



LEGAL PROTECTION OF LAND CONTROL OF BADUY INDIGENOUS PEOPLES AND SEDULUR SIKEP

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ABSTRACT

Applicability of UUPA, a step forward in the land law, but with the foundation of land tenure and the former western lands that are not owned by an individual into a state land "directly controlled by the State to the maximum benefit of the people", it becomes a big problem, what is it? Proof of ownership of land should be formal and based on the written evidence proved village government (Lurah), how to indigenous peoples who are not familiar with reading and writing, they are farmers working in the tradition to the next. In the Local Rules Samin people not give legal protection to ownership. Meanwhile the Lebak's District Government issued Decree's No. 32, 2001 About Protection of Land Rights Baduy society, to guarantee the continuity of the Baduy. This local regulation should be used as an example for legal protection against indigenous peoples.

Keywords: Legal protection; indigenous land;

PREFACE

BACKGROUND

Since the beginning of the enactment of the UUPA, there has been a sign of symptoms of inequality of ownership and control of

land. Comparison between the availability of land as a scarce natural resource on the one hand, and the increase in population with various needs for land on the other, is not easy to find the solution. In other words, the access to acquiring and utilizing land to fulfill basic human needs cannot be enjoyed by everyone due to, among others, differences in access to capital and political access

The question that arises is how actually the meaning of "for the greatest prosperity of the people" which is the basis of the UUPA is correctly understood and translated in various policies that support or are relevant to the land sector. It seems that the right choice is to reflect on fundamental things rather than just recording the lack of implementing regulations on the UUPA which are considered important. But furthermore it takes a thought that does not stop at the quantity of regulations that are still needed, but especially on the quality of the policies produced.

It seems that this sociological matter, it will appear increasingly complicated with the emergence of various deregulation and debureaucratization policies in the land sector in the face of the free trade era. The awareness of the importance of reforming in various fields in an effort to find a way out of the economic crisis, as well as horizontal land disputes that began to be felt in late 1977, has pushed thinking towards reforming in the land sector policy (Sumardjono, 2006: xiv). This dynamic development, whether desired or not, leads to the need for conceptual thinking in order to responsibly fill and anticipate the development of land law.

The important position of land in the community, especially customary peoples, shows the appreciation of customary people in interpreting the land. Even in defending the land must be defended even though it dies, no matter the spill of blood is caused by it. This shows that every inch of the land is covered with the dignity and honor of the owner. Land according to the peasant community is a matter of life or death matters (survival), self-esteem, existence, ideology and value.

Conflict over land today arises by a huge demand for land for government projects, such as infrastructure development and private enterprise projects. Some policies and attitudes of the government in development that are solely oriented towards pursuing economic needs by using a government-based development paradigm through the support of repressive legal instruments are the cause of damage and pollution of natural resources which will systematically destroy the culture of indigenous peoples whose lives depend heavily on soil.

The land law conception at the national level based on the 1945 Constitution paragraph 4, it states that it is insightful to advance the general welfare, educate the life of the nation, and participate in world order. What is formulated in the 1945 Constitution and regulated in the UUPA Article 1 states that all land in the entire territory of the Republic of Indonesia "is the right of the Indonesian people", the word "is" means "belonging". As the right of the Indonesian people is nothing but rooted in customary rights or based

on customary law. In customary communities, *ulayat* rights are the highest right of all community law. Based on the thought above, this study will focus on the behavior of the community, especially the land with the aim of forming a legal protection conception model of land in the indigenous people of Java and Lombok, in order to accommodate the interests of indigenous peoples and the balance of the environment in the Republic of Indonesia and its law enforcement becomes very useful.

PROBLEM FORMULATION

Ulayat rights are recognized for their existence for a particular adat law community, as long as in reality there are still exist. The existence of *ulayat* rights in certain customary law communities, among others, can be seen from the daily activities of customary leaders and traditional elders in reality, as the duty bearers of authority to regulate control and lead the use of *ulayat* land, which is a common land of indigenous peoples concerned.

In addition to being recognized, its implementation is limited, in the sense that it must be in such a way that it is in accordance with national and state interests, which are based on national unity and must not conflicted with higher laws and regulations. *Ulayat* rights in fact no longer exist, they will not be revived, and also no new *ulayat* rights will be created. In the framework of national land law, the duties and authorities which are

elements of *ulayat* rights have become the duties and authorities of the Republic of Indonesia, as the nation's power and officers. In reality *ulayat* rights tends to decrease, with the increasingly strong personal rights of the citizens or members of the customary law community concerned over parts of the *ulayat* lands under their control.

The number of legal issues on the protection of land rights for indigenous peoples resulted in the existence of indigenous peoples' land being always an actual problem in the agrarian field. The question then arises as to how to protect the rights of land for indigenous peoples and legal protection for the *ulayat* land. The question will be sought answers through this research. Then the results of these answers will be designed a conception of the model for the implementation of the protection of land rights for indigenous peoples in Indonesia.

GOALS AND USAGE

The purpose of this study is to analyze the implementation of protection of land rights for indigenous peoples and legal protection for these *ulayat* lands. The results of this study are expected to be useful to open the horizons of the community and related parties about legal protection of land rights according to national land law that is able to accommodate the interests of indigenous peoples.

RESEARCH METHODS

This research is a type of empirical legal research using the grounded theory research method, in conducting research using the method to construct hypotheses based on the concept of ideas, and others to verify the hypothesis comparing the results of the research, by looking at what happens next how to find solutions to the problem.

