

# Oversee Recognition and Existence of Right of Ulayat/Land of Ulayat Customary Legal Community

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## Abstract

The title in this paper is Oversee Recognition and Existence of Right of Ulayat/Land of Ulayat Customary Legal Community. In this study used the method of normative research or Library research that uses normative juridical approaches. Use of this method is intended to be obtained data about the basic knowledge and theory that is discussed in writing by conducting a normative legal review used to give an overview of the reality or the phenomenon of recognition of the rights of Ulayat by the state as set out in article 3 of Agrarian Law which then analyzed in order to explain the Existence of rights of Ulayat to date. Until now there are very few legislation that regulates the rights of Ulayat, and until now there is not as suitable by the Agrarian Law. In the legislation mentioned, the customary rights regulation is still generally not yet reached its implementation. Should the rights of customary Law Society be recognized as seen in article 56 of Agrarian Law that the rights of indigenous peoples will be governed by the laws that have not been carried out. Because there has not been any legislation governing the rights to the implementation of indigenous rights experiencing constraints, harassment can occur against indigenous peoples. These circumstances demonstrate the absence of political will and the willingness of good government to rule the rights of indigenous peoples. Allowing Ulayat rights with assumptions depends on the age. Because it can be concluded, that in legislation the existence of Ulayat rights is still weak. Besides, in order to build the national legal system, in addition to setting the right of Ulayat, it is necessary to set the meaning of the rights of Ulayat, its subject, its objects, the characteristics, boundaries, rights and obligations inherent in the rights of the Ulayat.

**Keywords:**existence of rights of Ulayat, recognition of Ulayat rights, indigenous people law

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## A. Introduction

The land is a very valuable asset worth the human life of its owner over the land. The land not only has an economical value, the but also has a value of religious, socio-cultural and security defenses. The

economic value of the land is now common that the land is made into investment for the development of industrial manufacturing, housing, plantation, agriculture, forestry and tourism. The economic value of the land has emerged since the Middle Ages after

the destruction of feudalism. The Industrial Revolution changes human perspective on land.

Human perspective on the land is always changing, that is, at the beginning of the land is seen to have or contain magical-religious values. In this way the land and earth are mothers who have uterus and from the womb born of man. This viewpoint is embraced by naturalism.<sup>1</sup>

In the early centuries of rationalism that was since Socrates with his disciples Plato, and Plato had a disciple of Aristotle and then this view changed. The land that originally looked to have a magical-religious value where it states that the land or earth is a nature where the ancestral world is even the land is the ancestor itself. This view changed that the land has not only the magical-religious value but also has a determinant of social status instruments. Land or earth as a social instrument when the feudal lords are the landlord, the chief of the tribe becomes king or emperor. Who controls the land/Earth he control the world. So the landlord competing to be the ruler of both legal and illegal means.

Legal means for example through buying and selling, exchanging, tenancy and illegal ways for example to seize, rob, fraud even colonize the land of others. This viewpoint is born from the view of who controls the land he conquered the world. This viewpoint is called feudalism that gives birth to the feudal people. Marx in his writings in the book "Das Capital" about Asian capitalism appropriately described the condition.<sup>2</sup> In the view of Marxism Land is capital, capital for Europeans is a specific capital of money, so for the Asian community, capital is the land. Only for the Asian community, the land is a determinant of social status, whoever controls the land is as landlord or chieftain and he is the king.

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<sup>1</sup> Dominikus Rato, *Hukum Benda dan Harta Kekayaan Adat*, LaksBang PRESSindo, Yogyakarta, 2016, hal.80.

<sup>2</sup> A.A.G. Peters dan Koesriani Siswosoebroto, *Hukum dan Perkembangan Sosial*, Buku Teks Sosiologi Hukum, Pustaka Sinar Harapan, Jakarta 1998, page.

