

RELATIONAL DYNAMICS OF STATE LAW AND CUSTOMARY LAW: A STUDY OF THE ULAYAT LAND RIGHTS RECOGNITION

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ABSTRACT

The recognition of *ulayat* rights is essential in fulfilling indigenous people's rights. However, the Indonesian government has not fully recognized their rights. This research aims at analyzing the recognition of *ulayat* right from the Dutch colonial, reformation to the Job Creation Law periods. This is doctrinal legal research focusing on relevant literature. Data are analyzed qualitatively. The research shows that during the Dutch occupation, it is ruled in *Agrarisch Wet 1870* followed by *Agrarisch Bestluit* regulating all lands without provable rights belonging to the state (*domein verklaring*). Post Indonesia's independence, Basic Agrarian Law eliminates the Domain Principle and replaces it with State Authoritative Right under Article 33 paragraph (3) of Indonesia's Constitution. Nowadays, *ulayat* rights are conditionally recognizable, known as pseudo-recognition. The recognition of indigenous people in the reformation era and post-enactment of the Job Creation Law is too minimal and it strengthens the state's right over the land.

Keywords: Recognition, *Ulayat* Right, State Law, Customary Law.

A. Introduction

The presence of *ulayat* (customary) lands is crucial for human life, as humans cannot be separated from the land from birth to death. Although it is vital for everyone, people have diverse perspectives on land. For eastern people, land has a greater magical-religious significance; it is a gift from God that must be cherished. In contrast, Westerners view land more as an economic commodity. There are still indigenous people living in the area as hunters and gatherers and practicing rotary agriculture. On

the territory of a customary society, land with collective ownership is referred to as *ulayat* rights, as opposed to land with an individual right of ownership. It can be used for agriculture, plantations, farming, cemeteries, swimming pools, rivers, and forests.

However, the existence of *ulayat* right to land, particularly in the form of customary forest, recently is getting eroded by various government policies that neglect the existence of the *ulayat* rights. Law Number 41, 1999 on Forestry determines customary forest as state forest. At other levels of implementation, the Ministry of Forestry with the policy of the Consensus Forest Land Use Plan determines approximately 133.7 hectares of Indonesian lands as forest area. The claim as a state forest is aimed to facilitate the government in order to get funding from granting permission in relation to forest use. Recently, the permissions to use forests are mostly used for palm oil plantation and mining (Mehring et al., 2011).

The policy has widespread conflicts between the Customary Law Society (later called MHA) and capital owners, State Owned Companies, and the government. Besides, some conflicts are getting worse with the problems of the rent of *ulayat* right at the time of Dutch colonialism, which is unfinished after the independence of the Republic of Indonesia. Recently, it is difficult to confirm how many conflicts regarding *ulayat* rights (Akmad Nulhaqim et al., 2019). The data from the National Commission of Human Rights shows that the institution, from 2012 to 2014, has received 3470 reports of agrarian cases including those involving indigenous people. The data from the Alliance of Nusantara Customary Society (AMAN) stated that until the end of 2020, at least there were 40 cases of violence and criminalization in the territory of customary society which involve 39.069 indigenous people and the width of the conflict area is 31.632,67 hectares ((AMAN), 2021). The continuous conflicts seem without government protection, have caused indigenous people who have lived on subsistence to be poorer. Based on UNDP data in 2017, 10 to 15% of the indigenous population

are categorized as poor and very poor. Even, indigenous people's poverty can be categorized as extreme poverty (Akmad Nulhaqim et al., 2019).

The provision of regional autonomy by the central government to the regional governments to oversee land and investment administration cannot be anticipated to reduce poverty in MHA, and may even exacerbate it. (Mietzner, 2007). The people of the Dayak Benuaq tribe in West Kutai District showed the stagnancy of poverty at a higher level than before the decentralization era (Sumarto, 2005). In addition, other researcher finds that poverty is not only caused by reduced natural resources but also because of the marginalization of MHA's various aspects of life as the consequence of modernization hegemony (Afiff et al., 2007).