In each research activity, object or target of research is needed by using data collection instruments, which are questionnaires supported by interview techniques. In this case, the researchers developing interview techniques as stated by Burhan Bungin which states: Data collection is carried out by participant observation methods, in-depth interviews, focused group discussions, photography and documentation.

LITERATURE REVIEW

History of Legal Recognition of Indigenous Peoples in Indonesia

Legal recognition of indigenous peoples in Indonesia, since post independence until now has experienced 4 phases of recognition, *first*; after Indonesia became independent in 1945, the founder of this country had formulated in the state constitution (UUD 1945) regarding the recognition of indigenous peoples. In the 1945 Constitution, it is said that in Indonesia there are around 250 regions with original arrangements (*zelfbesturende, volksgemeenschappen*), such as *marga, desa, dusun* and *nagari*, this is a form of recognition

from the 1945 Constitution which is not included in the constitutions that have ever been applied in Indonesia such as the RIS Constitution and UUDS.

Second; legal recognition of Indigenous Peoples occurred in 1960 with the promulgation of Law No. 5 of 1960 concerning the Basic Agrarian Law (BAL/ UUPA). Recognition of Indigenous Peoples and customary rights is carried out as long as the reality still exists and in accordance with national interests and in line with the above laws (contained in Article 3 of the BAL/ UUPA). The concept of recognition in the BAL/ UUPA is different from the concept of recognition in the 1945 Constitution because the concept of recognition in the BAL/ UUPA is the concept of conditional recognition.

Third; at the beginning of the New Order regime legislation was carried out on several fields that were closely related to Indigenous Peoples and their rights to land such as, Law No. 5 of 1967 concerning in Forestry and Law No. 11 of 1966 concerning in Mining. In these two laws regulate the recognition of the rights of Indigenous Peoples as long as they still exist. Which later in its development every legislation that was legalized during the New Order always requires recognition if it fulfills the elements: (1) in reality they are still exist; (2) does not conflict with national interests; (3) does not conflict with higher laws and regulations; and (4) determined by regional regulations, this concept is known as the concept of layered conditional recognition. The point is to recognize

the existence of an Indigenous Community must meet sociological, political, juridical and procedural requirements (stipulated by the Regional Regulation), thus the recognition of the law does not provide freedom for indigenous peoples but rather provides limitations.

Fourth; after the reformation era the 1945 Constitution was amended, in the second amendment of 2000 there was regulation of recognition of Indigenous Peoples and their rights. Based on the requirements of article 18B paragraph (2) of the 1945 Constitution the Second Amendment states that "The State recognizes and respects Indigenous Peoples' unions and their traditional rights as long as they are alive and in accordance with the development of society and the principles of the Unitary Republic of Indonesia, which is regulated in law.", Article 41 Tap. MPR No. XVII / MPR / 1998, concerning in Human Rights II. The Human Rights Charter states that "The traditional cultural identity of the people, including the rights on *ulayat* land is protected, in line with the times.", Article 6 of Law No. 39 of 1999 concerning Human Rights also stated that "In the context of upholding human rights, differences and needs in Indigenous Peoples must be considered and protected by law, society, and the Government." And other relevant provisions of the law, it can be drawn a line of recognition of Indigenous Peoples and their traditional rights during the reformation period still applied the same recognition pattern as the New Order era, called as layered conditional recognition.

Local Government Authority Regarding Legal Protection of Indigenous Peoples

Based on Article 7 and 11 of Law No. 22 of 1999 concerning in Regional Government which has been amended by Law No. 32 of 2004 concerning in Regional Government, is given authority to the District / City to formulate and make regional policies that provide greater space to provide protection for Indigenous Peoples and rights to ownership of customary land. Some regions have used this authority to provide protection and recognition to Indigenous Peoples, this is evident from the issuance of Regional Regulations on the Protection of *Ulayat* Rights and Indigenous Peoples, such as the Lebak Regional Regulation No. 13 of 1990 concerning Guidance and Development of Indigenous Peoples of the *Baduy* Community in the District of Level II Lebak, which was continued with the Regional Regulation of the District of Lebak N0. 32 of 2001 concerning Protection of *Ulayat* Rights of *Baduy* Community, Bali Provincial Regulation No. 3 of 2003 concerning the Protection of the Existence of *Pakraman* Village Traditional Village, and the Kampar District Regulation No. 12 of 1999 concerning Land Rights of *Ulayat*.

All Regional Regulations made by the Regional Government have the aim that the Indigenous Customs can be preserved and maintained so that they can support Indonesian National Culture,

(Kusdinar, 2004: 7)⁹ but in reality, the enforcement of these regulations does not fulfill elements which are important elements from law enforcement, such as legal certainty (*rechtssicherheit*), benefit (*zweckmassigkeit*) and justice (*gerechtigkeit*) (Mertokusumo, 1999: 145). Because in practice the implementation of these by-laws is not directed at the act of preserving and maintaining indigenous customs but rather directed at actions to modernize and take economic advantage of the existence of these Indigenous Peoples. As an example to the *Baduy* Indigenous Peoples, the Lebak District Government made *Sarmedi* (an Outer *Baduy* Citizen) a public figure in the development of prosperous families even though this was not in accordance with *pikukuh* (customs) held by the *Baduy* community that is concerned about simple and traditional life. Even more alarming is sometimes the inconsistency action taken by the Regional Government by making policies and regulations whose substance is contradictory to the regulation of the protection and recognition of Indigenous Peoples.

