

## Ulayat Rights on Presepective Customary Law

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### Abstract

The implementation of Customary Law in Customary Law is increasingly critical, in the phenomenon of customary law, Ulayat Rights as stipulated in the UUPA Article 3 states "customary rights and similar rights and rights of indigenous and tribal peoples are still implemented by indigenous and tribal peoples as long as the ulayat right is still there. In this article more clearly it is said that the existence of customary rights still exists if its ulayat rights still exist. But it becomes critical because the existence of UUPA in this case is not as strong as the Constitution which became the basis of the State of Indonesia. The law says that the recognition of customary rights is limited to the ulayat

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right that is still in tune with the development of the era and civilization as Article 28I of the 1945 Constitution.

**Keywords:** Customary Law, Existence of Ulayat Rights, Limitations of the 1945 Constitution

## A. Introduction

Ulayat right is the ultimate right of mastery of customary law community covering all the land as well as belonging in certain area environment. Currently, development is very high and raises concerns especially among indigenous people. These concerns arise because of the increasing need for land for development purposes so that the existence of Ulayat Rights is increasingly urged and gradually the customary law community also becomes eliminated. Seeing this very concerned condition, Ulayat right needs to be maintained and get more special attention from Local Government. Prior to the enactment of the Basic Agrarian Law (UUPA) as a result of the Dutch East Indies Government's politics, the prevailing Law of Land in Indonesia was dualistic. As a result of these dualistic laws, various institutions of land rights arising from Western Law and Customary Law. The right to land derived from Customary Law is an Ulayat Right. According to Boedi Harsono, "Ulayat Right is a series of authorities and obligations of a Customary Law, which relate to land located within its territory, which is the main supporter of livelihood including Public Law, in the form of the duty of authority to manage, manage and lead its designation, use and maintenance"

The 1945 Constitution recognizes the existence of Ulayat Rights. In Article 18B paragraph (2) it is stipulated that "The State recognizes and respects the communal units of Traditional Law along with their traditional rights as long as it is alive and in accordance with the development of society and the principle of the Unitary State of the Republic of Indonesia, as governed by law".

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What is meant by traditional rights is customary rights owned by customary law community. In Article 33 paragraph (3) it is determined that "Earth and water and natural resources contained therein are controlled by the State and used for the greatest prosperity of the people ", the natural wealth contained therein is a land which ultimately has a relationship with the Ulayat Right. Based on Article 18 B Paragraph (2) and Article 33 Paragraph (3) of the 1945 Constitution, it can be concluded that the Ulayat Right in the case of its existence is recognized by the State by listing two articles which do not directly clarify the existence of Ulayat Right therefore according to Article 33 paragraph (3) established Law Number 5 of 1960 on Basic Regulations of Agrarian Principles, hereinafter referred to as BAL. Prior to the adoption of the LoGA, Hak Ulayat is subject to local customary law. Ulayat right in juridical technical terms is an inherent right as a distinctive compensation to the Customary Law community, namely rights relating to land within its territory which is the main livelihood link of the community concerned. Objects of Ulayat Rights include:

1. Land (land)
2. Water (waters) such as times, lakes, beaches along with
3. its waters
4. Wild vegetation (trees, fruits, trees or firewood, etc.)
5. Animals living in an ulayat environment (wild life, free in the forest).

Land, water, vegetation, and animals living in the ulayat environment are the four elements which state that ulayat rights exist or live within the adat law community remains within the territory or community of customary law. Article 18B Paragraph (2) of the 1945 Constitution provides that "The State recognizes and respects the communal units of Traditional Law along with traditional rights as long as it is alive and in accordance with the development of society and the principle of the Unitary State of the Republic of Indonesia, as governed by the law". The 1945 Constitution clearly recognizes the existence of Indigenous and Traditional community communities in it. The existence of customary law community and traditional rights in question is customary rights owned by customary law community. After the entry into force of the LoGA in the Ulayat Right which is said as long as its existence is alive and as

