

Dynamics of the Meeting Between Customary Law and Modern Law in Resolving Land Disputes in Rural Communities

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Abstrak: Land for rural communities, the majority of whom are indigenous, is a source of livelihood. Unfortunately, indigenous people often do not have official documents on land ownership, which creates legal uncertainty. This is utilized by some individuals to claim land illegally, leading to disputes. This research wants to know how the dynamics between customary law and state law in resolving land disputes, The results of data analysis show that synergy between customary law and modern law is needed to realize justice for the community. This can be done through mediation through customary justice institutions or local wisdom-based dispute resolution.

Keywords : Customary Law, Modern Law, Land Dispute Resolution

INTRODUCTION

Land is an important asset for human life. Land not only has economic value, but is also a source of life and livelihood. Land has infinite value, so it is no wonder that the title of homeland and spilled blood is used by the Indonesian people to mention the unitary state of Indonesia which has islands and sovereign waters¹. For indigenous peoples, land is not only a place to carry out activities but also a symbol and pride for indigenous peoples in showing their existence. According to Wirman & Hengki (2014), in particular, customary law communities have a set of rules formulated and agreed upon that are passed down to their descendants and land is included in property rights that emphasize their existence².

The law serves as a guide for people to interact. This rule serves as a guide in doing things that are allowed and not allowed to be done as an effort to create order and security³. Law is a social controller that also provides a way to resolve it on the basis of policies based on norms that live in society. Indonesian

society consists of various tribes that also have different local wisdom and customs. In customary law communities (MHA) they still uphold the values and norms that have been agreed upon for a long time. However, the culture of indigenous peoples that is oriented towards the balance of nature is often in conflict with government policies that are explorative of natural resources such as mining and logging. Indigenous peoples in general emphasize economic activities that do not pollute the environment such as farming, hunting, gardening and so on⁴.

Based on the constitutional mandate contained in Article 33 Paragraph (3) that land is controlled by the state which is used for the prosperity of the people. In its management, land can be controlled individually or jointly within a customary law community known as ulayat rights. By law, customary rights are reinforced in Article 18 paragraph 2 which states that the state recognizes and respects the unity of customary law communities 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

¹ Adonia Ivone Laturette, Penyelesaian Sengketa Hak Ulayat Pada Kawasan Hutan, Jurnal SASI Vol. 27 No. 1, 2021, p. 103

² Halida Zia. Eksistensi Hukum Adat Dalam Penyelesaian Sengketa Tanahulayat Di Indonesia. *DATIN LAW JURNAL*, Vol. 2 No. (1), 2021, p. 23

³ Didiék R. Mawardi, Fungsi Hukum dalam Kehidupan Masyarakat. *Masalah-Masalah Hukum*, Vol. 44 No. 3, 2015. p. 275

⁴ Yusuf Salamat, Pengaturan Mengenai Hak Atas Tanah Masyarakat Hukum Adat (Studi Kasus Pengakuan Terhadap Hak Atas Tanah Masyarakat Hukum Adat Dayak Di Kalimantan Tengah). *Jurnal Legislasi Indonesia*, 13(04), 2016. p. 411

of the Republic of Indonesia as regulated by law.

Article 2 paragraph (4) of the Basic Agrarian Law (UUPA) states that the right to control from the state can be delegated to the independent regions and customary law communities if necessary and does not conflict with national interests. UUPA recognizes the existence of customary rights that must be accompanied by two conditions, namely regarding their existence and implementation. The existence of ulayat rights is recognized if, in reality, the customary law community still exists. If it exists, its implementation must not conflict with national law.

Historically, government policies on land and forest utilization to increase state revenues have a tendency to be based on the policies of the Dutch East Indies colonial government⁵. In reality, there is currently a clash between customary law and positive law. This is further complicated by the fact that politically Indonesia consists of several regions with different customary land ownership laws. This creates a conflict between law, politics and culture that should run harmoniously.

Currently, conflict resolution involving customary land is not explicitly stated in the applicable laws. Based on Article 3 of the UUPA, the concept of rights gives rise to new rights in the form of a communal concept, namely joint ownership of an undivided community. This concept is far different from the Dutch legal concept of *Mede Eigenaar* or shared property that can be divided, which is in line with the concept of *Burgelik Wetboek (BW)* or the Civil Code which is generally individual.

METHODOLOGY

The research method used is normative legal research which focuses on analyzing applicable legal texts. This is done to develop an understanding of the norms, principles and concepts of law that apply to a society or legal system. Data collection is done by collecting

⁵ Mohd. Yunus. Konflik pertanahan dan penyelesaiannya menurut adat di Provinsi Riau. *Menara Riau*, 12(1), 2013, p. 23

regulations, documents and legal literature relevant to the research study.

