



**JURNAL
POROS HUKUM
PADJADJARAN**

P-ISSN: 2715-7202
E-ISSN: 2715-9418

Volume 5, Number 2, May 2024

Submission:
13 August 2023

Published:
30 May 2023

DOI:
<https://doi.org/10.23920/jphp.v5i2.1450>

Link Publications:
<http://jurnal.fh.unpad.ac.id/index.php/JPHP/issue/archive>

Publisher:
Magister of Laws
Universitas Padjadjaran

THE EXISTENCE AND PROTECTION OF ULAYAT RIGHTS IN INDIGENOUS COMMUNITIES WITHIN THE FRAMEWORK OF POSITIVE LAW IN INDONESIA

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ABSTRACT

Ulayat Rights are the highest rights of indigenous law communities to land. Normatively, protection of the rights of indigenous law communities is contained in several related laws and regulations, but in practice, Ulayat Rights of indigenous law communities often become the object of dispute/conflict, both with the government and with private parties who need land, so that they are often eliminated and detrimental to the rights of indigenous law communities. The aim of this research is to obtain an overview of the criteria for determining the existence of Ulayat rights of indigenous law communities and the legal protection of them when dealing with outside parties from a positive legal perspective in Indonesia. The approach method used is a normative juridical approach, namely tracing, studying and researching secondary data related to this research material. A juridical approach is used considering the problems studied revolve around the relationship between a regulation and other regulations, namely regulations regarding land, forestry and plantation law. The research results show that recognition of the existence of Ulayat rights of indigenous law communities is limited as long as they still exist and must fulfill several elements as specified in several statutory regulations. Protection of traditional rights is contained in the constitution, sectoral legislation and regional regulations, but in reality there are still frequent disputes/conflicts, this shows that the protection of Ulayat rights of indigenous law communities is still not optimal.

Keywords: existence and protection; indigenous law communities; ulayat rights

INTRODUCTION

Given the significance of land for both society and the government, land issues need to be regulated by legislation capable of addressing and resolving the highly complex land matters.¹ Currently, land issues are not only governed by Law Number 5 of 1960 concerning the Basic Agrarian Principles, more commonly known as the Basic Agrarian Law (UUPA), but also

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¹ Rubiati, Betty (2016), *Asas Hukum Agraria Nasional, Penerapan Asas Pemisahan Horozontal dalam Kepemilikan Tanah dan Bangunan*, Bandung: Logoz Publishing, p. 2.

addressed in Law Number 11 of 2020 concerning Job Creation, along with its implementing regulations.

With the enactment of the UUPA, fundamental changes have occurred in Indonesian Agrarian Law, especially in the field of land sector. These changes are fundamental in nature because they affect both the legal framework structure and the underlying concepts and contents, as stated in the "Opinions" section of the UUPA, which must be in accordance with the interests of the Indonesian people and also meet the needs of the times.² The UUPA is mandated by Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia (UUD 1945), which states that land, water, and natural resources contained therein are controlled by the State and used for the greatest possible prosperity of the people.

The UUPA establishes a unified National Agrarian Law structure, as stated in both the "Opinions" and "General Explanations" sections of the UUPA, based on customary law regarding land, which is the original law for the majority of the Indonesian people. In the development of National Land Law, Customary Law serves as the primary source to obtain its materials in the form of concepts, principles, and legal institutions. This is articulated in Article 3 and Article 5 of the UUPA, which state that the Agrarian Law applicable to land, water, and airspace is customary law, as long as it does not conflict with national and state interests, based on national unity, Indonesian socialism, and legislation, all while respecting elements based on religious law.

Legal expert Sudargo Gautama argues that customary law provisions related to land rights, if they do not align with the modern interests of the Republic of Indonesia, cannot be considered applicable. Similarly, customary laws governing land rights must be refined to meet the needs of modern relationship.³

According to Djamanat Samosir, the highest customary land rights of the community is the Ulayat Rights. Until now, the regulation of Ulayat Rights is still scattered in various regulations in Indonesia. These regulations are essentially aimed at providing legal protection for the customary community's ulayat rights, but the formal recognition within legislation has never been implemented, thus failing to provide legal protection. In case of conflicts, whether between the government and the customary law community or between entrepreneurs and the community, ultimately, customary community rights are nullified due to the lack of support for the customary law community.⁴

² Harsono ,Boedi (1994), *Hukum Agraria Indonesia, Sejarah Pembentukan Undang-undang Pokok Agraria, Isi dan Pelaksanaannya*, Jilid I, Jakarta: Penerbit Djambatan, p. 1.

³ Nurlinda ,Ida (2014), *Monograf Hukum Agraria: Membangun Pluralisme Hukum dalam Kerangka Unifikasi Hukum Agraria*, Bandung: Logoz Publishing, p. 31.