Based on the aforementioned data and facts, it shows that the marginalization against MHA is mostly caused by the government's policies through the laws in favor of capital owners. Concerning the issue, the causes of tenurial conflicts (land ownership) are the presence of the dominance of an ownership system based on a state law providing great services to capital owners. Meanwhile, the rights of local people are simply ignored and violated (Suryani, 2016). In normative juridical, the recognition of the lands of *ulayat* right of customary law society appears in several laws. After independence, the existence of customary law society is acknowledged in the Explanation of Article 18 of the 1945 Constitution. Then, in the second amendment of the 1945 Constitution, the recognition of the existence of customary law society and their traditional rights are affirmed in Article 18 B paragraph (2). In specific, *ulayat* rights are recognized in Article 3 of Law Number 5, 1960 on Agrarian Law (later called UUPA) and other sectoral laws.

There are many laws recognizing the existence of MHA, but in quality, the recognition given seems inadequate and does not provide the assurance of recognition and protection for MHA. The government indeed recognizes the rights of customary society, but until recently the recognition of customary society has not run well since

the laws are still overlapping. Consequently, there is a vacuum of law that protects the rights of customary society (Hadiprayitno, 2017).

The relationship between the state and customary law society particularly referring to *ulayat* rights to land is in confusing condition or there is still ambivalence. The ambiguity of the government's recognition of *ulayat* rights is shown in various laws. On one side, it recognizes the existence of *ulayat* rights, but on the other side, both explicitly (e.g. in Forestry Law that determines customary forest as part of state forest) and implicitly, it negates *ulayat* rights through the requirements determined unilaterally by the government. This ambivalence is from the doctrine of State Authoritative Rights (later called HMN) which is worded under Article 2 of Agrarian Law based on Article 33 paragraph (3) of the 1945 Constitution interpreted differently between the lawmakers and executives causing land conflict.

The novelty of this article is the legal policy of indigenous people's recognition from the colonial, the beginning of Indonesian independence marked by Basic Agrarian Law, in the reformation and Law Number 11, 2020 on Job Creation Law eras. This article is different from Penelope Anthias' article (2021) which analyzes the difference in the conception of land titles and territory of indigenous people. This article does not specifically analyze the legal policy of indigenous people recognition (Anthias, 2021). Another compared article is Joel E Correia's (2021) which discusses specifically recognition of Xaioa Kamosek indigenous people's land. The object of recognition is very specific meanwhile this article analyzes the recognition of indigenous people's rights in a very wide scope (Correia, 2021). Other Kamaljit K Sangha et.al. (2019) focus on minimum recognition of indigenous people and financial aid for indigenous people which obstacle implementation of conservation (Sangha et al., 2019). This article wants to explain the legal policy of state recognition of *ulayat* rights from the time of Dutch occupation and the beginning of Indonesia's independence as well as the

legal policy of indigenous people recognition in reformation and enactment of job creation law

This is normative legal research that conceptualizes the law as regulation. Based on such conception, which uses statute, historical and conceptual approaches at the same time. Those approaches are used not only to explain the legal policy on the recognition of indigenous rights chronologically but also to evaluate the policy. In doing this research we use secondary data which consists of primary, secondary, and tertiary legal material. Then, those materials are analyzed based on content analysis, starting with coding and ending with conclusion-making.

C. Research Outcome and Discussion

1. The Recognition of *Ulayat* Right in the Dutch Colonialization and the Beginning of Indonesian Independence

The dynamics of state recognition would be described historically from the time of Dutch occupation to the present by focusing on the forms of recognition and the background or motive of recognition. The historical approach was conducted because of three things; i.e., without history, we will never exist, history continues along with life, and from history, we learn how to view mistakes and try to improve them in the future (Hunt, 2011). In the discussion, the process of how *ulayat* rights occur, the definition of *ulayat* rights, and their recognition would be presented.