In Articles 1 and 2, the implementation of customary rights and similar rights and Indigenous Peoples, as long as in reality they are still exist, must be made in line that they are in accordance with national and state interests, which are based on national unity and must not contradict the higher law and regulations.

⁹ This is in line with the policy objectives of handling the Remote Indigenous Community (RIC/KAT), such as, exploring the potential that exists in the community and the living space of the indigenous people so that the process of increasing the role of development and enhancing community empowerment is in line with local traditional wisdom in managing natural resources.

RESULTS AND DISCUSSION

The Sundanese *Baduy* is a term given to the Sundanese people whose lives were isolated from the crowds in Kanekes Village, Leuwidamar District, Lebak Regency, and Banten Province. Other names are Rawayan or Kanekes people. The government gave the customary rights to the Baduy community to process 5,101.8 hectares of land and its environment in accordance with the Lebak Regency Regional Regulation No. 13 of 1990, and the District Regulation of Lebak No. 32 of 2001 concerning in Protection of *Ulayat* Rights of *Baduy* Communities. For the *Baduy* community, the granting of *ulayat* rights is like an acknowledgment given by the Kingdom of Banten in the past, where they have the right to regulate their order of life in all matters and once a year give tribute to the authorities. The *Baduy* community has the structure of the customary law order which is subservient and obedient to the three *puun* as a unit (*trias politica*), as the supreme leader of the customary government residing in the villages of Cikeusik, Kampung Cibeo, and Kampung Cikartawana. The customary legal structure system in the Baduy community plays an important role in protecting all layers of its citizens both in the social field and in managing its natural environment (Results of an interview with Jaro Dainah, Kanekes Village Head).

Baduy people do not recognize formal education or school systems. Customs prohibits its citizens from attending school. They argue that if *Baduy* people go to school they will be smarter and smart people will only damage nature so that it will change all the rules that have been set. The education obtained by the *Baduy* community is mostly done through utterances delivered by their parents, especially about the *buyut karuhun* (ancestral prohibition) about how to use the natural environment (Results of an interview with Uncal, a Gajeboh resident). The main livelihood of the *Baduy* community is farming dry land rice. The farming system is farming shifting with the fallow period (resting the land), at this time, for 5 years. Side livelihoods while waiting for harvest time or free time are making bamboo handicrafts (*asepan, boboko, nyiru, etc.*), making *koja* (bags made from bark), into the forest looking for rattan, *pete, ranji*, fruits and honey, hunting, making roofs of *kirai* leaves, making agricultural tools such as machetes and kored (Results of an interview with Agus Bule, Ciboleger guide).

The main activities of the *Baduy* community are in living their lives, essentially consisting of land management for agricultural activities (*ngahuma*) and forest management and maintenance for environmental protection. Therefore land use in the *Baduy* can be divided into: residential land, agriculture, and permanent forest. Agricultural land is land that is used for farming and gardening, as well as lands that are fed. Permanent forest is customary protected forests, such as protected forests (*leuweung kolot/ deposited*), and

kampong protected forests (*hutan lindungan lembur*) located around salvaged springs or mountains, such as forests located on Mount Baduy, Jatake , Cikadu, Bulangit, and Pagelaran. This permanent forest is a forest whose existence will always be maintained (Results of an interview with Agus Bule, Guide of Ciboleger).

In utilizing the environment, the Baduy community is very obedient to the applicable provisions such as: (1) prohibited from changing waterways, for example making fish ponds, regulating drainage, and making irrigation; Paddy rice farming is prohibited, (2) It is prohibited to change the shape of the land, for example digging the soil to make wells, leveling the land for settlements, and digging land for agriculture. The house of the Baduy community is relatively the same; the floor is of bamboo (*palupuh*), the roof is made from leaves (*hateup*), the walls are of plaited bamboo (*bilik*), and the pillars are made from wood, (3) the forest is not allowed to enter (*leuweung titipan*) to cut down trees, open fields or take forests other products. The Baduy community divides its land use into two main functions; there are the environmental protection area (*hutan lembur dan hutan titipan*) and cultivation area (agricultural land and settlement). Environmental protection areas cannot be completely converted to any activity; (4) It is prohibited to use chemical technology, for example using fertilizer, chemical to eradicate pests, using kerosene, bathing using soap, brushing teeth using tooth paste, and using poison to catch fishes; (5) Planting of plantation crops such as coffee, cocoa, cloves, oil palm, and so other crops is prohibited, and (6) It is prohibited to

keep four-legged livestock, such as goats, cows and buffaloes (Results of interviews with Mursyid, traditional leader of Cibeo).

Rules and prohibitions adopted by the Baduy community, as if it were impossible to happen in the general public. But this is the reality that occurs in the Baduy Community, which is less than 200 km from the capital city of Jakarta. The meaning of these prohibitions can be felt by the general public in present era, starting from the dam with its floods, rice fields with their pests, deforestation by exploiting natural resources in it, fertilizers and insecticides with pollution, coffee and oil palm with deforestation, and so on. The wisdom that needs to be taken from the behavior of the Baduy community is their simplicity and their aversion of greed, love the environment, do not overtake the existing nature just because for a short moment of pleasure.