⁴ Sembiring, Rosnidar (2017), *Hukum Pertanahan Adat*, Depok: PT. RajaGrafindo Persada, p. 26.

Article 3 of the UUPA accommodates Ulayat rights as follows:

“Considering of the provision in Article 1 mid 2, the implementation of the "Hak-Ulayat" (The Communities, in so far as they still exist, shall be adjusted as such as to fit in the National and Property right of communal property of an Adat - Community) and rights similar to that of Adat-State's interests, based on die unity of the Nation, and shall not be in conflict with the acts and other regulations of higher level”

According to Maria S.W. Sumardjono, based on the content of Article 3, the recognition of ulayat rights is limited to two aspects: existence and implementation. The legislators' thinking at that time was primarily driven by empirical experiences, particularly the obstacles faced when the Government needed land for development, and such land was owned by customary law communities. This resulted in the fundamental idea that the interests of customary law communities must be subordinated to national interests, and ulayat rights are not exclusive.⁵

Furthermore, according to Boedi Harsono, the UUPA does not specify criteria for recognizing the existence of ulayat rights. The reason, according to the drafters and formulators of the UUPA, is that regulating ulayat rights, both in determining existence criteria and registration, would preserve the existence of ulayat rights. Naturally, there is a tendency for ulayat rights to weaken as individual rights of members of the respective customary law communities strengthen.⁶

In reality, the absence of criteria for the existence requirements of ulayat rights is one of the factors contributing to the marginalization of customary law community rights when confronted with the government or private entities that objectively hold stronger bargaining positions, both politically and financially, which are clearly disproportionate.⁷

Various cases demonstrate the increasing pressure on customary law community rights in tandem with the rapid influx of investments and government development projects since the 1970s. According to the Year-End Report of the Agrarian Reform Consortium (KPA), in 2021 alone, there were 207 structural agrarian conflicts recorded in Indonesia. These conflicts occurred in 32 provinces and spread across 507 villages and cities. They affected 198,895 households, involving a land area of 500,062 hectares. The expansion of oil palm plantations and Industrial Timber Estates (HTI) is the primary cause of agrarian conflicts in Riau Province, stemming from decisions by public officials

⁵ Sumardjono, Maria S.W. (2008), *Tanah dalam Perspektif Hak Ekonomi Sosial dan Budaya*, Jakarta: Penerbit Buku Kompas, pp. 170-171.

⁶ Harsono, Boedi, *Op.Cit.*, p. 167.

⁷ Sumardjono, Maria S.W., *Op.Cit.*, p. 171.

to grant concessions to companies. The agrarian conflicts documented by the KPA are of a structural nature, where communities, villages, farmers, or indigenous communities within a group are pitted against State-Owned Enterprises (BUMN) and/or private companies. In Riau Province, agrarian conflicts are primarily concentrated in the plantation sector. Agrarian conflicts in Riau Province, when viewed by sector, plantations remain the sector with the highest number of agrarian conflicts.⁸

The case of 'Sinama Nenek' between PT Perkebunan Nusantara V (PTPN V) and the Sinama Nenek Indigenous Community, where PTPN V has taken approximately 2,800 hectares of ulayat land that is not within the area granted an HGU concession, serves as an example. According to the Decree of the Governor of Riau Number Kpts.131/V/1983 dated May 3, 1983, PTPN V was allocated land for plantations covering 30,000 hectares, consisting of 13,000 hectares in the Tandun District (now part of Rokan Hulu District Government) and 17,000 hectares in the Sinama Nenek Kenegerian of the Siak Hulu District (now the Sinama Nenek Kenegerian of Tapung Hulu District in Kampar Regency). Out of the 17,000 hectares of land, 14,200 hectares have been granted an HGU, while the remaining 2,800 hectares, as per the Decree of the Regional Office (Kanwil) of Land Affairs of Riau Province Number 500/1114/BPN dated November 11, 2000, were designated as an enclave for the local community through a partnership scheme. This land was previously cultivated by the Sinama Nenek community since 1981. Until now, PTPN V has refused to hand over the 2,800 hectares, prompting the community to continue demanding their rights until they are fulfilled. This case highlights that despite the Sinama Nenek community being on the correct legal path, they still cannot enjoy legal justice.⁹