RESULTS AND DISCUSSION

Dynamics of Land Position in Customary Law and National Law

National Land Law is formulated based on Customary Law on land as outlined in the Basic Agrarian Law or Law No. 5 of 1960. Customary law has subjective rights to land from all members of the customary community. According to Ter Haar (1999), subjective rights depend on the intensity of the relationship between the person concerned and the land⁶. The concept that forms the basis of National Land Law is the concept of Customary Law, namely: religious communalism that provides opportunities for individual land ownership, with land rights that are private, while having an element of togetherness⁷.

The religious communalistic nature of the concept of National Land Law is contained in Article 1 paragraph (2) which states that: "all the earth, water and airspace of the Indonesian nation, as a gift of God Almighty, is the earth, water and airspace of the Indonesian nation and is national wealth". Based on this article, it can be stated that the Customary Law of Ulayat Land is the common land of the entire customary law community concerned, so in the development of the National Land Law, all land in the unitary state of Indonesia is the common land of the Indonesian people⁸.

The enactment of customary law as the basis of national agrarian law is in accordance with the explanation of the preamble in the

⁶ Setyo Utomo. Nilai-Nilai Kearifan Lokal Hukum Adat dalam Hukum Tanah Nasional. *Jurnal Hukum Media Bhakti*, 2018, p. 14

⁷ Halida Zia, Eksistensi Hukum Adat Dalam Penyelesaian Sengketa Tanahulayat Di Indonesia. *DATIN LAW JURNAL*, 2(1), 2021, p. 26.

⁸ Yosep Hadi Putra & Nessa, F. F, Tinjauan Yuridis Tentang Kedudukan Hukum Adat dalam Perkembangan Hukum Agraria Nasional. *Journal Review of Justisia*, 1(1), 2019, p. 69

UUPA. In detail, UUPA customary law is also explained in several articles including⁹:

- a. General Elucidation Number III (1)
- b. Article 5
- c. Explanation of article 5;
- d. Explanation of article 6;
- e. Elucidation of article 16;
- f. Article 56 and indirectly also in;
- g. Article 58.

In essence, customary rights are joint ownership of the same legal community. Customary land is a legacy of ancestors or a gift given by supernatural beings that indigenous people believe in sustaining past, present and future lives¹⁰. The enactment of the UUPA has changed customary land in Indonesia. These changes can be seen from customary rights, buying and selling land, and so on. Despite the changes, customary rights are still recognized as stated in Article 3 of the UUPA which states:

“In view of the provisions of Articles 1 and 2, the implementation of *hak ulayat* and similar rights of customary law communities, to the extent that they still exist in reality, shall be in such a way that it is in accordance with the national and State interests, which are based on national unity, and shall not conflict with laws and other higher regulations.”

This article recognizes customary rights and other rights of indigenous peoples as long as they meet several conditions, including reality requirements and ideality requirements. The reality requirement is that customary law is still alive and in accordance with the development of society; and in accordance with the principles of the Unitary State of the Republic of Indonesia and its validity is regulated by law¹¹. Customary law as a source in the development of National Land Law

began to be collaborated with several new institutions including¹²

1. Land Registration

Land rights that previously had no proof of ownership began to be issued certificates for proof of land ownership. Transfer of rights, such as sale and purchase, exchange and grant must be registered with the Land Office. The process of buying and selling land has also undergone modernization and adjustment based on customary law and buying and selling based on the UUPA. According to customary law, land sale and purchase is an act of transferring land rights that is clear and cash. When viewed from customary law, the sale and purchase of land is classified in the law of objects, specifically fixed objects, this is on the basis of¹³

- a. Sale and purchase of land referring to customary law does not constitute a contract, so the parties are not obliged to carry out the sale and purchase;
- b. Sale and purchase does not create rights and obligations, there is only a transfer of rights and obligations over land.

In terms of the UUPA, the only mention of sale and purchase is in Article 26, which concerns the sale and purchase of land ownership rights. The UUPA does not clearly explain the meaning of sale and purchase. Article 5 of the UUPA states that National Land Law is Customary Law, based on this, the concept of National Land Law refers to the concepts, principles, legal institutions and systems of customary law¹⁴. The customary law referred to in Article 5 of the UUPA is customary law that has been adjusted or refined and eliminated its regional nature so that it is national in nature. The definition of land sale

¹² Boedi Harsono. *Hukum Agraria Indonesia: Sejarah Pembentukan Undang-Undang Pokok Agraria, Isi dan Pelaksanaannya. Edisi Revisi*. Cetakan 10. (Jakarta: Djambatan, 2005), p. 209-211.

¹³ Soerjono Soekanto, *Hukum Adat Indonesia*, (Jakarta: Rajawali, 1983), p. 211.