Baduy people have life guidelines such as norms that originate from beliefs, such as habits and traditions that carried on in society, traditions and beliefs that applied and lived in the community (The interviews results with Mursyid's father, Cibeo village customary leader). In this study the author sees an anthropology adage including legal anthropology which states "that there is no society that does not have a law", this is based on the holistic approach that has been used and the position that law is part of culture (Mirwati, 2012: 28). Activities of human relations and group activities with each other require rules or a set of rules as a guide to behave (Kriekhoff, 1991: 37). What is truly fundamental must be in law in any society;

primitive or civilized is the legitimate use of physical coercion by bodies that are socially authorized (Adamson, 1979: 26).

In the land sector of the Baduy community, they declare themselves as enforcers of indigenous peasant culture as expressed by Victor T. King (King, tt: 460): "lastly, they regard themselves as the stakeholders of true Javanese peasant culture. They are fiercely independent." These habits and traditions are still believed and applied in the Samin community. For the Baduy community, community culture and behavior in educating their children still hold such views. How does it affect the land problem views, compare it with Malinowsky's functional and structural theory, the social function of a custom, social institution or cultural element at the first abstraction level regarding the influence and effect on customs, human behavior and other social institutions in society (Koentjaraningrat, 1990: 167).

For Baduy people, formal schools are prohibited by adat, the first reason, because according to *Jaro Cibeo*, it is enough for Baduy people to pursue *swiwitan*, the formal school is to take care of the state, let outsiders take care of the state. Second, if people have gone to school, they will be smart; if they are smart they will do what they want, which is unethical. Although not formally educated, some people can read, write, and count. This was learned from visitors who came to Baduy. The written evidence of the Baduy community is seen in the wood in his house, which is written using charcoal. What they write is their own name. In addition to learning from interactions with visitors, Baduy people also recognize letters from the *hanacaraka*

alphabet and *kolenjer* (ancient Sundanese letters) (The interviews Results with Mursyid, traditional leader of Cibeo).

In Baduy people have *karuhun* like a concept without change. The most important religious and customary concepts that are the core of Baduy *Pikukuh* are "without any changes", as stated in the *buyut titipan karuhun* as follows (The interviews results with Karmain, Baduy Residents in Kampung Cibeo):

*gunung teu meunang dilebur
lebak teu meunang diruksak
larangan teu meunang dirempak
buyut teu meunang dirobah
lojor teu meunang dipotong
pendek teu meunang disambung
nu lain kudu dilainkeun
nu ulah kudu diulahkeun
nu enya kudu dienyakeun*

Free translation:

The mountains cannot be destroyed
The valley must not be destroyed
The prohibitions cannot be violated
The great-grandfather cannot be changed
The length should not be cut
The short should not be extended
What is not should be abolished
The others must be viewed differently
The right must be justified

Baduy custom teaches "*lojor teu meunang dipotong, pondok teu meunang disambung*" 'the length should not be cut; the short should not be extended.' *Pikukuh* implies that everything must be maintained as it is, there should not be "engineered" which ultimately causes something to change from the reality. This teaching is a milestone in the uniformity of the behavior, views and appearance of the Baduy community. The additions and subtractions will result in disharmony (The interviews results with Karmain).

With life always strives to behave well: diligently working on the land, planting the gardens, raising livestock, work and activities *kudu bareng-bareng* (must be together), helping to get along well and peacefully aside from doing something forbidden, by *Sikep* residents those are believed that the result is that their lives and the surrounding environment can improve. However, if the opposite happens, it is realized that the result is only a disadvantage to the future of their own lives even the goodness of their surrounding environment (Interview with Sardi).

Boedi Harsono argued that the statement of the UUPA which states that the National Land Law (HTN) is based on Customary Law¹⁰ and that HTN/ National Land Law is Customary Law¹¹

¹⁰ In the consideration of the letter a 'states "that in connection with what is in the above considerations it is necessary to have a national agrarian law based on customary law on land, which is simple and guarantees legal certainty for all Indonesian people, without ignoring the elements that rely on religious law. "

¹¹ Article 5 states "Agrarian Law which applies to earth, water and space is customary law, as long as it is not contrary to national and state interests, which are based on national unity, with Indonesian Socialism and with the regulations

indicates a functional relationship between Customary Law and HTN/ National Land Law. Customary law according to the real meaning is the original law of the indigenous people, which is a law that lives in an unwritten form and contains original national elements, such as the nature of society and kinship based on balance and covered by religious conditions (Harsono, 1999: 201-202).

HTN/ National Land Law is 'based on' Customary Law means that in the construction of HTN/ National Land Law, Customary Law serves as the main source in taking the necessary materials; while the statement of HTN/ National Land Law 'is' Customary Law means that in relation to positive HTN/ National Land Law, Customary Law norms function as complementary laws (Harsono, Ibid). Therefore there are 2 (two) customary law functions in HTN/ National Land Law: (1) the main source of HTN/ National Land Law development; and (2) positive source of land law in Indonesia (Storus and Sirrad, tt: 49). This means that in relation to the written HTN/ National Land Law if it is not complete, then the Customary Law norms function as a complement as stated in Article 56 of the BAL/UUPA and Article 58 of the BAL/UUPA (Muhsin, et.all, tt: 70). In relation to Customary Law, with the source of HTN/ National Land Law development there are: (1) concepts/ philosophies; (2) legal principles; (3) legal institutions and (4) regulatory systems.

contained in this law and with other laws and regulations, all things are heeded by elements that rely on religious law." According to TAP MPR No. II / MPRS / 1960, the "Indonesian Socialist Society" is "a just and prosperous society based on Pancasila"

Strictly speaking, the conception/ philosophy, principles, legal institutions and the regulatory system that is the content of HTN/ National Land Law politics are mainly derived from Customary Law.

