



LAND LAW IN THE COMMUNAL RIGHTS OF THE COMMUNITY

***Hamler**

Persada Bunda Law High School, Indonesia

E-mail: bkdam20@gmail.com

Leonard C. Opara

Nigeria Police University (Academy), Wudl, Kano State, Nigeria

Email: lcoparalegal@gmail.com

Abstract

Land has an important role to human livelihood and the economic need for land that is inversely proportional to the availability of the amount of land (tendrung is static) to be one factor triggering the spike in the number of disputes, conflicts and land affairs that occurred in Indonesia. Land use change can be a cause of disputes followed by the development of plantation development that continues to increase causing increased demand for land. Communal rights to customary community land should be given legal protection. These communal rights shall be regulated in the Regulation of the Minister of Agrarian Affairs / Spatial Planning and Head of BPN Number 10 of 2016, and in particular the provisions of Article 16 paragraph 1 h jo Section 53 of the BAL, In case of land rights disputes granted to legal subjects with communal rights of customary law community then the law must be enforced in its settlement to be resolved through the Court (litigation) of the institution having the authority to resolve the dispute and settlement of a non litigation dispute or alternative disputes resolution. Alternative dispute resolution in the form of win-win solusen that can provide mutual benefit.

Keywords: *Land, Communal Rights, Disputes, Indigenous and Tribal Peoples.*

1. INTRODUCTION

Indonesia as an agrarian country views the importance of regulating land control, because based on the 1945 Constitution, that land is controlled by the state and used as much as possible for the interests and prosperity of the people. So that land has an important role in human life and on the other hand the increasing economic need for land which is inversely proportional to the availability of the amount of land (tends to be static) is one of the triggering factors for the spike in the number of disputes, conflicts and land cases that occur in Indonesia today (Rahmat Ramadhani, 2016).

The state as the holder of the right of control over the earth, water and natural resources contained therein as outlined in the 1945 Constitution of the Republic of Indonesia, Article 33 paragraph (3), determines "earth, water and natural resources contained in controlled by the State and used for the greatest prosperity of the people". This provision becomes the philosophical basis and juridical basis for the State of Indonesia in the context of managing natural resources (SDA) as well as regulating and administering the allocation, use, supply, and determining legal relations between people and legal actions concerning earth, water, and space with the principles of togetherness, efficiency, justice, sustainability, and environmental insight.

The Indonesian state as the highest authority organization for all Indonesian people, in this case the Indonesian government as the main bearer of the responsibility to promote general welfare for the Indonesian people, which is given the authority by Law No.

September 1960, LN No. 104, TLN No. 2043 of 1960 (hereinafter referred to as UUPA) as the holder of the highest power over the earth, water and space, including the natural resources contained therein as reflected in the provisions of Article 2 paragraph (1) UUPA, that the earth, water and space, including the natural resources contained therein, are at the highest level "controlled" by the State as an organization of all the people.

The state's right to control is meant to give authority to legal institutions and concrete legal relations between the state and Indonesian land. The state's authority is the delegation of the nation's tasks, so that the authority is solely public. The state in this case is not a legal entity that owns, but the state is given the authority to regulate as stated in Article 2 paragraph (2) of the UUPA:

1. Regulate and administer the designation, use, supply and maintenance of the land, water and space;
2. Determine and regulate legal relations between people and the earth, water and space;
3. Regulate and determine legal relations between people and legal actions concerning earth, water and space.

On the basis of this authority, the state is obliged to regulate the supply, designation and use of earth, water, and space in the best possible way, taking into account the principles of justice, certainty and usefulness (Baiq Burdatun, 2016). , then regulation and control in land use (land) is very necessary in order to control land use changes, especially in changes in use with land use changes which can have a detrimental impact on the community in the event that occurs in the conversion of agricultural land and water absorption land, in general. For example, the conversion of peat lands into agricultural land (oil palm plantations) and it could happen that forest areas become villages because of the pressure on the community by companies that open plantation land from year to year and continues to increase and reach tens of thousands of hectares (Baiq Burdatun, 2016).

Land conversion almost occurs in all provinces, regencies/cities throughout Indonesia and the development of plantation development that continues to increase will have an impact on changes in land use. The rapid population growth, as well as the intensity of development that develops in various fields have also led to an increase in the need for land (Baiq Burdatun, 2016).

According to Soerjono Soekanto (2011), states that "The essence and meaning of law enforcement lies in the activity of harmonizing the relations of values that are outlined in solid and manifested rules and attitudes of action as a series of value assignments at the last stage, to create, maintain and maintain peaceful social life."