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long as it is not contrary to the interests of Nasioanl as well as the interests of the State, which means that if the Ulayat Rights that have died can not be revived or that none can not be held, see BAL was formed on 24 September 1960, anything that existed before the establishment of the LoGA did not take effect in the year after enactment of BAL. In Article 3 of the LoGA it is determined that: "The exercise of customary rights and similar rights from customary law communities, insofar as they still exist, shall be such that in accordance with the national and state interests, based on national unity and may be contrary to other laws and regulations higher ". Under Article 3 of the UUPA Hak Ulayat is recognized with two conditions, namely the existence and implementation. Hak Ulayat is acknowledged its existence when, in reality, within certain community groups certain customary law still exists. If it still exists, the implementation of the Ulayat Right shall be such that it is in accordance with the national and state interests, based on national unity.

## **B. Research Mehtod**

Related to ulayat land of Basic Agrarian Law

set forth in chapter 3 says that by remembering the provisions in Article 1 and Article 2, namely the implementation of customary rights and such rights from customary law communities as long as in reality there still exists to be such a way so in accordance with the national interest and that State based on the unity of the nation and should not be in conflict with

laws and other regulations. Observing this on the one hand there is recognition of the existence of law customs that prevail as a norm born and grow from society, while meeting the development of a modernizationcommunity. But on the other hand there are actually restrictions by law land, because it better represents the interests of rulers and entrepreneurs, The People's Consultative Assembly considers it necessary to do soreview of natural resource management with based on the principles of decentralization as well as respect for rights of indigenous peoples.

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And on the RPJMN (Long Development Plan) Menengah nasional 2004-2009 through Presidential Regulation No.7 Tahun 2005 jo.Presidential Regulation No.39 of 2005 on the Work Plan Government (RKP) Year 2006, set policy direction development of the legal system development and political field of Indonesia by respecting and strengthening local wisdom and customary law to enrich the national legal system.<sup>5</sup>

In line with the above recognition of the rights of indigenous peoples and access to natural resources (land) is also recognized This can be seen in the ILO convention (International Labor Organization) No.169 concerning indigenous peoples and peoples

customs in independent States which entered into force on 5 September 1991, stipulates that governments are obliged to respect culture and the spiritual values of indigenous peoples held in high esteem in relationships those with the land (land) they occupy or use.

## C. Result & Discussion

### 1. Defenition of Ulayat Rights

The definition of ulayat rights can be seen in Article 3 of the Basic Agrarian Law which stipulates that "customary rights and similar rights of indigenous and tribal peoples" can still be carried out by the indigenous peoples concerned as long as the ulayat " there is".

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In the Decree of the Minister of Agrarian Affairs / Head of BPN No.5 of 1999, Article (1) expressly stipulates that:

"ulayat rights is an authority which according to customary law belongs to by a particular customary law community over a particular area which is the living environment of its citizens to taking advantage of natural resources, including land in the region for survival and his life, which is related to outward relationships and inwardly hereditary and uninterrupted intermediate the customary law community with the territory concerned.

The above provisions indicate that ulayat rights must be true is still there and is not given a chance to revive these rights, if factually in society are gone again. The existence of ulayat rights should be followed by the relationship between the land and society.

Thus, as long as the ulayat land exists should be utilized by the community to improve welfare. The land in question is the land above it there are ulayat rights and have a close relationship between the land with customary law community. While the intended community is a group of people bound by their customary law as citizens together with a legal partnership because of the similarity of residence or because the offspring are known by various names of each region.

The customary rights and similar rights of indigenous and tribal peoples are defined as "an authority which, according to customary law, belongs to a particular customary law community over a particular area which is the environment of its citizens to benefit from natural resources, including land,

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within the territory for its survival and life, arising from the outward and inner inner and uninterrupted relation between the customary law community and the territory concerned ".

Ulayat Rights, known in the Customary Law literature and among indigenous and tribal peoples in different regions known under different names, is the ultimate right of dominion over land under customary law, which includes all lands belonging to the territory of a customary law community certain, which is a land belonging to its citizens. The ulayat right contains two elements. The first element is the element of civil law, namely as a right to belong with the customary law community concerned to ulayat land, believed to originate originally as a relic of their ancestors and is a gift of supernatural powers, as the main supporters of life and livelihood and the environment the entire community of customary law. The second element is the element of public law, namely as the authority to manage and regulate the designation, use and control of communal land, whether in internal relations with its own citizens or externally with non-residents or "outsiders".