There are only a few references discussing the process of how *ulayat* rights occurred, such as the writing of Van Setten Van der Meer that, in Majapahit Kingdom time, the organization of land ownership in villages internally was not clear (Isdiyanto, 2019). The presence of individual and collective ownership is as follows:

The rights of individual ownership are applied to a pioneer farmer if he has opened new land, so he is given three years of time to develop and make a rice field before it is charged a tax. The land opening and rice field making performed by some farmers collectively make the land to be collective

ownership. If the entire villagers work together to open land, the land becomes the collective ownership as village land. Therefore, *ulayat* rights are formed because of forest opening for rice fields collectively so that the ownership and use are also performed collectively led by a village pioneer (head of the village). Then, at the end of Mataram Kingdom, the land ownership by the officials was divided into appanage system (*lungguh*, Javanese), i.e., a form of land ownership granted to officials with the condition to pay the tribute to the central government (king) in the form of crops collected from farmers (Setiawati, 2021).

The terminology of *ulayat* derives from Minangkabau. In other regions of Indonesia, the terminology are different, for example, *patuanan* (Ambon), *panyampeto/pawatasan* (Borneo), *wewengkon* (Java), *totabuan* (Bolaang Mongondow, North Sulawesi), *limpo* (South Sulawesi), *nuru* (Buru) (Nuhidayah et al., 2020). Van Vollenhoven stated the allied rights to land in the terminology of *beschikkingsrecht*, which was then translated as *ulayat* rights in various laws. *Ulayat* rights are in the category of communal ownership (*gemeen bezit*). Communal ownership is a form of ownership in which someone (or a family) uses particular land which is a part of village communal land, i.e., the person does not have the rights to sell or to transfer the ownership of the land and the utilization is usually rotated periodically.

Ulayat rights are defined differently by both academicians and regulations of the government. Van Vollenhoven as the initiator of *beschikkingsrecht* did not give the definition but only gave six features of *ulayat* rights. Law Number 5, 1960 on Agrarian Law (UUPA) recognizing *ulayat* rights in Article 3 of such Law has no further explanation on the definition of *ulayat* rights, except in the explanation of the article stating, " *ulayat* rights and such rights", which is in the library of customary law called as *beschikkingsrecht*. The juridical definition appeared after the issuance of the Regulation of Minister of Agrarian/ Head of National Land Agency Number 5, 1999 on the Guidance for the Settlement of Ulayat Rights Problems of Customary Law Society (PMA Number 5, 1999), which is in Article 1 point 1 states that:

Ulayat rights and such the rights of customary law society is the authority, in accordance with customary law, belonging to a particular customary law society over a certain territory which is the environment of the residents.

Thus, it can simply be concluded that *ulayat* rights to land are collective rights to the land of the members of a customary law society in which the ownership and use are regulated by customary law.

The first milestone of the recognition of customary law society's *ulayat* rights at the time of Dutch occupation can be referred to as the Agrarian Law 1870 (*Agrarische Wet* 1870) and the implementing regulation was in the form of *Agrarische Besluit*. The aim of the Agrarian Law of 1870 was to provide broader opportunities for foreign private investment in the Dutch Indies (Indonesia). The aim was in relation to the program Forced Cultivation System (*Cultuurstelsel*) by Governor General Van Den Bosch who successfully coped with the financial crisis in the Netherlands. This success caused jealousy among private investors who also wanted to invest in the Dutch Indies (Timo Duile, 2017).

In Article 1 of *Agrarische Besluit* (the Gazette of 1870 Number 118), it was stated that all lands without any provable ownership are state lands (*domein*), which was also known as *domein verklaring*. In the Netherlands, there are two factions interpreting state *domein* in general or free state lands (*vrijlandsdomein*) and state *domein* in specific or unfree state lands (*onvrijlandsdomein*). The general interpretation of Utrecht school contains the definition of an authorized state to own all indigenous lands (native of Indonesia) which are uncultivated (*woeste gronden*). Conversely, the Leiden school supported by Van Vollenhoven required the interpretation of state *domein* in specific by stating that the *ulayat* rights of customary law do not recognize the principal differences between cultivated and uncultivated lands. Finally, in 1916, the Dutch government issued *Domeinnota* (domain memorandum) as the manual for Dutch officials to use broad interpretation against state *domein* so that state lands were included in uncultivated lands. In such interpretation, *ulayat* rights to land were only

to the extent of agricultural land, residential area, and so forth, which were continuously utilized.