With the inception of the Industrial Revolution, the view that whoever controls the land is controlling the changing world. The change is that whoever controls the capital/money is the one who controls the world. That is the birth of the capitalists referred by Marx in his book "Das Capital".<sup>3</sup> The change of land view that contains magical-religious value becomes a determinant of social status and is now an investment instrument criticized by Marx. Marx saw that the capital was also the feudal people, this materialism has exploited against fellow human beings, especially the laborers or proletarian people. The capitalists relying on the power of money, he controlled the workers and so he exploited their workforce. Because in the view of the feudal people, workers who need food, clothing and houses that are now being controlled by landowners/landlords. With the change of land to money, the money owner is also not much different from the landlord in the feudal period. Only in the times of the proletarian were agricultural laborers, so the industrialization of the proletariat was an industrial laborer.

Such a change changed human perspective on the land. Land is no longer a source of living but a source of conflict, because land has been replaced by machinery. The point of view that land as determining social status is changed and replaced with money. Who has the money he conquered the world. Time measured with money "time is Money". The nature and human dignity are measured by money. The materialism criticized by Marx became a reality. The capitalist supporters then turned no longer defending Marx but hostile to Marx, as Marx stripped the capitalists.

That is the point of view of Europeans on land and how does Indonesia's people view the land? The perspective of Indonesians on land is also not much different from European perspectives. What distinguishes the perspective of Indonesians with

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<sup>3</sup> Ibid.

Europeans on land is that the European viewpoint that land has the magical religious value has been pass and replaced by a very materialistic perspective. This materialistic viewpoint that the land is only one of the many production tools in addition to the machine and man. While the viewpoint of the Indonesian people do not leave their views on the land, namely that the land still contains the magical religious value in addition to economic value, socio-cultural, political and security defense.

To see the importance of land in human life, the ancestors of the Indonesian people have outlined the provisions of land law in the customary laws of each region.

In general there are at least four fundamental characteristics of the form of land mastery according to customary law, i.e. absence of absolute ownership, inclusive mastery, prohibition to trade the land (albeit for land that has been personally mastered), as well as the more respected to human and works than the land. These four traits are intertwined, which is based on the underlying paradigm that land is a distinctive resource unlike other economic resources. Because of its limited number, the land should be used fairly and should be able to give welfare to all people on the earth. Therefore, the land should not be used as a free market commodity.<sup>4</sup>

The land in the indigenous peoples has a special and important position. This is due to the nature of the land is one of the permanent and unaffected wealth with the condition that occurs above it, then factually in the comfort of the land serves as a dwelling place of fellowship, giving life to the citizens of the fellowship, where the citizens of the people in the village and the abode of supernatural protection of fellowship and spirit in the ancestor of the Fellowship<sup>5</sup>

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<sup>4</sup> Laksono Utomo, *Hukum Adat, Rajawali Pers, Jakarta, 2016*, page.58.

<sup>5</sup> Surojo Wignojodiputo, *Pengantar dan Azas-Azas Hukum Adat, Alumni, Bandung 1978*, page 237

## **B. Research Methods**

In writing this author used normative juridical approach because this research based the law or norm in the form of concrete laws that have normative legal object in the form of legal principles, legal system, synchronization vertically and horizontally.

The type of research was categorized as a research that was descriptive analytical which was a method that gives an overview of the reality or the phenomenon of recognition of the Rights of Ulayat by the State as set forth in article 3 of the Agrarian Law who then analyzed in order to explain the existence the rights of Ulayat until this time.

The data sources used in this study used Secondary data derived from relevant legal materials which include: primary legal material include the 1945 Constitution, Agrarian Principal Act; Secondary legal materials include the results of scientific research, legal experts, scientific meeting results as well as tertiary legal materials that were materials that can provide guidance and explanation of primary and secondary legal material.

Data that has been collected was analyzed qualitatively and was given an overview of the recognition and existence of rights of Ulayat or the land of Ulayat in Indonesia as well as how it should be done by the country and customary law community in strengthening the existence of That can provide legal certainty and continue to preserve the customary law community itself.