The subject of this ulayat right is a community of customary law, which is a legal partnership based on a residential (territorial) similarity, or based on a genealogical heritage, known by a variety of distinctive names in the area concerned, such as tribe, clan, , hamlet, nagari and so on. If there is any person who seems to be the subject of ulayat right then that person is the adat leader or elder who obtains the delegation of authority from the customary law community concerned according to the provisions of customary law. It is not the subject of customary rights, but the officers of indigenous and tribal peoples in exercising the authority concerned with customary rights.

Regarding the criteria and determination of the existence of ulayat rights signs that need to be examined to determine the existence of ulayat right includes 3 elements, namely:

- a. The element of indigenous peoples, namely the presence of a group of people who still feel bound by their customary law order as citizens with a certain legal partnership, which recognizes and applies the terms of the fellowship in daily life.



- b. The element of the territory, that is, the existence of certain ulayat lands which become the environment of the citizens of the legal community and where they take their daily necessities, and.
- c. The element of the relationship between the community and its territory, namely the existence of the customary law system governing the handling, control and use of customary land that is still valid and adhered by the citizens of law alliance.

## **2. Basic Law of Communal Rights**

As mentioned in Article 33 paragraph (3) of the 1945 Constitution of the State of the Republic of Indonesia (hereinafter abbreviated to the 1945 Constitution) that "the earth and the water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people". The 1945 Constitution does not mention the land but the earth. Regarding the meaning of this earth there is no further explanation. According to Article 1 Paragraph (3) of the BAL, "The relationship between the Indonesian nation and the earth, water and space is an eternal relationship".

Regarding the earth is regulated in the LoGA, as Article 1 paragraph (1) and paragraph (2), that the entire territory of Indonesia is the unity of the homeland of all the people of Indonesia, which united as the nation of Indonesia. The whole earth, water and space, including the riches contained in it within the territory of the Republic of Indonesia as a Gift of God Almighty is the earth, water and space of the Indonesian nation and is a national treasure. This means that in Indonesia, the definition of land is used in a juridical sense as a definition that has been restricted in Article 4 paragraph (1) of the Basic Agrarian Law, the basis of the right of control of the state only the surface of the earth, called the land, which can be given to and possessed by persons people, either alone or together with other persons and legal entities.

After Indonesia became independent and lasted until the enactment of Law No. 5 of 1960 on Basic Regulations of Agrarian Principles, keeping in mind the importance of land in life, long before the enactment of UUPA has been known system of mastery of natural resources in various regions of Indonesia



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known as ulayat . Although not explicitly explained about the understanding of customary rights but from various opinions of experts, ulayat right is a recognition / belonging to all members of society and there is also the existence of individual rights which means that individuals may own land in an ulayat right the.

When examined by the opinions given by the experts above, there is a common opinion about customary law, that is in customary law contained legal rules governing the lives of the Indonesian people in unwritten form and have legal consequences.

In indigenous and tribal societies, land is important, because by its very nature the land is the only thing of wealth which, though under any circumstances, remains permanent in its state, and sometimes becomes more profitable. Due to the fact that it is the dwelling of fellowship, giving life to fellowship, it is the place where the fellowship of the dead who is dead is buried and is also the residence of the lords of the protection of the fellowship and the spirit of the fellows' ancestors.

Thus it can be understood that customary rights are not explicitly explained about the existence of legal basis or regulating rules, but customary rights are recognized by the Law and their application refers to the Basic Agrarian Law as well as the prevailing customary law.

### **3. Position of Ulayat Rights**

Basically, the ulayat right of existence in UUPA is already recognized, but the recognition is still followed by certain conditions, namely: "existence" and about its executor. Therefore, ulayat rights can be recognized as long as the reality still exists. The point is that in areas where the right no longer exists, it will not be revived.