Still in Riau Province, another example of conflict arises between PTPN V and the indigenous community of Pantai Raja, which has been ongoing for more than two decades. Initially, in 1984, the Governor of Riau reserved 20,950 hectares of convertible forest area (HPK) for community plantations in Sei Pagar. In 1989, the Minister of Forestry issued a decree releasing a forest area of 21,994 hectares in that area, covering the Kampar Kanan River-Kampar Kiri River Forest Group, Siak Hulu and Kampar Kiri Districts. The central government intended to implement the People's Plantation Project (PIR) for transmigrant communities, known as PIR Trans, and local farmers around or Special PIR. As the project executor, PTPN V was only able to develop 8,856.841 hectares of oil palm plantations. Due to the economic crisis and political turmoil before the fall of

⁸ Meiranda, Ayu, et. all (2023), "Upaya Hukum Terhadap Penyelesaian Sengketa Tanah Ulayat di Kabupaten Kampar Guna Menjaga Keamanan Nasional", *Jurnal Analisis Hukum (JAH)*, 6(1), p. 100.

⁹ Bachtiar, Maryati (2017), "Peranan Lembaga Adat Melayu Riau dalam Penyelesaian Konflik Tanah Ulayat di Provinsi Riau", *Jurnal Hukum Respublica*, 16(2), p. 304.

the New Order regime, the central government distributed the plantation. About 6,000 hectares were allocated to 2,000 transmigrant farmers and local farmers. Each received two hectares known as plasma plantation plus yard and housing land. The remaining 2,856.841 hectares were fully handed over to PTPN V, referred to as the nucleus plantation. This is where the problem begins. The Pantai Raja indigenous community demands that PTPN V surrender 1,013 hectares of their seized land. According to the villagers, long before the PIR program or project existed, their ancestors had settled and cultivated the land as a source of livelihood. According to I Dewa G Buddy (Chief of the Bangkinang District Court), the cause of the land dispute is the claim over the Sei Pagar core palm oil plantation owned by PTPN V, based on the land ownership certificate in the form of Land Use Rights Certificate No. 152 dated March 24, 2001, covering an area of 2,856.841 hectares issued by the Kampar Land Office in the name of PT. Perkebunan Nusantara V. However, according to the Pantai Raja indigenous community, they also claim ownership of the disputed land based on the Records of Agreement Meeting between the Pantai Raja Village Community and the Board of Directors of PT Perkebunan Nusantara V held on April 6, 1999.¹⁰

In another case in West Sumatra, in 1983, an investor (PT. Mutiara Agam) applied for permission to use 2,000 hectares of ulayat land out of 10,000 hectares for the establishment of an oil palm plantation. The application was deliberated in a *ninik mamak* forum, the traditional decision-making assembly of the Nagari Tiku V Jorong land rights holder. From the deliberation, it was agreed that the investor could utilize 2,000 hectares of land plus a reserve of 8,000 hectares for the oil palm plantation (later agreed upon to be only 6,625 hectares), and in return, the investor was obligated to provide compensation, profit-sharing, and establish plasma plantations for the local community, as follows: 1. The investor will provide compensation according to customary norms referred to as (*adat diisi limbago dituang*). 2. If the planned plantation business succeeds, a portion of the profits will be allocated for village development. 3. Establishing a 3,000-hectare (1,500 households) plasma plantation for the Nagari community. 4. Regarding the reserve land of approximately 8,000 hectares, further deliberation would occur if it were to be utilized. Based on the land transfer letter stating that 2,000 hectares were handed over with a reserve of 8,000 hectares, PT. Mutiara Agam later obtained an HGU certificate No. 4 of 1992, which was presumably facilitated through collaboration with relevant institutions. Over time, PT. Mutiara Agam experienced rapid growth, but the promises made were not fulfilled. These include: 1. Development of the plasma plantation/PIR covering 3,000 hectares. 2. Compensation for

¹⁰Santoso, Adityo et.al (2023), "Efektifitas Upaya Hukum Sengketa Tanah Ulayat Masyarakat Adat Pantai Raja Dengan PTPN V", *Jurnal Kewarganegaraan* 7 (1), p. 1260.

the ulayat land used, referred to as "*adat diisi limbago dituang*" (customary funds), has not been paid.¹¹

With the cases where ulayat rights are marginalized, there has been a push to formulate objective criteria regarding the existence of ulayat rights concerning their subjects, objects, and authorities. This led to the issuance of the Minister of Agrarian Affairs/Head of the National Land Agency Regulation No. 5 of 1999 concerning Guidelines for Resolving Issues of Indigenous Community Ulayat Rights. In this regulation, criteria for the existence of ulayat rights of indigenous communities are stipulated, which must fulfill the elements specified in various regulations, including criteria for the indigenous community, its territory, and the legal relationship between the indigenous community and its territory.