¹⁴ Yosep, *Op.Cit.*, p. 72

⁹ *Ibid.*, p. 68

¹⁰ Setyo, *Op.Cit.*, p. 14

¹¹ Zia, *Op.Cit.*, p. 26

and purchase in reference to customary law is a transfer of rights that is cash, real and clear¹⁵.

Referring to this, the government enacted Government Regulation No. 10/1961 on Land Registration, now Government Regulation No. 24/1997. In this regulation, the sale and purchase must be carried out by the parties before a PPAT who is in charge of making the deed. This implementation will fulfill the requirement of clarity (not hidden). The deed signed by the parties also proves the transfer of the seller's rights to the buyer with payment. This fulfills the cash requirement, which shows the reality or real action of the sale and purchase law. PPAT is exclusive, so that the parties to the legal action concerned and their heirs.

a. Mortgage Rights

The Mortgage Right institution is a land security right for modern credit services. In the event of a debt and credit relationship between members of the indigenous community, a different institution is used than land security rights for credit through banking institutions. This institution is experiencing rapid development, due to the demands of the growing economy that requires funds in an effort to drive the country's economy.

b. Cultivation Rights, Building Rights and Management Rights

Customary law does not contain Cultivation Rights, Building Rights and Management Rights. This right is needed to meet the needs of the times for modern communities in a rural context. These rights are not the erfpach and opsal rights of Western Land Law but the land tenure rights of National Land Law. In addition to these rights, rights that are registered but are not property rights in Western Law are called Zakelijk. Such registration does not change the National Land Law but is intended as a strong means of proof.

Effective Strategies in Harmonizing Customary Law and Modern Law in Land Dispute Resolution

Normatively, the emergence of land disputes is caused by welfare issues, which

usually arise in locations where people are not economically prosperous. These disputes are usually caused by the absence of proof of ownership which makes them limited in exploring land resources. In recent years, land disputes have become increasingly prevalent between communities, governments, investors, and between communities and governments. In general, these problems are caused by land acquisition in the interests of infrastructure development, industry, housing, tourism or plantations that require large areas of land.

Reconstruction of the non-litigation model is needed in resolving disputes outside the judiciary through mediation. This model restores harmony in socio-culture, this can be done with several conditions¹⁶

- a. Establish institutions that function as mediators and facilitators, which aim to act as advisors in reducing tensions. Mediators and facilitators come from the customary elders. Mediators must act objectively, wisely and neutrally.
- b. Establish a reconciliation institution drawn from state or customary law institutions.
- c. There is collaborative cooperation between the state, indigenous peoples and religious leaders that is oriented towards the interests of the community, not just upholding one group or political interests.

The advantages of using mediation are short time, low cost and simple procedures. According to Hamzah (2014) this is in line with the principles of simple, fast and low cost justice in providing legal protection and legal certainty for justice seekers¹⁷. Another

¹⁶ Maya, H.I (2018). Kajian Atas Asas Peradilan Cepat, Sederhana, Dan Biaya Ringan Terhadap Pemenuhan Hak Pencari Keadilan (Studi Putusan Mahkamah Agung Nomor 246 K/Pid/2017), p. 213

¹⁷ Elsrowit, E.T.G, Bernadio M.O, Mariani, I. J. J, Claudia, H. L., Michael, A. S., Servasius, S.S., Stefanus, D.R. Penyelesaian Sengketa Tanah Adat Dalam Perspektif Kearifan Lokal Pada Masyarakat Ngadhu-Bhaga, Kabupaten Ngada-

¹⁵ *Ibid.*,

alternative that can be used is local wisdom-based customary land dispute resolution. Dispute resolution based on local wisdom is an alternative model that can restore the needs of justice in the community, based on the norms and values that live in the community. Customary law court is a traditional judicial system that exists in some ethnic groups or communities. Historically, customary law is still relevant in the national legal system¹⁸. There are still many Indonesians who use customary law as a guideline in doing activities and solving several problems.

CONCLUSION

The Basic Agrarian Law provides facilities for indigenous peoples to have joint or individual ownership rights that can be proven under national law. However, this can sometimes lead to prolonged conflict if indigenous peoples do not have title deeds. This will lead to disputes if there is exploration of land resources. The results of the above analysis can be stated that there is a need for legal reform in facilitating justice seekers. Settlement of land disputes in rural areas which are generally indigenous communities must consider the values and norms that live in the community. This will fulfill the sense of justice so that it does not lead to other conflicts.

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¹⁸ Beta Rahmasari, Ariza Umami, & Tirta Gautama, T. Pengaruh Hukum Adat dalam Pengaturan Pemerintahan Desa: Perspektif Normatif. *Muhammadiyah Law Review*, 7(2), 2023, p. 65

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