The implementation of customary rights in the LoGA is regulated in article 3 which reads as follows: "The implementation of customary rights shall be such that in accordance with the national and state interests, based on the unity of the nation and not contrary to the law and other regulations which higher. In accordance with what is described in the general explanation (Figure H / 3)

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here it is also affirmed that the interests of a society must be subject to the higher and wider national and state interests ".

Therefore, the exercise of ulayat rights is absolute, ie as if the members of the community themselves are entitled to the land of that territory, and as if only in the designation of the customary law community itself. It is thus the attitude which UUPA deems to be contradictory, in accordance with the principles set forth in chapters 1 and 2.

In the UUPA and national land laws, the customary rights are not abolished, but also will not regulate them, in the sense that regulating customary rights can result in perpetuating or preserving its existence. Since ulayat rights ultimately abolish themselves by natural processes, namely by the strengthening of individual rights within the relevant customary law communities (elucidations 85 and 106 E).

#### **4. The Process Occupies Rights**

The occurrence of property rights can be through 3 ways, among others:

a. According to customary law

Land ownership rights occur by land clearance (clearing). This means that the clearing of the land (forest) is carried out jointly with the customary law community led by the adat chief through the cultivation system, ie, sirah matah, sirir mud loops, and the bluburan system or occurs due to the emergence of "ground tongue" (aanslibbing). Ground tongue is a land that arises due to the blocking of river currents or land on the edge of the coast, usually from the mud that grew higher and hardened. In customary law, the not so wide tongue of land is the right of the bounded landowner. Such property may be registered at the local district / municipal office of land to obtain a certificate of ownership.

b. Government determination

The land ownership rights are due to the application of land ownership (originally from state land) by the applicant by fulfilling the procedures and requirements determined by the National Land Agency (BPN). Once all is met, BPN issues a Decree on Granting Rights (SKPII). The SKPH shall be registered

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by the applicant to the head of the local district / municipal office of land to be recorded in the land book and issued as a title certificate of title to the land.

c. Terms of Law

Occupancy of the land is based on conversion (change) according to UUPA. Since the entry into force of the UUPA, all existing land rights must be converted into one of the land rights regulated in the

## 5. Arrangement of Land Tenure Rights

In each law of the land there are arrangements concerning the various rights of land ownership.

In the UUPA for example regulated and simultaneously set the hierarchy of rules or hierarchy of land ownership rights in our National Land Law, Namely:

### 1. Rights of the Indonesian Nation over land

This right is the highest land title and covers all the land in the territory of the State, which is a common land, is immutable and is the mother of other land tenure rights. this arrangement is contained in Article 1 paragraph (1) - (3) of the UUPA.

The right of the Indonesian Nation to the land has a communal character, meaning that all the land in the territory of the Republic of Indonesia is a land with the people of Indonesia, which has united as the Indonesian Nation (Article 1 Paragraph (1) UUPA). it also has a religious nature, meaning that all the land in the territory of NKRI is a gift of God Almighty (Article 1 paragraph (2) UUPA). The relationship between the Indonesian nation and the land is eternal, atinya as long as the people of Indonesia are still united as the Nation of Indonesia and as long as the land is still there, under no circumstances there is any power that will be able to decide or negate the relationship (Article 1 paragraph (3)).

### 2. Right of control of the State of the Land

This right derives from the right of the Indonesian people to the land, which is essentially an assignment of the duties of the authority of the nation which contains the public law. The task of managing all the land together is

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fully authorized to the Unitary State of the Republic of Indonesia as an organization of the power of the whole people (Article 2 paragraph (1) of UUPA).

The contents of the authority of the right of control of the State of Land as contained in Article 2 Paragraph (2) of the UUPA are:

- a. Arranging and organizing land use, use, inventory and maintenance.
- b. Determining and regulating legal relationships between people and the land.
- c. Define and regulate the legal relationships between persons and legal acts that concern the land.

### 3. Ulayat right of customary law

This right is regulated in Article 3 of the BAL. The right to customary rights of customary law communities is a set of powers and obligations of an adat law community, which relates to land situated within its territory.