In addition to "harmony" in law, according to Soerjono Soekanto, there are 5 (five) factors that may influence the law so that the law applies effectively (Soerjono Soekanto, 2011), namely:

1. The legal factor itself, namely in this theory it is limited by law only;
2. Law enforcement factors, namely the parties that form and apply the law;
3. Factors of facilities and facilities that support law enforcement;
4. Community factors, namely the environment in which the law applies or is applied;



5. Cultural factors, namely regarding the work, creativity, and taste based on human initiative in social life.

According to Utrecht quoted by Budi Harsono (1999), agrarian law in a narrow sense is the same as land law. Agrarian Law and Land Law are part of the State Administrative Law (HTN) which examines special legal relationships that are held to enable officials in charge of managing agrarian matters, through their duties. So the term agrarian law in the government administration environment is limited to legislation that provides a legal basis for the authorities in carrying out their policies in the land sector.

Lawrence M. Friedman argues that the effectiveness and success of law enforcement depends on three elements of the legal system, namely the legal structure (structure of law), legal substance (substance of the law) and legal culture (legal culture). The legal structure concerns law enforcement officers, legal substance includes statutory instruments and legal culture is a living law adopted in a society (Friedman, 1984).

The entire territory of Indonesia is the unity of the homeland of all the people of Indonesia, who are united as the Indonesian nation (Article 1 paragraph 1 of the UUPA). then gave birth to various rights on the surface of the earth or known as land rights. The right to the earth's surface, which is called the right to land, originates from the state's right to control the land.

The legal basis is stated in Article 4 paragraph (1) of the UUPA, namely "on the basis of the right of control from the state as referred to in Article 2, it is determined that there are various types of rights on the surface of the earth, which are called land which can be given to and owned by people, either alone or together with other people and legal entities". Furthermore, Article 16 paragraph (1) of the LoGA describes the land rights mentioned in Article 4 paragraph (1) of the LoGA, namely Ownership Rights, Business Use Rights, Building Use Rights, Use Rights, Lease Rights to Build, Land Opening Rights, The right to collect forest products and other rights that are not included in these rights on land to be stipulated by law, as well as temporary rights as stated in Article 53 of the UUPA, in the form of lien rights, business rights for Yield, Right to Ride, Right to Rent Agricultural Land.

There are 2 (two) ways to obtain land rights for a person or legal entity (Urip Santoso, 2013), namely:

1. Original land rights, namely land rights that are obtained by a person or legal entity for the first time, namely land rights originating from state land, management rights and those occurring according to customary law and or originating from former land owned custom.
2. Land rights obtained by derivative, namely land rights obtained by a person or legal entity from generation to generation from land rights owned or controlled by other parties, such as obtaining land rights through buying and selling, exchanging, grants, inheritance, imreng, and auctions.

Land rights are parcels of land to which land rights have been attached by using sequential rights numbers from the land registration register carried out by the National Land Agency (BPN) (Urip Santoso, 2013). In other words, private land is land that has been registered and has received a land registration registration number with the classification and

type of rights determined by the National Land Agency with final evidence of the land registration process known as the Certificate of Land Rights.

There is a dispute over the control of the land (pemilikan), the land dispute arises due to several factors (Sarah D.L. Roeroe, 2013) such as:

1. Incomplete regulations;
2. Non-compliance with regulations;
3. Land officials who are less responsive to the need and the amount of available land;
4. Inaccurate and incomplete data;
5. Incorrect land data;
6. Limited human resources tasked with resolving land disputes;
7. False land transactions;
8. Acts of the right applicant or
9. There is a settlement from other agencies, so that there is an overlap of authority.

Land disputes that arise in Indonesia can be classified into problems, namely problems related to the recognition of land ownership, transfer of land rights, encumbrance of rights and occupation of ex-private land (Urip Santoso, 2013). Judging from the subject matter of the dispute, land disputes can be grouped into land disputes, namely between fellow citizens, the Government (Central / Regional) with local residents, and disputes related to natural resource management (Ali Achmad Chomzah, 2002).

If there is a dispute over land rights, it is necessary to enforce the law to find a way to resolve it. This law enforcement is carried out as an effort to enforce or actually function legal norms as guidelines for behavior in traffic or legal relations in social and state life. In a broad sense, the law enforcement process involves all legal subjects in every legal relationship. In a narrow sense, in terms of the subject matter, law enforcement is only defined as the efforts of certain law enforcement officials to guarantee and ensure that a rule of law runs as it should. In ensuring that the law is enforced, if necessary, law enforcement officials are allowed to use force (Baiq Burdatun, 2016).

Based on the description in the background above, the writer will then conduct a discussion with the title "Land law in the communal rights of the community" with the following main issues: How is the enforcement of land law which is in the community's communal rights? And How is the legal certainty of communal rights over local community lands?