Domein verklaring can be divided into *algemene domein verklaring* which means land whose no property of a person is state domain and *speciale domein verklaring* which means uncultivated land is state domain. *Domein verklaring* turned into HMN. HMN is worded in Article 2 of Agrarian Law which refers to Article 33 paragraph (3) of the 1945 Constitution stating that “Land, water, and natural resources contained within are controlled by the state and utilized as much as possible for the prosperity of the people.” The meaning of “controlled” by the state has a different public dimension from “owned” as interpreted by the state domain at the time of colonialism with a private dimension. Here, the state has its position as a public body not as an individual who owns the land (Bedner & van Huis, 2008).

Based on the HMN concept, the government recognizes *ulayat* rights with the conditions stated in Article 3 of Agrarian Law. However, as a right, *ulayat* is not recognized as one of the rights in Article 16 paragraph (1) of Agrarian Law. Regarding such a regulation, it is necessary to say that the government’s recognition of *ulayat* rights is a pseudo-recognition or ambivalence. Such a recognition implies the implementation of *ulayat* rights in the fields. In practice, the government officials interpret HMN broadly meaning that as long as the land is considered as *ulayat* rights by customary law society is not cultivated, so the land is included in state land. It is similar to the interpretation of the principle of state *domein* in general at the time of Dutch colonialism. As a result, the conflicts over *ulayat* rights land are widespread and caused by the narrow understanding of the central and regional government officials. Therefore, what was stated by the researcher of Indonesia from the Netherlands, Herman Slaats stated that *domein verklaring* is not lost but evolved into HMN (Herman Slaats, 2002).

In the implementation, although the Old Order recognized *ulayat* rights with some limitations, in the period of guided democracy, the agricultural issues were prioritized and agrarian reform was the starting point as the foundation of development as well as there was no foreign investor invasion. In reverse, the New Order regime focused on economic development prioritizing strong investors, not people, supported by regulations of Foreign Investor Law, Forestry Law, and Mining Law. They invited many investors and much foreign debt. It is predictable that state recognition of *ulayat* rights did not run properly. Everywhere, there were takeovers of *ulayat* rights to land with the reason of public interests so there were latent conflicts between customary law and investors supported by the government.

In relation to the recognition of *ulayat* rights, the government does not want to provide opportunities for the application of customary law society's *ulayat* rights completely although such rights are officially recognized. Such recognition was considered to merely endanger the integration of the unitary state (Tyson, 2011). The threat against the state integrity was also considered to appear when the state claim to the land as included in the doctrine of *domein* was also removed *de facto* and considered to be inapplicable. In addition, in the relation between customary law and national and state interests, as determined in Article 5 of the UUPA, lawmakers consciously had a purpose to exempt customary law from the tendency to separate itself and lead to the autonomy shown by the customary law society. Pseudo-recognition toward indigenous people also happen in New Order Era through the enactment of Law Number 5, 1979 on Village Government which regulates that all kinds of activity in the village are under village administration which is created by the government. Recognition of indigenous people in this law is not only pseudo but also potential to eliminate indigenous people's rights (Huda, 2017).