Based on the frequent experiences of land issues faced by indigenous communities in forest and plantation areas, the issuance of Minister of Agrarian Affairs Regulation No. 9 of 2015 concerning Procedures for Determining Communal Rights Over Customary Land of Indigenous Communities and Communities in Certain Areas was prompted. Most recently, with the enactment of Law No. 11 of 2021 concerning Job Creation and Government Regulation No. 18 of 2021 concerning Management Rights, Land Rights, Condominium Units, and Land Registration, it is hoped that there will be clearer criteria for determining the existence of customary land rights of indigenous communities, ultimately providing appropriate legal protection.

Based on the aforementioned background, the issue to be analyzed is: What are the criteria for determining the existence of indigenous community ulayat rights in legislation and the legal protection of indigenous community ulayat rights when dealing with the government and private entities within the framework of positive law in Indonesia.

RESEARCH METHODS

This research adopts a descriptive-analytical approach, which involves systematic, factual, and accurate documentation of facts.¹² It aims to provide as thorough data as possible regarding human and other phenomena.¹³ Thus, the research will outline various legal issues, facts, and related phenomena concerning the existence and legal protection of indigenous community ulayat rights. It will examine these matters through

¹¹Fatimah, Titin & Andor, Hengki (2014) "Pola Penyelesaian Sengketa Tanah Ulayat di Sumatera Barat (Sengketa Antara Masyarakat Dengan Investor)", *Jurnal Ilmu Hukum*, Universitas Riau, 5(1), pp. 57-58.

¹²Sumadi (1988), *Metode Penelitian*, CV Rajawali, Jakarta, p. 19.

¹³Soekanto, Soerjono (1990), *Penelitian Hukum*, Jakarta: UI Press, p. 10.

several relevant regulations applicable in Indonesia, analyzing them to obtain a comprehensive understanding of the researched issues.

The approach used in this research is the normative juridical method. It involves tracing, examining, and analyzing secondary data related to the research material. This approach was chosen because the research problem focuses on the relationship between one regulation and another. The research was conducted through library research, aiming to review, investigate, and explore secondary data such as primary legal materials, secondary legal materials, and tertiary legal materials related to this research. Once the data is collected, it will be analyzed qualitatively. The results of the analysis will be presented descriptively, providing a comprehensive overview of the issues under investigation.

DISCUSSION

Criteria For Determining the Existence of Customary Community Ulayat Rights in Relevant Legislation

Von Savigny, a historical school jurisprudence, states that good law is law created based on the law that lives within society (living law). It is suggested that law is a historical phenomenon, so the existence of each law is different, depending on the time and place of its application, and law should be seen as a manifestation of the spirit or essence of a nation. This perspective is reinforced by the sociological jurisprudence school, which emphasizes the importance of living law. Thus, customary law known in Indonesia is influenced by this school of thought.¹⁴

According to R. Soeroyo, the existence of customary land for indigenous communities is one form of implementing customary rights. Long before the formation of Law Number 5 of 1960 concerning Basic Agrarian Principles (UUPA), indigenous communities were already familiar with and practicing customary rights. The existence of customary rights is known by various terms in different indigenous communities in Indonesia, such as "patuanan" (Ambon), "panyamperto" (Kalimantan), "wewengkon" (Java), "prabumian" (Bali), "pawatasan" (Kalimantan), "totabuan" (Balaang Mongandow), "limpo" (South Sulawesi), "nuru" (Buru), or "ulayat" (Minangkabau).¹⁵

In Indonesia, this is affirmed in the State Constitution which recognizes the existence of customary communities, as stated in Article 18 B of the 1945 Constitution which declares that the State acknowledges and respects the unity of customary

¹⁴Ismi, Hayatul (2020), "Pengakuan dan Perlindungan Hukum Hak Masyarakat Adat atas Tanah Ulayat dalam Upaya Pembaharuan Hukum Nasional", *Jurnal Ilmu Hukum*, 3 (1), p. 2.

¹⁵Pulungan, Sofyan M (2023) "Menelaah Masa Lalu, Menata Masa Depan: Sejarah Hukum Tanah Ulayat dan Model Penanganan Konflik Sosialnya," *Undang: Jurnal Hukum*, 6 (1), p. 237.

communities along with their traditional rights as long as they are still alive and in line with the nation's development, society, and the principles regulated by law. Respect and recognition of the existence of customary rights as human rights are evident in Article 28I paragraph (3) of the 1945 Constitution (resulting from the Second Amendment), stating that cultural identity and the rights of traditional communities are respected in harmony with the progress of time and civilization,

In the National Agrarian Law (UUPA), Ulayat Rights are recognized in Article 3 of the Agrarian Law, but their recognition is accompanied by two (2) conditions:¹⁶

1. Its existence: Ulayat rights are recognized as long as they still exist in reality.
2. Its implementation: The implementation of ulayat rights must be in such a way that it is in line with the national and state interests, which are based on national unity, and must not contradict higher laws and regulations.