2. IMPLEMENTATION METHOD

The type of research used in this study is a normative legal research method, which is a scientific research procedure to find the truth based on scientific logic from the normative side (Johnny Ibrahim, 2007). This research method is used to analyze various regulations, rules (norms) and legislation as the object. Normative legal research is a process to find the rule of law, legal principles, and legal doctrines in order to answer the legal issues faced (Peter Mahmud Marzuki, 2011). The approach used in this research is a statutory approach and a conceptual approach. Legislation (Statute Approach) the approach used to review and analyze all regulations related to the problem being researched, because the law is the focal



point of research with an approach using legislation and regulations (Peter Mahmud Marzuki, 2011).

Conceptual approach, which is a concept in the relevant sense related to abstract elements that represent classes of phenomena in the field of study which sometimes refer to universal things that are abstracted from particular things. One of the logical functions of the concept is to generate objects that attract attention from a practical point of view and the point of view of knowledge in mind and certain attributes. Thanks to these functions, concepts are successful in combining words with certain objects (Johnny Ibrahim, 2007).

The conceptual approach starts from the views and doctrines that develop in legal science. The conceptual approach is an approach that refers to existing views and doctrines. The type of legal material used in writing this thesis is secondary data, namely data obtained from literature review or review of various literatures or library materials related to problems or research material which is often referred to as legal material (Mukti Fajar, 2009).

The technique of collecting data is by exploring the normative framework using legal materials that discuss theories of customary law and national land. Then primary legal materials, secondary legal materials and tertiary legal materials are collected based on problem topics that have been systematically formulated, classified according to sources and hierarchies to be studied comprehensively (Mukti Fajar, 2009).

The collected legal materials will be processed systematically to get a complete and clear picture of the issues discussed. Processing of materials in normative legal research is carried out by selecting existing legal materials, then classifying according to the classification of legal materials and compiling data from the results of the research systematically, of course this is done logically, in the sense that there is a relationship and interrelationship between legal materials with one another. with other legal materials to get an overview of the research results (Mukti Fajar, 2009).

Legal material analysis technique is an activity in research that examines or examines the results of processing legal materials assisted by previously obtained theories. Legal materials obtained are then processed and analyzed using prescriptive methods. Research using prescriptive methods aims to provide an overview or formulate problems according to with the existing conditions/facts. The use of prescriptive methods in this study is intended to provide arguments for the results of research conducted by researchers. .

3. RESULTS AND DISCUSSION

3.1 Enforcement of Land Laws Under Community Communal Rights

Enforcement in English is known as enforcement. In the Big Indonesian Dictionary, enforcers are those who establish, enforce. Law enforcement is the one who enforces the law, in a narrow sense it only means the police and prosecutors which is then expanded to include judges, lawyers and correctional institutions (M. Husein Maruapey, 2017).

Sudarto (1986) gives the meaning of law enforcement as attention and cultivation, both unlawful acts that actually occur (onrecht in actu) and unlawful acts that may occur (onrecht in potentie). According to Satjipto Rahardjo, law enforcement is a series of processes of elaborating legal ideas and ideals that contain moral values such as justice and truth into

concrete forms. another that law enforcement essentially contains the supremacy of a substantial value, namely justice (Satjipto Rahardjo, 2009).

According to Muladi, law enforcement is a systemic process, manifesting itself as the application of law (M. Husein Maruapey, 2017) which is seen as:

1. As a normative system, namely the application of the entire rule of law that describes social values in society.
2. As an administrative system (administrative system) that includes interactions between various law enforcement officials who are sub-judicial systems.
3. The social system, in the sense that in defining it must also take into account the various perspectives of thought that exist in the layers of society.

Furthermore, law enforcement towards dispute resolution is supported by theories (Tesis Hukum.com, 2017) including:

1. Theory of Legal Protection is a protection given to legal subjects in the form of instruments both preventive and repressive, both verbal and written. In other words, it can be said that legal protection is a separate picture, which has the concept that the law provides justice, order, certainty, benefit, and peace.
2. Law Enforcement Theory, is a problem that is not simple, not only because of the complexity of the legal system itself, but also the complexity of the relationship between the legal system and the social, political, economic, cultural, and technological systems that are currently developing.

Communal rights to land, hereinafter referred to as “communal rights”, are common property rights to the land of a customary law community, or joint property rights to land that are granted to communities who control the land within a period of time that requires legal protection. The regulation is regulated in the Regulation of the Minister of Agrarian Affairs/Spatial Planning and the Head of the National Land Agency Number 10 of 2016, in particular it is contained in Article 16 paragraph 1 h of the UUPA, where the types of land rights can be grouped into three namely permanent land rights, determined land rights. by law, namely land rights that will come later which will be determined by law and temporary land rights as regulated in Article 53 of the UUPA.

As stated in Article 2 paragraph (1) that Customary Law Communities that meet the requirements can have their land rights confirmed and in paragraph (2) it is stated that community groups residing in a certain area that meet the requirements can be granted land rights. Regarding the procedure for registering communal rights, Article 19 of the Ministerial Regulation Number 10 of 2016 outlines that the registration of communal rights is carried out in accordance with the laws and regulations in the field of registration. communal follow the registration procedure regulated in PP No. 24 of 1997.