## **C. Results and Discussion**

In the Agrarian Law of the rights of Ulayat, it can be firmly seen in article 3 which mentions that by remembering the provisions of article 1 and article 2 the implementation of Ulayat rights and rights similar to those of customary Law society, as long as in reality Still exist, must according to national and state interests, which were based on the unity of the nation and should not be contrary to higher laws and

regulations. Although the rights arrangement of Ulayat in only one article in the Agrarian Law but it was a very brilliant idea of the Agrarian Law framing team, this was due to the customary rights of indigenous Law Society was recognized in the provisions of the fundamentals governing agrarian In Indonesia. The concept of the rights in the form of Ulayat of indigenous peoples in Indonesia was not found in the concept of Western law, because the concept of Western law was based on the individual, Person and the group or institution formed by law and which is formed by deed of desired law. Courage of the team that forming agrarian law required a follow-up in the implementation of the rules of agrarian implementing both laws, government regulations and other in accordance with the construction and hierarchy Legislation in Indonesia.<sup>6</sup>

### **1. The conception of the rights of Ulayat**

In the Agrarian Law concerning the land of Ulayat and Ulayat rights were not separated firmly. The rights of Ulayat are found in article 3 of the Agrarian Law which formulated by combining the formulation that has been produced by the Agrarian Law forming team since the beginning of 1948 until a thorough review in the DPRGR Council that mentions that with Given the provisions of article 1 and article 2 the implementation of Ulayat rights and rights similar to those of indigenous peoples, as long as the fact still exists, must be accordance with national and state interests, which Based on the unity of the nation and should not be contrary to higher laws and regulations.

Further reviewing from the provisions of the Agrarian Law explanation in the number II on the fundamentals of the National Agrarian Law (3) mentioned that related to the relationship between the nation and the earth as well as water and state power as mentioned in article 1 and 2 , then in article 3 the

provisions of the rights of the Ulayat of the unity of the law community. The right of Ulayat referred to herein will be to seat the right at the appropriate place in the country of nature today.

This provision was first based on the recognition of the customary rights in the new agrarian law. As it is known, in fact, the rights of the Ulayat exist and apply and are also noted in the decisions of the judges, never before is officially recognized in the law, with the consequences that in carrying out Agrarian Regulations of the Ulayat rights in the colonial period used to be often ignored. In relation to the mention of the right of Ulayat in the underlying law of agrarian law, which essentially means the recognition of the right, then basically the right of Ulayat will be observed as long as the right in fact is still in the community Laws concerned. For example, in granting a right to land (such as the right of business) the legal community in question will be heard in his opinion and will be given "Recognitie" which he is entitled to accept it as the rights holder of the Ulayat. But the contrary is not justified, if it is based on the rights of Ulayat that Law Society obstructing the granting of the business rights, while the granting of such rights in the area is really necessary for a wider interest.<sup>7</sup>

The rights of Ulayat based on the official recognition of a law referred to as the Basic Law is not a basis of the grand norm in a country, because explicitly referred to as the basic provisions in the new law ( means national Agrarian Law) is the joints and the provisions of the course that need to be prepared in the form of legislation and this will be the basis for other regulations. Thus, the law means that the Constitution was not different from other laws in the order to form legislation in the country of Indonesia, but its nature was the basic rule of law New agrarian.

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<sup>6</sup> Yulia Mirwati, Wakaf Tanah Ulayat dalam Dinamika Hukum Indoensia, Rajawali Pers, Jakarta, 2016, page. 130.

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<sup>7</sup>*Ibit*, page.131.

