state authority derived from the right to control natural resources is solely public, namely the ability to regulate in this case related to legal regulations, and not to physically control land and use its land as the authority of "private" land rights holders. (Brier & Lia dual Jayanti, 2020)

The life of the individual in the customary law community is seen as a life that is primarily reserved for community service. On this basis, customary land is considered as land that is joint in its ownership and control. Customary law communities have 2 (forms) of legal relations with their customary rights, namely internal and external. The purpose of the first relationship is that the management of customary rights management is aimed at maintaining a balance of interests between citizens. Therefore, traditional heads are then appointed to maintain, organize, cultivate and utilize customary land in an efficient and efficient manner. (I Made Suwitra, 2020)

The exercise of customary and similar rights of indigenous peoples, so far as they exist, shall be such that they are compatible with national and state interests, based on national unity and shall not contradict other higher laws and regulations. This has contained several principles on the basis of agrarian / land law. Thus, the position of customary rights of customary law communities is observed from a juridical aspect based on customary law, so it essentially reflects the legal relationship between land and community, not contrary to norms and principles as the basis for the formation of ATR / BPN Ministerial Regulation No. 18 of 2019. (Lubis, 2021)

The issuance of Regulation of ATR No. 18 of 2019 with the consideration that Indonesia's national land law recognizes and respects the traditional rights of the unity of customary law communities or similar, as long as in fact they still exist and are in accordance with the development of society and the principles of the unitary state of the Republic of Indonesia. "In fact, there is still customary land unitary of customary law communities whose management, control and use are based on the provisions of local customary law and are recognized by the unitary residents of the customary law community concerned. [\(Konsideran Bagian Menimbang Permen Atgr No. 18 Tahun 2019.\)](#)

If communal rights over land are registered, so that there is legal certainty, but in the control of customary rights over land there is no customary right land registration, but the Customary Land Administration of the Unity of Customary Law Peoples, but in the ATR Regulation there is no explanation of land administration. Land administration is intended to ensure legal certainty, the Government organizes customary land administration. The administration of customary land of the Customary Law Community Unity is carried out based on the determination of recognition and protection of the Customary Law Community Unit, as per Article 3 of ATR Regulation No. 18 of 2019. This means that the administration of customary rights over land is based on the determination of recognition, as the basis for controlling customary rights over the land gets legal protection.

Customary rights to land controlled by the community unit in its implementation do not apply to land parcels when determined to have been controlled by individuals or legal entities with a right to land; or those that have been obtained or exempted by government agencies, legal entities or individuals in accordance with the provisions of laws and regulations, as Article 4 of ATR Regulation No. 18 of 2019. This provision shows that customary rights are only granted to customary law community units based on the determination of recognition only limited to land parcels that have not been controlled by individuals or legal entities with some land rights; or that has not been obtained or exempted by a government agency, legal entity or individual.

Applications for customary land administration are submitted to the Head of the local Land Office. Customary Law Community Unity Customary Land Administration, including measurements carried out against the boundaries of the Customary Law Community Unity Customary Land parcel that has been determined. Mapping of customary land parcels of Customary Law Community Unity in land registration maps, Recording in land registers. The Customary Land Parcel of the Customary Law Community Unit is given a Land Parcel Identification Number with the Regency / City area unit, as Article 5 and Article 6 of ATR Regulation No. 18 of 2019. [\(Hutama, 2021\)](#)

Based on the description and discussion as mentioned above related to the characteristics of customary rights of customary law communities after the issuance of Regulation of ATR No. 18 of 2019 concerning Procedures for Administering Customary Land Unity of Customary Law Peoples, it can be explained that: communal rights to land that have been issued before the enactment of this Ministerial Regulation, are declared to remain in effect as per Article 7 of Regulation of ATR No. 18 of 2019, Although Regula-

tion of ATR No. 10 of 2016 has been revoked by Regulation of ATR No. 18 of 2019, communal rights to land, both subjects, objects and legal certainty over the registration of communal rights to land are different from customary rights to land as stipulated in Regulation ATR No. 18 of 2019, the revocation juridically does not actually affect the existence of communal rights over land.

Therefore, Indonesia's national land law recognizes and respects the existence of traditional rights of the unity of customary law communities or similar, as long as the reality still exists and is in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia.

Conclusion

Customary land is customary rights over land controlled by customary law communities. Namely, people who live in groups, down and down based on ties of origin/ancestry or similar places of residence, have the same culture, live in a certain area, have customary property owned together, have customary institutions containing sanctions, if they still live according to development and do not conflict with national law. The legal position of customary land after the enactment of Regulation of ATR No. 18 of 2019, juridically does not affect the existence of communal rights over land, as long as it does not conflict with the regulations of the Unitary State of the Republic of Indonesia and its regulatory procedures.

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