HTN/ National Land Law has the same philosophy/ conception as the Customary Law, which is religious-communalistic in line with the original view of the Indonesian community in viewing the relationship between personal human beings and the people who always prioritize the interests of the community. In Customary Law, there is a principle that "in the rights of individuals is always attached to the rights of the people" this is a manifestation of the nature of the Indonesian society (Muhsin, et all, *ibid*).

Soepomo stressed that in Customary Law, humans are not isolated individuals who are free from all ties and only remember their own benefits, but members of society. In Customary Law, the primary is not an individual, but a society, therefore according to Customary Law responses; individual life is a life that is primarily intended to serve the community. In that case, the rights given to individuals are related to their duties in society (Soepomo, *op. Cit*).

Based on this conception, the *ulayat* land as a joint property of a customary law community is seen as joint land. The joint land is a 'gift/ blessing' from a supernatural power, not seen as something that is obtained by chance or because of the strength of the indigenous people's efforts. Because the *ulayat* rights that become the life-giving environment for the community can be seen as joint-land, all

individual rights are sourced from the common land (Sitorus and Sirrad, tt: 50).

The communalistic nature refers to the existence of joint rights of members of the customary law community on land, which in the *hukuin* literature is called the *Hak Ulayat*. *Tanah Ulayat* is a common land, which is believed to be the gift of a Supreme Power or a legacy of Ancestors to a group or a customary law community, as the main supporting element for the life and livelihood of the group of all time. This is where the religiosity or religious elements appear in the legal relationship between the citizens of the customary law community and their *ulayat* land. The group can be a territorial customary law community (*desa, marga, nagari, huta*).

Citizens as group members, each of them has the right to control and use part of the land - together to fulfill their personal and family needs, with temporary rights, up to time-bound rights, commonly referred to as ownership rights. The control and use of the land can be done individually or together with other group members. There is no obligation to master and use it collectively (Harsono, op. Cit: 181). The land control is formulated with individual characteristics. The individually land control rights are private rights, because the land under his control is intended for the fulfillment of personal and family needs, not for meeting the needs of the group. Group needs are fulfilled by partial use of shared land by groups under the leadership of the Customary Head of the customary law community concerned, for example land for the development of

common livestock or land for markets and other shared needs (Harsono, *ibid*).

In the meantime, individual rights are not merely personal. It was realized, that what was controlled and used was part of the joint land. Therefore, in its use it should not be guided by mere personal interests, which are the interests of the group. The nature of such mastery in itself contains what is called an element of togetherness. The shared land is not only intended to fulfill the needs of a generation, but is intended as a major supporting element in the lives and livelihoods of previous generations, now and in the future generation. So it must be managed well and utilized to meet the common needs and needs of each individual and his family. Allotment, mastery, use and maintenance need to be regulated by the group concerned, so that in addition to being carried out in a regulated and orderly manner to avoid dispute it is also possible to maintain the sustainability of its abilities for future generations (*Ibid*). Thus, the *Ulayat* Rights of the customary law community are:

- a. in addition to containing joint ownership rights on land with members or citizens, including the field of civil law;
- b. It also contains the duty to manage, regulate and lead its control, maintenance, designation and use, which includes the field of public law.

The duty of the obligation to manage, regulate and lead the control and use of joint land, both those which are intended for mutual interests and for the interests of its citizens, cannot always be carried out jointly by the residents of the customary law community itself. So, part of the day-to-day implementation of the task was handed over to the Customary Chief himself or with the Customary Elders. The authority's duties devolution which includes the field of public law does not cover and does not affect the legal relationship with the joint land with civil law aspect. The right to own-the land is still in the customary law community, which means that it remains in the community together and does not turn to the Customary Chief. The joint right which is an *ulayat* right is not a ownership right in a juridical sense, but it is a collective right. Thus, in the framework of the *Ulayat* Rights, it is possible to have ownership rights over land that is privately controlled by the concerned indigenous peoples (Ibid: 183).

In HTN/ National Land Law, the communalistic-religious philosophy/ conception is seen in Article 1 of the UUPA/ BAL, the 'communalistic' nature can be seen in Article 1 point 1 which states that all land in the territory of the Republic of Indonesia is a common land of all Indonesian people. Furthermore, the 'religious' character appears in Article 1 Point 2 of the UUPA/ BAL which states that all the earth, water and space, including the wealth contained within it in the territory of the Republic of Indonesia is the gifts of the Supreme Lord (Sitorus and Sierrad, loc. cit).