According to J.B. Daliyo, the provisions of Article 3 cannot be separated from the considerations of Articles 1 and 2 of the UUPA. The regulation of the existence of ulayat rights in the UUPA is related to the three fundamental principles underlying national agrarian law, namely: the principle of Divinity, the principle of nationalism, and the principle of the Archipelagic Outlook.¹⁷ Asas-asas tersebut mengakui dan melihat bumi, air dan ruang angkasa sebagai karunia Tuhan, sehingga hubungan Bangsa Indonesia dengan bumi, air These principles acknowledge and view land, water, and airspace as gifts from God, so the relationship of the Indonesian nation with the land, water, and airspace of Indonesia resembles an ulayat right relationship elevated to the highest level, which is the level of the entire territory of Indonesia. This relationship is eternal, as long as the Indonesian people remain united as the Indonesian nation and as long as the land, water, and airspace of Indonesia still exist, under any circumstances, no one can sever that relationship.

Furthermore, Article 2 provides detailed regulations on Article 33 paragraph (3) of the 1945 Constitution. Article 2 paragraph (1) of the UUPA states that land, water, airspace, and the natural resources contained therein at the highest level are controlled by the State. The authority of the State is regulated in Article 2 paragraph (2) of the UUPA. Referring to this Article 2, thus, the ulayat rights of customary law communities are fundamentally not autonomous rights, but rather rights of state control exercised by customary law communities.

The UUPA does not explicitly regulate in the form of legislation, as mentioned by Boedi Harsono above, because according to the designers and formulators of the UUPA,

¹⁶Harsono, Boedi, *Op. Cit.*, p. 166.

¹⁷Sembiring, Rosnidar, *Op. Cit.*, p. 15.

it would hinder the natural development of ulayat rights, which in reality tend to weaken.

The concept of ulayat rights was first encountered in the Minister of Agrarian Affairs/Head of the National Land Agency Regulation No. 5 of 1999 concerning Guidelines for Resolving Issues of Customary Law Community Ulayat Rights. In Article 1, it is stated:

“Ulayat rights and similar rights of customary law communities (hereinafter referred to as ulayat rights) constitute a series of authorities and obligations of a customary law community relating to land within its territorial jurisdiction”

The Ministerial Regulation explicitly presents the criteria for the continued existence of customary land rights based on the presence of indigenous communities, their territories, and customary legal systems. In this formulation, the characteristics of ulayat rights are indicated as follows:¹⁸

1. The presence of indigenous communities as legal subjects,
2. The authority of indigenous communities based on customary law,
3. The existence of specific territories recognized as customary law areas,
4. Members of indigenous communities derive benefits or livelihood from the land,
5. The presence of both tangible and intangible hereditary connections between the community and their land.

Previously, the expert in Customary Law, Ter Haar, formulated *Beschikingsrecht* as the communal legal right of a society, representing a collective right rather than an individual right that can be owned by an individual or a family. Hazairin formulated the ulayat right of a customary society (*rechtsgemeenschap*) as the right over the entire territory of the respective customary society, which will never be alienated to others or other community groups. It will persist as the collective right of the customary society over the land within the territory of that customary law.¹⁹

According to Van Vollenhoven, there are 6 (six) characteristics of ulayat rights, namely:²⁰

1. Only the legal alliance and its members can use the land, the thickets within the territory.
2. Those who are not members of a partnership can exercise that right, but must be authorized by the legal community.
3. In exercising that right for non-members, one must always pay a recognitie.

¹⁸Sembiring, Rosnidar, *Op. Cit.*, p. 18.

¹⁹Hastuti, Hesty, (2000), *Penelitian Hukum Aspek Hukum Penyelesaian Masalah Hak Ulayat dalam Otonomi Daerah*, Badan Pembinaan Hukum Nasional, Departemen Kehakiman dan Hak Asasi Manusia, p. 41.

²⁰Sembiring, Rosnidar, *Op. Cit.*, p. 11.

4. The legal alliance has the responsibility for certain crimes that occur in the area of its territory, if the person who committed the crime itself cannot be sued.
5. The legal community must not transfer its rights forever to anyone.
6. The legal alliance has the right to intervene in cultivated land, for example in the distribution of plots of land or in sale and purchase.