According to Boedi Harsono, the customary rights of customary law community is still valid if fulfilling 3 elements, namely:

- a. There is still a group of people as citizens of a particular adat law community, which is a customary law society.
- b. There is still a territory which is the customary law community ulayat, which is realized as belonging with the citizens.
- c. There are still traditional rulers who, in fact, are admitted by indigenous peoples concerned, carrying out their daily activities as implementers of ulayat rights.
- d. Land rights

This right is one of the land rights. Rights of the landowner is a right that authorizes the holder of the right (individual, group of persons together, legal entity) to use, in the sense of mastering, using and or benefiting from certain parcels of land. The legal basis is Article 4 paragraph (1) of UUPA.

Individual rights to land in the form of land rights (Articles 16 and 53 of the UUPA), land ownership rights (Article 49 paragraph (3) UUPA), mortgages

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or land rights (Article 25, 33, 39 and 51 UUPA) belonging to the apartment unit (Article 4 paragraph (1) of UUPA).

Although varying, land tenure contains a set of powers, obligations and / or restrictions on the right holder to do anything about the land being abandoned. something that may, shall or may be prohibited to do, constitutes the content of the controlling right that becomes the criterion or the benchmark of the distinction between the tenure rights of the land governed by the law of the land.

## **6. Land Rights as Legal Institution and Concrete Legal Relationship**

The regulation of land tenure rights in land law exists as a legal entity, and others as concrete legal relations.

Land tenure as a legal entity is the right of land ownership that has not been linked to land and certain person or legal entity as its right holder. For example, it can be called Hak Milik, Hak Guna Usaha, Hak Guna Bangunan, Hak Pakai, Hak Sewa for the buildings mentioned in Article 20 to 45 UUPA.

The provisions of the Land Law which regulates the rights of land ownership as a legal institution are:

1. Give a name to the control of the rights concerned
2. Determine the contents, which is to arrange what is allowed, compulsory or prohibited to be done by the rights holder and the period of his mastery
3. Set things about the subject, who can be the holder of his rights and the conditions for his mastery
4. Organize things about the land.

Land tenure as a concrete legal relationship is the right of control over land which has been connected with certain land as its object and certain person or legal entity as the subject or its right holder. An example may be the rights to land mentioned in the provisions of UUPA conversion.

The provisions of the Land Law that govern land rights as a concrete legal relationship are:

1. Organize matters concerning its creation into a concrete legal relationship, with the name or title of certain land tenure
2. Arranging matters concerning their imposition with other rights
3. Organize matters concerning his dissection to other parties
4. Set things about delete it
5. Set things about the proof

## D. Conclusions

According to the UUPA recognizes the existence of customary rights as Article 3 UUPA. Land recognition is a matter that is protected in accordance with the meaning of Article 18 B Paragraph (2) of the 1945 Constitution, that the State recognizes and respects the unity of indigenous and tribal peoples as well as its traditional rights as long as it is alive and in accordance with the development of society and principles The Unitary State of the Republic of Indonesia, but the recognition of customary rights is limited namely the ulayat right that is still in tune with the development of the era and civilization as Article 28 I of the 1945 Constitution and is not listed.

Forms of legal protection if necessary for the public interest as Pasal 18 UUPA, the community ulayat rights holders are given a replacement in the form of construction of public facilities or other forms of benefit to local people in accordance with Article 14 of Presidential Regulation no. 36 of 2005 which has been amended by Presidential Regulation no. 65 of 2006, which is used for the benefit of all ulayat right holders of the land. The 1945 Constitution recognizes the existence of Ulayat Rights. In Article 18B paragraph (2) it is stipulated that "The State recognizes and respects the communal units of Traditional Law along with their traditional rights as long as it is alive and in accordance with the development of society and the principle of the Unitary State of the Republic of Indonesia, as governed by law". What is meant by traditional rights is customary rights owned by customary law community. In Article 33 paragraph (3) it is determined that "Earth and water and natural resources contained therein are controlled by the State and used for the greatest

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