Principles of HTN/ National Land Law, such as: (1) the nationality principle of the subject of land rights; (2) the social function principle of land rights; (3) the principle of equity and justice; (4) the principle of land use and environmental maintenance; (5) the principle of kinship and mutual cooperation in land use; and (6) the principle of horizontal separation and its relationship to buildings and land above it, is actually a legal principle derived from customary law. 'The nationality principle of the subject of land rights' comes from the principle of customary law regarding land which always prioritizes 'members of customary law' rather than members who do not come from their customary law community. Only members of the customary law community can take full advantage of their customary law areas, while the "foreigners" can only have temporary rights. "The principle of social functions of land rights" is also transformed from the principle of customary law. In customary law all private land rights come from *ulayat* rights as joint rights of customary law communities. Therefore, all land rights that are private must have social functions. As 'The principle of equity and justice' is taken from the principle of customary law which limits land acquisition to the personal and business needs of members of the customary law community itself. "The principle of family and mutual cooperation in land use" is clearly very easy to know in the customary law community, which always uses and utilize the land in a family and mutual cooperation. Furthermore, as 'the principle of horizontal separation in relation to buildings and land above it' was born from the social structure of the customary law community that separates

land controlling and ownership of the land from objects on the ground. This is due to the tendency of indigenous peoples in the beginning to always move from one place to another. HTN/ National Land Law institutions such as land rights and land sale are transformed from customary law. As it is known that the land tenure rights/ *Hak Penguasaan Atas Tanah* (HPAT) system in customary law communities consists of *ulayat* rights (Dijk, 1971: 47) as communal and land rights as individual rights, which include: Ownership rights and Usere Right. Regarding on land rights in HTN/ National Land Law which then introducing Business Use Rights/ Hak Guna Usaha (HGU) and Building Use Rights/ Hak Guna Bangunan (HGB). This was done to accommodate the modern interests of Indonesian society, especially for business interests.

Based on the understanding of the religious communalistic conception above, the differentiation of land tenure rights/ *Hak Penguasaan Atas Tanah* (HPAT) according to customary law consists of: the *ulayat* rights (communal rights) and individual rights over land. *Ulayat* rights are the highest HPAT in Customary Law. From *Hak Ulayat*, because the individualization process can result in personal rights (individual rights). The individualization process starts from the selection of land based on the Right to Choose. Then after notification to the community and the installation of traffic signs, the Previous Rights were born. Furthermore, after opening the forest and the land were cultivated, the Right to take benefit was born. Only after the Right to take benefit had been going on for a long time and the

cultivation of the land was carried out continuously, did it turn into a Right of Use. Finally, after mastering and using it lasts so long that it becomes inheritance to the next generation, and then the Right to Use is changed to Ownership Rights (Soesangobeng, 1998: 4).

In its development, scholars then simplified the types of individual rights over land in Customary Law into Ownership Rights and Use Rights. In the meantime, if simplification is done, then the differentiation of land control rights according to customary law consists of (Sitorus and Sierrad, op. Cit: 53-54):

- a. The *ulayat* rights held by the entire Customary Law Community, whose authority has a private aspect (the authority to obtain from the Members of the Customary Law Community (AMHA) on the *ulayat* land and the public aspects held by the Customary Chief and the Customary Elders;
- b. The rights of Customary Elders held by the Customary Chairperson and Customary Elders, which contains public authority to regulate the control and use of indigenous territories for the survival of the customary law community itself;
- c. Individual Rights to Customary Land (as an individualization process of the Hak *Ulayat*), which consists of: (1) Ownership Rights (AMHA rights inherited from generation to generation); (2) Right of Use (AMHA rights obtained by processing part of the customary territory).

Based on the regulation system for the Individual Rights to Customary Land, the UUPA/ BAL as the main source of HTN/ National Land Law is composed of the following: The Right of the Indonesian Nation (Article 1), the Right to Control the State (Article 2), the *Ulayat* Right (Article 3), and Individual Rights, consisting of: (a) Land Rights (Article 4 juncto Article 16), (b) underwriting Rights (Article 23, 33, 39, 51 and Law Number 4 of 1996), and (c) endowments (Article 49). It is clear that the HPAT level regulation system accommodates the regulatory system of Customary Law.

Before the UUPA/ BAL, in customary rights principle were recognized based on *Agrarische Wet* (*Staatblad* Number 55 in the year of 1870) which was contained in Article 51 of the *Wet op de staatsinrichting van Nederlands Indie* (*Staatblad* Number 447 in the year of 1925) (Harahap, 2007: 4). After the UUPA/ BAL, the "*wet*" has been revoked; the *Ulayat* Land is recognized in Article 3 of the UUPA/ BAL, which states as follows:

"By bearing in mind of the provisions in Article 1 and 2 of the implementation of customary rights and similar rights from customary law communities, as long as in reality they still exist, they must be such that they are in accordance with the National and State interests, which are based on national unity and may not conflict with laws and other higher regulations." (Harsono, 1991: 6).

Therefore *Ulayat* land is still recognized, but only as long as the customary law community still exists, eventhough the law is not written. Apart from Article 3 of the UUPA/ BAL, Article 2 paragraph

(4) states that the words of customary communities are closely related to the understanding of *Ulayat* land, which reads as follows:

"The right to control from the state can be authorized to self-supporting regions and customary law communities, just to be needed and not have a conflict with national and state interests, who are based on national unity and must not contradict with laws and other higher regulations" (Harahap, op.cit: 6).

From the contents of the article there are chances and other opportunities for customary law communities to obtain the right to control the State, the right to control must certainly obtain officially from the State. To obtain it, it is necessary to submit an application by the concerned customary law community (Ibid). In the Philippines, the recognition of *Adat* land also received an arrangement in the Republic Act (RA) Number 6657 which is known as the Comprehensive Agrarian Reform Law of 1988. In Article 9 RA Number 6657 regarding Ancestral Lands (Customary Land) reads as follows:

"For purposes of this act, ancestral lands of each indigeous cultural community shall include, but not limited to, lands in the actual, continuous and open possession and occupation of community and its members; Provided that the Torrens Systems shall be respected.