The end of the New Order era marks the beginning of the reformation era. In this era, there are fundamental differences in the construction of our state law. The

main step in reforming the law changes Indonesia's constitution which also regulates indigenous people's rights in Article 18 B. In this era, recognition of indigenous people's rights is still pseudo because recognition of Indigenous people is based on several requirements. (Adib & Siddiq, 2015). Indigenous People Alliance For Archipelago report in 2021 states that agrarian policy including *ulayat* rights of indigenous people have been based on neoliberalism which sacrifices indigenous people

In addition to the state's apprehension that the recognition of *ulayat* rights was not given completely, the other thing obstructing the recognition was the definition of state land. The definition of state land in Government Regulation Number 8, 1953 on State Land Ownership is different from Government Regulation Number 24, 1997 on Land Registration. According to the General Explanation of the Government Regulation Number 8, 1953, state land is all lands that are totally free from someone's right (based on both customary laws originally from Indonesia and western law). It is different from the definition of state land according to Article 1 number 3 of the Government Regulation No. 24, 1997 affirming that state land or the land owned directly by the state is the land which is not owned by a right to land. Government Regulation Number 24, 1997 has no firm statement whether the rights in question are also the rights to land based on customary law. However, it can be interpreted that the rights to land here are like what is set forth in Article 16 paragraph (1) of Agrarian Law meaning that *ulayat* rights are not included. Thus, it is obvious that *ulayat* rights are not recognized in Government Regulation Number 24, 1997. Legally, the way for granting the Rights to Cultivate (later called HGU) for the palm plantation business in Indonesia is getting smoother. As it has been known that one of the rights granted from the land owned directly by the state is the right to HGU for agriculture, fishery, and farming as determined by Article 28 paragraph (1) of Agrarian Law.

B. The Recognition of Indigenous People in the Reformation Era and Post-Job Creation Law Promulgation

After the reform, with the spirit of autonomy and the awakening of the customary law society, the corrections appear against the regulations considered to marginalize customary law society. Then, the 1945 Constitution was amended (1999-2001) into the 1945 Constitution of the Republic of Indonesia that recognizes with the condition the unity of customary law society and their rights in Article 18 B paragraph (2) and in various articles on human rights. The recognition of *ulayat* rights is also found in PMA Number 5, 1999, Act Number 41, 1999 on Forestry, Act Number 39, 1999 on Human Rights, Act Number 32, 2004 on Regional Government, Act Number 18, 2004 on Plantation, Act Number 7, 2004 on Water Resources, and Act Number 27, 2007 on the Management of Coastal Area and Small Islands, etc.

From several laws mentioned above, the author would only show two laws in relation directly to *ulayat* rights to land, namely, Forestry Law and Human Rights Law. The ambiguity of Agrarian Law against *ulayat* rights is continued by Forestry Law more obviously and explicitly. It can be seen in Article 5 paragraph (2) which is contrary to Article 67 paragraph (1). Article 5 paragraph (1) of Forestry Law states that state forest as mentioned in paragraph (1) letter a, can be in the form of customary forest. The meaning of the article is that it does not recognize the existence of customary law as part of customary law society's *ulayat* rights. On the other hand, Article 67 paragraph (1) confirms that customary law society, as long as in fact it still exists and its existence is recognized, has the rights to collect forest products, manage the forest, and empower it to enhance its prosperity (Surono, 2018).

In addition, the Regulation of The Minister of Environment and Forestry Number P.17/MENLHK/SETJEN/KUM.1/8/2020 on Indigenous Forest and Title Forest is also against the norm above. There are several weaknesses related to the recognition of indigenous people in this regulation namely indigenous forest is part of

a state forest if the status as the indigenous forest has not been stipulated. The impact is indigenous people cannot manage their own forest and can be taken over by the state. Another weakness is indigenous people must submit a proposal to get recognition for their forest. It means that the stipulation is constitutive but academically this must be declarative and not influence the ownership and status of indigenous forests. The last weakness, this regulation requires a clear boundary of layout right to be recognized as indigenous people.

Recognition of indigenous people is more complicated post enactment of Law No. 11 of 2020 on Job Creation Law. Both of those regulations provide easiness for investment (Wahyu Nugroho & Erwin Syahrudin, 2021). Based on cybernetic concept, policy which stress on investment aspect will derogate cultural and social interest include indigenous people recognition (Adhi Putra Satria, 2020). Development policy based on economic growth in national inquiry of National Commission for Human Right in 2016 is the cause of human right violation over indigenous people.