Based on Article 2 of the Minister of Agrarian Affairs/Head of the National Land Agency Regulation No. 5 of 1999 concerning Guidelines for Resolving Issues of Customary Community Land Rights, the criteria and monitoring of the existence of similar rights of customary communities are still carried out by the Regional Government through three elements:

1. The element of indigenous communities, meaning there is a group of people who still feel bound by their customary legal system as members of a particular legal association, recognizing and applying the provisions of that association in their daily lives.
2. The element of territory, indicating the presence of specific customary land that serves as the environment for the members of that legal association and where they meet their daily needs.
3. The element of the relationship between the indigenous community and its territory, referring to the existence of customary laws governing the management, control, and use of customary land that are observed and adhered to by the members of that legal association.

The indigenous legal community, through its customary rights, grants specific authority to the indigenous community as the source and basis of implementation, as well as the provisions on how it is implemented according to the customary law of the respective indigenous community. This authority, based on Article 4, paragraphs (1) (a) and (b), includes:

1. The right to land ownership by its members, which, if desired by the holder, can be registered as land rights according to the provisions of the Basic Agrarian Law (UUPA).
2. The release of land for the benefit of outsiders, subject to the provisions and procedures of customary law in effect.

Regarding recognition of its own indigenous legal community, it is regulated in Minister of Home Affairs Regulation No. 52 of 2014 concerning Guidelines and Recognition of Indigenous Legal Communities. Article 1, number 1 states that the Indigenous Legal Community is Indonesian citizens who have distinctive characteristics, live harmoniously in groups according to their customary laws, have ties to their ancestral origins and/or common places of residence, have a strong connection

to the land and the environment, and have a system of values that determine economic, political, social, cultural, and legal systems, and utilize a specific area from generation to generation.

Recognition and Protection of customary law communities are carried out through the following stages:

1. Identification of customary law communities
2. Verification and Validation of customary law communities
3. Determination of customary law communities.

Furthermore, Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia Number 18 of 2019 concerning Procedures for Land Administration of Customary Community Unit Land. In Article 1 paragraph (1) it is stated that, the Customary Community Unit Land Rights or similar rights are the communal rights of customary communities to control, manage, and/or utilize, as well as preserve their customary territory in accordance with prevailing customary norms and laws.

The customary community unit land rights or Ulayat rights of the customary community unit as referred to in paragraph (1) are considered to still exist if they meet certain criteria, including the presence of:

1. Customary community and institutions;
2. Territory where the customary rights take place;
3. Relationship, connection, and dependence of the customary community unit with its territory; and
4. Authority to jointly regulate the utilization of land in the territory of the respective customary community unit, based on prevailing customary laws adhered to by its community.

The customary community unit as referred to above must meet the following requirements:

- a. Still exist tangibly, whether territorial, genealogical, or functional in nature;
- b. In accordance with societal developments; and
- c. In accordance with the principles of the unitary state of the Republic of Indonesia.

Next, in Regulation of the Minister of Agrarian Affairs No. 9 of 2015 Regarding Procedures for Establishing Communal Rights to Customary Land of Indigenous Communities and Communities Located in Certain Areas, it is stipulated as follows.

1. The Specific Area referred to here is forest or plantation areas.
2. Meet the requirements as a group of customary law communities.
3. Have controlled and utilized the land for at least 10 years or more.
4. Submit an Application.

5. Granted Land Rights.

To determine the existence of Customary Community Land Rights, the above regulations have provided limitations and elements that must be met by customary law communities. However, in reality, indigenous communities often do not precisely know their customary territories, and the legal relationship, connection, and dependence of customary law communities on their customary land no longer exist because they have started seeking livelihoods outside their territories.

Legal Protection for Customary Community Land Rights when Facing the Government and Private Entities Within the Positive Law Framework in Indonesia

Legal protection is the safeguarding of dignity and recognition of human rights possessed by legal subjects within a legal state, based on the prevailing laws of that country, to prevent abuse of power. Legal protection generally takes the form of written regulations, making it more binding and resulting in sanctions for those who violate them.²¹ Furthermore, Philipus M. Hadjon distinguishes two types of legal protection:

1. Preventive legal protection aims to prevent issues or disputes from arising.
2. Repressive legal protection aims to resolve issues or disputes that have already arisen.

Satjipto Raharjo stated that legal protection is providing shelter for the basic rights of individuals that have been violated by others, and this protection is given to society so they can enjoy all the rights provided by the law.²²

Preventive Legal Protection:

For the first time, Law No. 5 of 1960 concerning the Basic Agrarian Principles (UUPA) included provisions regarding the Customary Community Ulayat Rights, as stated in Article 3, which reads: "Considering the provisions in Articles 1 and 2, the implementation of customary rights and similar rights of indigenous communities, as long as they exist in reality, must be carried out in such a way that it aligns with national and state interests, which are based on national unity and must not contradict higher laws and regulations"

Over time, various sectoral laws enacted after the UUPA have recognized, respected, and protected the rights of indigenous communities, including:²³

1. The Second Amendment to the 1945 Constitution

²¹ Hadjon, Philipus M (1987), *Perlindungan Hukum bagi Rakyat Indonesia*, Surabaya: Bina Ilmu, p. 20.