## 2. Conception of Ulayat Land

Relating to the land of Ulayat should be interpreted according to the interpretation of the law, because the meaning of the land in the Agrarian Law is the surface of the Earth (article 4 paragraph (1) Agrarian Law) which expressly mentions that: on the basis of the right to control of the state as Referred to in article 2 shall be determined by the rights to the Earth's surface, called the land, which can be given to and owned by the people either personally or together with other persons and legal entities. From the interpretation of article 4 paragraph (1) of Agrarian Law that the state in its public authority determines and governs the granting of land rights to:<sup>8</sup>

- A. People or private;
- B. People along with others;

This was where the emergence of shared ownership (individual concepts) and undivided co-ownership (communal). The concept with this undivided bowed was only known in the heterogeneous laws of a country. Indonesian state declared itself with Bhineka Tunggal Ika, different but still unified, then accepted the basic legal concept in two systems namely written law and customary law (the law in which the customary region is mostly unwritten) .

This customary law also used as the source of the formation of agrarian law, was not the customary law of one area but the customary law of the customary summary and values arising in the foundation of the philosophy of the country or basic country or the ideal foundation of the country is Pancasila. Based on this, it should be lifted to the surface of the common rights of customary law communities called by the rights of Ulayat or other designations in the areas of customary Law society.

C. Agency of Law, is an institution formed based on the will of a group of people to alienate its wealth with certain objectives, such as limited liability companies, cooperatives, foundations, other social

legal entities, or In government regulation No. 38 year 1963 for legal entities that are allowed to have proprietary rights as stipulated in article 21 paragraph (2) by the Government stipulated by legal entities that can have proprietary rights and Certain terms.

In its development then concerned with the rights of the Ulayat seen in the regulation of the Minister of Agrarian No. 5 year 1999, about the guidelines for problem solving the rights of the Society of Law of Adar affirmed a strict formulation between the rights of Ulayat with The land of Ulayat as stated in article 1 that mentions that Ulayat land was a field of land on which there is the right of ulayat of a customary Law society, while the customary law community itself was a group of people who are bound by Its legal order as a citizen with a law fellowship because of the similarity of shelter or on the basis of offspring.

The affirmation of the right of Ulayat and the land of Ulayat that was formulated above still has not given the legal certainty of the concept of the land as a right. From the formula of Ulayat right it appeared that the right referred here was to take advantage of natural resources, including land within the indigenous territories of a customary law community in Indonesia. If traced from the concept of authority there was a Concept of permissions and concept of rights. Authority within public law fields called licensing. Permission is to grant or not prohibit, approve and allow. When concerned with the formulation of authority given to indigenous people to take advantage of the land, it was only a concept of permission, not the concept of rights in law. Because in the law the concept of rights was all that is organized by law. The concept of entitlement was not only a given permission but the concept of right is inherent to the subject due to legal relationship. Legal relationship caused by legal action.

## 3. Existence of the right of Ulayat in the Positive law in Indonesia:

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<sup>8</sup>*Ibit*, page.134-135.

Further recognition of Ulayat's right was also stipulated in the Constitution of the state of Indonesia namely in article 18 B of the 1945 Constitution that the State recognizes and respects the unity of indigenous peoples and their traditional rights throughout the still And in accordance with the development of the people and principles of the unitary Republic of Indonesia, which was governed by the law, and further in article 28 paragraph (3) of 1945 Constitution that cultural identity and traditional society were respected in harmony With the development of times and contests. And on the Fourth Amendment of 1945 Constitution was stipulated also in article 32 paragraph (1) that the state is advancing Indonesia's national culture amid the world's civilization by guaranteeing the freedom of society in maintaining and developing its cultural values.