Liberal orientation base of enactment of the Job Creation Law and all its derivative regulations includes Government Regulation Number 18 of 2021 on Management Right, Land Title, Condominium and Land Registration. Article 4 of the Regulation state that *ulayat* right can be source of management right. Management is part of state authoritative right. Thus, state intervention of this land use is allowed. This is not according to philosophy of indigenous people as independent entity and separated from State Authoritative Right. There are several weakness of indigenous people recognition in Job Creation Law, namely:

1. Ambiguity of reason and purpose of management title for indigenous people.
2. Lack of regulation about format of indigenous people recognition.

3. Stipulation of management right for indigenous people is negation of this community's *ulayat* right.
4. To equate indigenous people with state institution as management right owner is misleading way.

Management right as part of state authoritative right can negate indigenous people right in maintaining his land independently. In addition, there is also overlapping of authoritative right between indigenous people and state in this land use. When this land has been stipulated as management right, state deserves to manage, maintain, supervise and make policy over this land. Management right over this land also bring potency of indigenous people land as investment object based on contract between the parties. At this point, land meaning in indigenous people contains social and spiritual value is reduced into economic value. If this land also be object of investment, land use will be taken over by investor. This will limit even deplete access of indigenous people over their land. Moreover, indigenous people life is highly depended on natural resources. Land is very important for indigenous people life to maintain their life and not for economical purpose. Even though, investment is based on contract but position of indigenous people and investor is unequal. The weak position of indigenous people can decrease their bargaining position and the investment will bring detriment and lose for them.

How a customary law society can possibly cultivate forests in the customary forest is not recognized. In practice, customary forest is mostly considered as state forest rather than *ulayat* rights hence the government is free to concession it to investors. This is the cause of minimum recognition of indigenous forest right from 10.5 million hectares of indigenous' land map, government only recognize 56.903 hectares (Aliansi Masyarakat Adat Nusantara, 2022).

One of the examples is the sacred forest belong to Talang Mamak tribe in Indragiri Hulu District, Riau with the width of 1,813 hectares that turned into palm

plantation. On the other hand, Patih Laman, the chief of the tribe, had been granted *Kalpataru* from President Megawati for his services to maintain the preservation of forest. The provision in Article 6 paragraph (2) determines that the cultural identity of customary law society including the rights to ulayat land is protected in line with the development of time. It can be meant that essentially the government does not recognize the presence of *ulayat* rights and has neglected human rights violation related to the use of ulayat rights to land for investors' interests.

Indeed, it is admitted that until recently there are some regional regulations and Regent Decrees that recognize the presence of *ulayat* rights, but the number is small. More district governments who do not recognize *ulayat* rights hence the existence of *ulayat* rights of customary law society is eroded by the concession for investors who get the permission from the center and regional government. Although there are many laws regulating *ulayat* rights, it does not mean that *ulayat* rights is recognized and protected. There is the fact that policies to grind *ulayat* rights are continued for the sake of investors so that the conflicts occurred everywhere.

D. Closing

Conclusion

In conclusion, from the Dutch colonial period to the current day, Indonesia has recognised *ulayat* rights that are driven by specific goals. As a result of the interpretation of *domein verklaring* and in accordance with this principle, the Dutch government has only acknowledged lands directly cultivated by customary law societies. Post independence, this principle was replaced by the State Authoritative Rights. In practice, especially in the presence of regional autonomy, it cannot be separated from the pseudo-recognition (ambivalence) of *ulayat* rights under the UUPA, which serves as the reference for the recently published laws in the natural resource sectors that favor capital owner. The recognition of indigenous people during the

reformation era and after the enactment of the Job Creation Law is minimal because it places indigenous people as holders of management rights, which diminishes their *ulayat* rights, strengthens the state's claim to the land, and makes this land an investment target.

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