The right of these communities to their ancestral lands shall be protected to ensure the economic, social and cultural well being. In line with the principles of self determination and autonomy, the systems of land ownership, land use and the models of settling land disputes of all these communities must be recognized and respected.

Any provisions of the law to the contrary notwithstanding, the PARC may suspend the implementation of this Act with respect to ancestral lands for the purpose of identifying and delineating such lands; Provided that in the autonomous regions, the respective legislature may enact their own laws on ancestral domain subject to the provisions of the Constitution and the principles enunciated in this Act and other national law.” (Hustiati, 1990: 64).

From the provisions of Article 9 RA Number 6657, can draw points of conclusion as follows:

1. This Customary Land will include, but is not limited to lands which are in the real ownership and control, open and sustainable ownership and control of customary communities and their members.
2. The Torrens system must be respected.
3. The rights of these people to their customary lands will be protected to guarantee economic, social and cultural welfare.
4. Land ownership system, land use and settlement method of disputed land in this community must be recognized and respected.
5. In autonomous regions, each legislative body can pass its own regulations concerning customary land in the accordance with the provisions of the Constitution and the principles mentioned in this Law and other national regulations.

This protection of communal rights is contained in the Regulation of the Minister of Agrarian Affairs / Head of the National Land Agency number 5 of 1999 concerning Guidelines for the Settlement of *Ulayat* Rights Issues in Customary Law Communities. In these regulations what is meant by¹²:

1. The *ulayat* rights and other similar rights from the Customary Law Community (hereinafter referred to as *Hak Ulayat*), are under the authority of, according to customary law belongs to, certain customary law communities over certain areas which constitute the living environment of its citizens to take benefit from its natural resources, including land in the region, for the survival of their life and their living, which arising from an hereditary relationship, physically and non-physically between the customary law communities and the region concerned
2. Ulayat land is an area of land which has the customary land rights from a particular customary law community.
3. Customary law community is a group of people who are bound by the customary law as joint citizens with a legal alliance because of the similarity of their place of residence or on the inheritance basis.

¹² Regulation of the State Minister of Agrarian Affairs / Head of the National Land Agency concerning Guidelines for the Settlement of the Ulayat Rights Issues of Customary Law Communities, PMNA / KBPN No. 5 of 1999, Article 1

4. Region is an autonomous region authorized to carry out land affairs as referred to in Act Number 22 of 1999 concerning Regional Government (now amended by Law Number 32 of 2004 concerning on Regional Government).

From the above mentioned Ministerial Regulation it is clear what is meant by *ulayat* land and *ulayat* rights also who has the authority to carry out land affairs in the region area, which is the Regional Government. Furthermore, the Presidential Decree No. 34 of 2003 delegated the authority in the land sector to the Regional Government (Harahap, op. Cit: 8-9).

The Land Rights in Customary Law can be categorized as follows: (a) The rights of private ownership due to inheritance; (b) The rights of private ownership because of buying and selling or barter; (c) Ownership rights due to recognition; (d) The rights to claim or the right to open forest/ land/ land privately; (e) The rights to work on customary land/ *ulayat* land in the "kingdom" area (either hamlet or village); (f) The right to take forest products on *ulayat* land (land of "kingdom" area); (g) Other rights relating to the customary law communities (Ibid).

Ulayat land has the meaning of common land and cannot be owned privately even though it also has the understanding as if the land is not owned. With the existence of the UUPA, *ulayat* land can be interpreted as the land areas minus the State land, even though the reality it overlaps with the State land. In the development of *ulayat*

land or "customary land", it is increasingly pressed by formal legislation, which results in the urgency of the interests of the village community due to not having a written grip (Ibid). In Article 4 of the UUPA, stated that the right to control is in the State, so that the position of *ulayat* land must be submitted to the State. With the issuance of Law Number 22 of 1999 which has been amended by Law Number 32 of 2004 concerning on Regional Government and linked to the Regulation of the Minister of Agrarian Affairs / Head of the National Land Agency No. 5 of 1999, therefore regulating the land and *ulayat* rights is in the District/ City Government (Ibid: 19). Without any evidence of the existence of a customary law community, the land is the land controlled by the state. It is the state that has the authority to determine whether or not the land and the *ulayat* rights concerned are exist (Ibid).

It can be concluded that *ulayat* land originated from the existence of its subjects, such as the customary law community in the area concerned. By not regulating *ulayat* land specifically, the process of customary land will always be faced with various problems. Since *ulayat* land is within the scope of State land according to the Act, then to obtain control over the *ulayat* land, it must be requested, which of course must also fulfill certain requirements for the application to be granted.

In the explanation of article 3 of the UUPA, it is said to be: "What is meant by "*ulayat* rights and similar rights" is what is in the

customary library called "*beschikkingsrecht*". Furthermore in "General Explanation II number 3 is as follows:

"In connection to the relationship between the nation and the earth and the water and the power of the State as referred to in Article 1 and 2, therefore in Article 3 there is a provision concerning the *ulayat* rights of legal community units, which is intended will place that rights in the appropriate place within state nature today. "

Article 3 stipulates that: The implementation of *ulayat* rights and similar rights from customary law communities, as long as according to the reality still exists, must be in such a way as to comply with the national and state interests, which are based on national unity and must not contradict with higher laws and other regulations. "First, this provision is rooted from the recognition of the *ulayat* rights in the new Agrarian Law. As it commonly known even though according to the reality the *ulayat* rights exist and apply and are also noted in the judges' decisions, this right has never been officially recognized in the law, with the result that in implementing agrarian regulations *ulayat* rights in colonial times it was often neglected. Due to the mention of *ulayat* rights in the Basic Agrarian Law, which in essence means the recognition of that right, basically the *ulayat* rights will be considered, as long as the rights are in fact still in the legal community concerned. For example, in the granting of land rights (for example the right to cultivate) to the legal community is concerned. At first, his opinion

will be heard and will be given a "recognitie", which is indeed they are entitled to receive it as the holder of the *ulayat* rights.