The certificate of existence or the existence of customary rights in the formal juridical law can be deduced from the legislation that set it, among others:

- a. Agrarian Law Article 3 and Article 5.
- b. Law No.5 of 1967, about Basic Forestry Provisions and Law No. 41 of 1999, on Forestry.
- c. Law No. 39 of 1999, about Human Rights.
- d. Presidential Regulation No. 55 of 1993, about Land Procurement for Public Interest and Presidential Regulation No. 36 of 2005 concerning Land Procurement for Implementation of Development in the Public Interest.
- e. President Instruction No. 1 Of 1975, concerning Synchronization in the Implementation of the Arrangement in the Field of Forestry, Mining, Migration and Public Works.
- f. PMNA/Ka. BPN No. 5 Tahun 1999, concerning Guidelines for Resolving Customary Law Communal Ulayat Rights Issues.
- g. Law No.21 Of 2001, concerning Special Otonomy fro Papua Province
- h. Local Regulation of West Sumatra Province No. 9 Of 2000, concerning the Principal Provisions of the Nagari Government and West Sumatra Province

Regional Regulation No. 16 of 2008, concerning Ulayat Land and Its Utilization.

- i. Local Regulation of Lebak No. 32 Of 2001, concerning Protection of the Ulayat Rights of the Bedouin Community.
- j. Local Regulation of Nunukan No.3 Of 2004, concerning the Ulayat Rights of the Customary Law Community and Local Regulation No.4 of 2004, concerning the Ulayat Rights of the Customary Law Community of Lundayeh, Nunukan Regency.

To determine whether there are still customary rights or not, the criteria that can be used as a reference is according to Article 2 paragraph (2) of the Regulation of the Minister of Agrarian Affairs / Head of BPN No. 5 of 1999, namely :<sup>9</sup>

- a. The customary law of community element is that there is a group of people that still feel bound by their customary legal arrangements as their citizens along with a certain legal alliance, that recognizes and applies the provisions of the community in their daily lives.
- b. Regional element, that there is a certain customary land that is the environment of the citizens of the legal community and the place to take their daily needs.

Relationship between the customary law community and their land, i.e. there is a customary law order regarding the management, control and use of customary land that is applicable and adhered to by the members of the legal community.

Likewise the formulation of whether or not there are still customary rights is also conveyed by Maria S.W. Sumardjono, it must be seen from three elements namely :<sup>10</sup>

- a. The existence of customary law communities who adhere to certain

<sup>9</sup> Hal ini dijelaskan kembali dalam buku tulisan Rosnidar Sembiring, Hukum Pertanahan Adat, Rajawali Pers, Jakarta, 2017, hlm.28.

<sup>10</sup> Maria S.W. Sumarjono, *Tanah dalam Perspektif Hak Ekonomi Sosial dan Budaya*, Jakarta, Kompas, 2008, hlm.170

characteristics, as subject of customary rights;

b. Land / territory with certain boundaries as a characteristic of labensraum which is the object of customary rights; and

c. The authority of indigenous and tribal peoples to take certain actions.

In the context of the existence of ulayat land, its existence needs to be stated in the registration of base map by including a cartographic object and describing its boundaries and recording it in the land register.<sup>11</sup>

#### **4. Strengthening the existence of rights of Ulayat in Indonesia:**

According to the regulations mentioned above can be seen very few legislation that regulates the rights of Ulayat, and until this time does not exist as intended by the Agrarian Law. In the legislation mentioned, the customary rights regulation was still generally not yet reached its implementation.

Should the rights of customary Law community be recognized as seen in article 56 of Agrarian Law that the rights of indigenous peoples will be governed by the laws that have not been carried out. Because there has not been any legislation governing the rights to the implementation of indigenous rights experiencing constraints, harassment can occur against indigenous peoples. These circumstances demonstrate the absence of political will and the willingness of good government to rule the rights of indigenous peoples. Allowing Ulayat rights with assumptions depends on the age. Because it can be concluded, that in legislation the existence of Ulayat rights was still weak. Besides, in order to build the national legal system, in addition to setting the right of Ulayat, it was necessary to set the meaning of the rights of Ulayat, its subject, its objects,

the characteristics, boundaries, rights and obligations inherent in the rights of the Ulayat.