²² Raharjo, Satjipto (2000), *Ilmu Hukum*, Bandung: PT. Citra Aditya Bakti, p. 53.

²³ Sumardjono, Maria S.W., *Op. Cit.*, pp. 157-163.

- a. Article 18B paragraph (2): " The state shall acknowledge and respect traditional societies along with their customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law"
 - b. Article 28I paragraph (3): " The cultural identities and rights of traditional communities shall be respected in accordance with the development of times and civilisations".
2. MPR Decree No. IX/MPR/2001 concerning Agrarian Reform and Natural Resource Management.

Article 4 states: Agrarian reform and natural resource management must be implemented in accordance with the following principles:

- a. Protecting and maintaining the unity of the Unitary State of the Republic of Indonesia
- b. Respecting and revering human rights
- c. Respecting the supremacy of the law by accommodating diversity in legal unification
- d. Providing prosperity to the people, particularly by increasing the quality of the human resources of Indonesia
- e. Developing democracy, obedience of the law, transparency and the optimal participation of the people
- f. Attaining justice, including gender equality, in the control, ownership, utilisation, and cultivation of agrarian resources/natural resources
- g. Cultivating sustainability that can provide optimum benefits, both for present generations and future generations, by continuously considering the accommodating capacity and supporting capacity of the environment
- h. Holding social functions, preservation, and ecological functions based on the condition of the local social culture
- i. Enhancing the integrity and coordination among development sectors and among regions in the implementation of agrarian reform and management of natural resources
- j. Recognising, respecting, and protecting the legal customary rights of the society and the diversity of the national culture over agrarian resources/natural resources
- k. Making efforts to balance the rights and obligations of the state, government (central, provincial, kabupaten/kota, and village or equivalent), community and individuals; and.

1. Implementing decentralisation by dividing authority in relation to the allocation and management of agrarian/natural resources between the national, provincial, kabupaten/kota and village or equivalent levels.
3. Law No. 41/1999 on Forestry
 - a. Article 1 Letter f: Customary Forest is state forest located within the territory of customary law communities.
 - b. Article 4 paragraph (3): Forest management by the State shall still consider the rights of customary law communities, as long as they still exist and are recognized, and not conflicting with national interests.
 - c. Article 5 paragraph (1): Forest shall by status consist of:
 - 1) state forest, and
 - 2) title forest
 - d. Article 5 paragraph (2): State forest as referred to in paragraph (1) item a, can be in terms of customary forest.
 - e. Article 34: Specially designated Forest area management as referred to in Articles 8 can be issued to:
 - 1) Indigenous law community
 - 2) Educational institutions
 - 3) Research institutions
 - 4) Social and religious institutions
 - f. Constitutional Court Decision No. 35/PUU-X/2012 regarding the review of Law No. 41 of 1999 concerning Forestry: Emphasizes the existence of customary forests as forest concessions, no longer part of state forests.
4. Law No. 18 of 2004 concerning Plantations
 - a. Article 9 paragraph (3): In the event that the required land is customary land owned by customary law communities which, according to the facts, still exist prior to the granting of the right referred to in paragraph (1), the applicant for the right must hold consultations with the customary landholding community and the inhabitants holding rights over the land in question to reach an agreement regarding the transfer of land and compensation.
5. Government Regulation No. 18 of 2021 on Management Rights, Land Rights, Condominium Units, and Land Registration.
 - a. Article 1 number (13): Ulayat Land means Land existing in the area of control by adat law community which factually still exists and not attached by any Land Right.
 - b. Article 4: Right to Manage may derive from State Land and Ulayat Land.

- c. Article 5 paragraph (2): Right to Manage derived from Ulayat Land is stipulated for the adat law community
- d. Article 15 paragraph (3): Relinquishment of the Right to Manage as referred to in Article 14 over an Ulayat Land causes the land return under the control of the adat law community.
- e. Article 21: The Land that can be granted Right to cultivate include:
 - a. State Land; and
 - b. Land under Right to Manage
- 6. Several Regional Regulations governing the customary land rights of indigenous communities or customary community ulayat rights:
 - a. Regional Regulation of Ternate City No. 13 of 2009 concerning the Protection of Customary Rights and Culture of the Kasultanan Ternate Indigenous Community.
 - b. Regional Regulation of Nunukan Regency No. 3 of 2004 concerning the Ulayat Rights of the Nunukan Customary Law Community.
 - c. Regional Regulation of Kampar Regency No. 12 of 1999 concerning Ulayat Rights
 - d. Provincial Regulation of West Sumatra No. 2 of 2007 concerning the Basic Principles of Nagari Government
 - e. Special Regional Regulation of Papua Province No. 23 of 2008 concerning the Ulayat Rights of Indigenous Law Community and Individual Rights of Indigenous Law Community Residents over Land.
 - f. Regional Regulation of Lebak Regency No. 32 of 2001 concerning the Protection of Ulayat Rights of the Baduy Indigenous Community.
 - g. Governor Regulation of Central Kalimantan No. 13 of 2009 concerning Customary Land and Rights over Land in Central Kalimantan Province.
 - h. Regional Regulation of Riau No. 10 of 2015 concerning Ulayat Land and its Utilization.