On the contrary, it cannot be justified, if based on the *ulayat* rights; the legal community is obstructing the granting of the right to cultivate, while the granting of the right in the area really needs to be done in the name of larger interest. Likewise, it cannot be justified if a legal community based on their *ulayat* rights, for example refusing to open regular large-scale forests to carry out big projects in the framework of implementing the plan to increase the yield of crops or food and resettlement. Experience also shows that regionals development itself is often held back because of the difficulties with *ulayat* rights. This is the base of the second thought from the provisions of Article 3 above. The interests of a legal society must be subject to broader National and State interests and their *ulayat* rights must also be carried out in accordance with the broader interests.

It cannot be justified if in this state era some of a legal society still retains the contents and implementation of its *ulayat* rights absolutely, as if it was separated from its connection with legal communities and other areas within the State as unity. Such an attitude is contrary to the basic principles set out in Article 2 and in practice it will also result in the obstruction of great efforts to achieve the prosperity of the people as a whole. But as is clear from the

description above, this does not mean that the interests of the legal community concerned will not be considered at all."¹³.

From the general explanation above, it is clear that the position of *ulayat* land remains in the national interest. The relationship between the nation, the earth and the water and also the state's power applies to the provisions concerning the *ulayat* rights of the customary law community units, so that the *ulayat* rights are placed in the proper place in the state, and the most important thing is not to contradict the higher Law including the State Policy Guidelines (GBHN).

CLOSING

CONCLUSION

The land possession pattern implemented by the Samin and Baduy communities is a hereditary culture carried out in an orderly manner. Theoretically the land possession culture reflects the opinions of Soetandjo Wignjosoebroto and Bagong Suyanto, that for the sake of the continuation of each community must be in an orderly state. Without a certain orderly condition, people's lives will not be possible. Unlike the case with the insect community that is in an orderly condition because of the workings of biological and natural factors, so in human society an orderly condition is always upheld on the basis of

¹³ General explanation II number 3 UUPA

cultural factors, and endeavored with normative regulations. These arrangements and regulations are sometimes intentional, formal, and codified (such as in the form of written laws, status, or acts), and sometimes also only done informally, and codified (as in forms of folkways and mores). Because of these considerations, for humans, the law functions at least to achieve public order and in turn create conducive conditions to achieve justice.

The view of the life of the Samin community and Baduy on the land matter is carried out to be guidance for their life in carrying out their daily lives. "*Paugeran*" in Samin society towards land is a law that must be obeyed. Sikep people are lack of respect to formal school, because they are worried that the intelligence gained from school is just smart but only to *minteri* (outsmart or fooled) other people. Therefore their school is a school in life itself, including farming on land. From the results in this school of life, they aspire to a high social level, but don't let it *ngungkuli* (too high), but if it only reach a low social level, *aja ngantio kasoran* (not to be so disgraced) towards other people. The development of the livelihood of Sikep residents is therefore expected to lead to people who are more or less equal and same feeling. According to Esmi Warassih, for a developing society, the law is always associated with efforts to improve people's lives in a better direction. Facing these conditions, the role of law is increasingly becoming important in realizing that goal. Legal function is not enough as a control social, but more than that. Further elaborated by Esmi Warassih, the expected legal function today is to

make an effort to move the people to behave according to new ways to achieve an aspired goal. To act or behave in accordance with the legal provisions it is necessary to have legal awareness from the community because that factor is a bridge that connects legal regulations with the behavior of community members. In short, in fact the function of law is now experiencing a shift that is more actively carrying out the desired changes.

The government gave the *ulayat* rights to the Baduy community to process 5,101.8 hectares of land and its environment in accordance with the Lebak Regency Regional Regulation No. 13 of 1990, and the District Regulation of Lebak No. 32 of 2001 concerning on Protection of *Ulayat* Rights of Baduy Communities. The Baduy community divides its land use into two main functions, which are the environmental protection area (*hutan lembur dan hutan titipan*) and cultivation area (agricultural land and settlement). Environmental protection areas cannot be completely converted to any activity; (4) It is prohibited to use chemical technology, for example using fertilizer, drugs to eradicate pests, using kerosene, bathing using soap, brushing teeth using pasta, and poisoning fish; (5) Planting of plantation crops such as coffee, cocoa, cloves, oil palm, and so forth is prohibited, and (6) It is prohibited to keep four-legged animals, such as goats, cows and buffaloes. The meaning of these prohibitions can be felt by the general public now, starting from the dam with its floods, rice fields with their pests, deforestation by exploiting natural resources in it, fertilizers and insecticides with its pollution, coffee and palm oil with

deforestation, and so on. The wisdom that needs to be taken from the behavior of the Baduy community is simple and the aversion of the greed, love for the environment, do not overtake the existing nature just because for a moment of pleasure.

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