Strengthening the existence of rights Ulayat or Customary land as it has been set in Agrarian Law and explanation should be done further arrangement in the form of legislation, because if not regulated in the form of legislation will be has resulted in a prolonged polarization of conflicts regarding the right of Ulayat or ulayat land.

The arrangement in the law should base on several theories concerning this which aims that at the time of the application of the law, it can actually be implemented in accordance with the purpose of the legislator.

The Living Law theory of Eegene Ehrlich states that every community has a living law. All laws are considered as social law, in the sense that all legal relations were characterized by socio-economic factors. The fact of the social factor gave birth to the law including the world of human experience and thereby responded as normative ideas. There are four ways for the anormative realities to normative habits, effective power, effective property and a statement of personal will.

The social reality was more seen from the economic aspect, where the economy was the basis of the whole human life, so the economy was decisive for the rules of life. From human economic needs to become conscious, and then arise directly, that was the living law, because the law was not a rule on the members of the community, but was realized and expressed in their own behavior.<sup>12</sup> This was a theory of sociological Jurisprudence in addition to the decay by Eugene Ehrlich also by some experts, namely Roscoe Pound, Benyamin Cardozo, Kantorowics, Gurvitch and others. This essence of mahsab thought flourished in America:

<sup>11</sup> Djamanat Samosir, *Hukum Tanah Indonesia (Eksistensi dalam Dinamika Perkembangan Hukum di Indonesia)*, Bandung, Nuansa Aulia, 2013, hlm 160.

<sup>12</sup> Theo Huijbers, *Filsafat Hukum dalam Lintas Sejarah*, Kanisius, Yogyakarta, 1982, page. 213-214

"Good law is the law that is in accordance with the law that lives in society"

It means that the law reflects the values that live in society. This mahsab was about the importance of Living Law laws that live in the community. And its nascence according to some assumptions is a synthesis of Thesis, namely positivism Anti thesis Law of history sect.<sup>13</sup>

Thus the dealings concerning land rights should be governed further in the legislation. This was if it is connected with the right to land contained in article 16 paragraph (1) Letter h that other rights not included in the above rights shall be stipulated by the law and the rights in temporary nature as Referred to in article 53 of Agrarian Law. Based on the above, the arrangement was related to the rights of Ulayat as implied in the Agrarian Law and its explanation must be at the legal level. If not specified in the form of legislation it will cause polarization of prolonged conflicts in the application or implementation of Agrarian Law.

#### **D. Conclusion**

In general, ulayat rights exist throughout the territory of Indonesia and its existence depends on the existing fellowship and is an integral part of the customary laws of each region.

In today's socio-economic condition with the rapid growth of population and industrialization era that has long penetrated to all corners of the country is no exception to the areas that the indigenous peoples' unity recognition of the rights of Ulayat is still strong in the form of customary land, the author denied that the excitation of Ulayat rights specifically in terms of land of ulayat can still be maintained.

In addition to the recognition of Ulayat rights by the Government in a formal juridical law, the right of Ulayat is considered the private rights of the State,

namely a part of the non-free Domein state. The recognition of the customary rights is contrary to the recognition that the right of the Ulayat is still in the comfort of the customary law community concerned, although the confession is still ambivalent, because there is a government that recognizes the existence of the land, on the other hand the government outlined in the implementation of the rights of the Ulayat should not contradict the interests of the national and State, the unity of the nation and the regulations listed in the Agrarian law.

To need to clearly formulated the things that cause ambivalent state recognition of the rights of Ulayat e.g. by distorting and avoiding the multi-interpretation of the sentence "As long as it does not contradict national and state interests, unity of nations and regulations listed in the agrarian law" in agrarian law in the hopes of providing more legal certainty, justice and sustainability of the existence of rights ulayat/land customary legal community.

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<sup>13</sup> Lili Rasjidi dan Ira Tahania, Dasar-Dasar Filsat dan Teori Hukum, Pt. Citra Aditya Bakti, Bandung, 2004, page. 66-67.

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