Although the UUPA is based on customary law and principle-wise recognizes the existence of ulayat rights, the detailed regulation of ulayat rights is lacking, leading to issues arising from differing legal perceptions within society.²⁴ With the issuance of Minister of Agrarian Affairs/Head of the National Land Agency Regulation No. 5 of 1999, which clarifies the recognition of ulayat rights and similar rights of indigenous law communities, a precedent was set for the creation of regional regulations aimed at protecting the ulayat rights of indigenous law communities.

²⁴Rembrandt, "Kedudukan Hak Ulayat dalam Status Kawasan Lindung di Sumatera Barat", *Jurnal Bina Hukum Lingkungan*, Volume 1, Nomor 2, April 2017, p. 253.

However, in reality, overlapping and inconsistency in natural resource management policies among several relevant institutions often occur in the field. Conflicts between communities and the government further deteriorate environmental conditions and natural resource issues. Local governments tend to exploit natural resources solely to increase regional revenue without significantly involving the local community.²⁵

In this determination, the aspect of legal legality becomes crucial. The status of customary community land rights or customary community ulayat rights must be ratified through a legislative process (a political process) that will give rise to regional regulations regarding the recognition of customary community land rights. In the writer's opinion, this is highly detrimental to the customary communities. Local leaders will have a significant interest in land, whether it's for personal gain or political power. With such authority, the status of customary community land rights ratified through regional regulations will heavily depend on local leadership.²⁶

Repressive Legal Protection:

Sectoral legislation is deemed inadequate in protecting the existence of customary land rights of indigenous communities. Despite the numerous laws and regulations established to safeguard these rights, disputes and conflicts between indigenous communities and both the government and private entities still persist. Local governments play a crucial role as facilitators, coordinators, and policymakers. Crafting policies related to customary land rights require a correct conceptual understanding and adherence to higher-level laws and regulations.

From the cases outlined above, it is evident that the non-litigation dispute resolution process, which involves settling disputes based on local customary law through negotiation, often fails to reach an agreement. Consequently, the parties involved resort to litigation, specifically through the District Court. However, the litigation process is time-consuming and ultimately results in the indigenous community being defeated. This lack of legal certainty, protection, and justice is deeply felt by the indigenous community.

CONCLUSION

The recognition of the existence of customary community land rights in Article 3 of the UUPA is limited to the extent that they still exist. This means that if they cease to

²⁵ *Ibid*, p. 255.

²⁶ Laike, Reli Jevon (2019), " Problematika Pengakuan Hukum Terhadap Hak Ulayat Masyarakat Hukum Ada", *Jurnal HIBUALAMO, Seri Ilmu-ilmu Sosial dan Kependidikan*, 3 (1), p. 24.

exist in reality, these rights will not be revived, and no new customary land rights will be created. The conditions for the existence of customary land rights must meet several elements as stipulated in various legislative regulations. These regulations are enacted with the aim of protecting the customary land rights of indigenous communities. However, in reality, communities often struggle to outline their territorial boundaries and establish legal relationships regarding land utilization within their territories. As a result, customary land rights are often marginalized when facing government or private entities. Protection of customary land rights is already embedded in the constitution, sectoral laws, and local regulations. However, conflicts between indigenous communities and the government or private entities still frequently occur in reality. Some examples of disputes happen in forestry and plantation areas.

With the enactment of Law No. 11 of 2020 on Job Creation, later replaced by Law No. 6 of 2023 on the Determination of Government Regulation in Lieu of Law No. 2 of 2022 on Job Creation as Law and Government Regulation No. 18 of 2021 on Management Rights, Land Rights, Apartment Units, and Land Registration, it is hoped that all indigenous communities will apply for their customary land rights or ulayat rights to be granted Management Rights. By being given the opportunity to obtain management rights over customary land, indigenous communities will not lose their rights with the issuance of HGU (Right to Cultivate) which has a longer duration compared to management rights. Thus, when the tenure expires, the land will revert to the possession of the indigenous community.

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