According to Jan Michiel Otto quoted by Adrian Sutedi (2006) in his book Transfer of Land Rights and Registration, to create certainty, the law must meet the following requirements:

1. There are clear and consistent legal rules.
2. Government agencies apply the rule of law consistently, obey and obey it.
3. Communities adjust their behavior to the rule of law.



4. Judges who are independent, impartial and must apply the rule of law consistently and observantly when resolving legal disputes.
5. Court decisions are concretely implemented.

The transitional rights of the customary law community's communal rights are based on the customary law provisions that apply to the relevant customary law community and the communal rights of the community residing in a certain area cannot be transferred to other parties except by inheritance. For parcels of land that are in the territory of customary law communities, which are already owned by individuals or legal entities with some land rights, and parcels of land that have been obtained or released by government agencies, legal entities or individuals in accordance with the provisions of laws and regulations, it remains legal (Article 23 in conjunction with Article 24 paragraph (c), PMA/TR and KBPN No. 10 of 2016).

If a dispute occurs, it can be resolved or taken (AA Sutarsa, 2017) in several ways:

1. Litigation, namely the settlement of land disputes through the courts.

The State of Indonesia as a legal state based on Pancasila as regulated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which states that the State of Indonesia is a state of law. Indonesia as a state of law, we need an institution that has the authority to resolve disputes that occur in the community, both disputes between the community and the community and between the community and the government. In a state of law based on Pancasila, the institution that has the authority to resolve disputes is called the judiciary or judicial institution. Meanwhile, in relation to the settlement of plantation disputes through the judicial process, it is referred to as the litigation dispute resolution process.

2. Alternative Disputes Resolution, namely non-litigation dispute resolution or alternative dispute resolution.

Non-litigation dispute resolution is often also referred to as alternative dispute resolution. Alternative dispute resolution is a responsive expression of dissatisfaction (dissatisfaction) dispute resolution through a confrontational and *zwaarwichtig* litigation process. Thornas J. Harron said that "... people are tired of seeking dispute resolution through litigation (judicial bodies), they are dissatisfied with the judicial system (dissatisfied with the judicial system), because the dispute resolution method inherent in the judicial system is very long-winded. (the delay inherent in a system) in ways that are very detrimental, including: a waste of time (a waste of time), very expensive costs, worrying about the past, not solving future problems, making people hostile (enemy), paralyzing the parties (paralyze people)."

3.2 Legal Certainty of Communal Land Rights of Local Communities

The certainty of communal rights is reviewed from Article 16 paragraph 1 of the LoGA that customary law is the main source of National Land Law. This implies that the development of the National Land Law is based on the conception of Customary Law, which is formulated as religious communalism, which allows individual land tenure with private land rights as well as containing elements of togetherness (Ni Ketut Ardani, 2016-2017).

Bernhard Limbong argued that land in general are matters related to land in terms of control, ownership, use and utilization. The customary law referred to in the Basic Agrarian Law as the basis for the National Land Law is not actual customary law, in the sense that it is not pure customary law but customary law which has been filtered from elements that are contrary to the law and the social spirit of Indonesia (Ni Ketut Ardani, 2016-2017).

Discussing the Indigenous Law Community, which is recognized as one of the subjects of land rights, becomes important at any time, because considering its existence it can be said to be something that is fundamental to the establishment of the Republic of Indonesia, with its unique diversity. As a legal community, the Customary Law Community is a legal subject that is different from natural persons (*natuurlijk persoon*) and legal entities (*rechtspersoon*) which have been known in legal studies where as legal subjects, the Indigenous Law Community has the ability, as bearers of rights and obligations in legal traffic (Arba, 2016).

Strict acceptance of the concept of customary law which can be said to be the basis of communal rights can be seen in Article 5 of the UUPA which states that: "the law that applies to earth, water and space is customary law as long as it does not conflict with national and state interests". Customary Law is referred to as a complement to the National Land Law. Applicability of Customary Law:

1. It must not conflict with national and state interests.
2. It must not conflict with Indonesian Socialism.
3. It must not conflict with the UUPA regulations.
4. Must not conflict with other laws and regulations.
5. Customary Law Norms are part of the unwritten National Land Law.

While Van Dijk divides three forms of customary land rights, namely the right of alliance or lordship, individual rights, and the right to collect land products (Arba, 2016), the differences are as follows:

1. The right of partnership or the right of mastery has external and internal consequences. The internal consequences include allowing members of the alliance (ethnic, sub-ethnic, or family) to take advantage of the land and everything on it, such as building houses, hunting, or herding livestock. Permits are only used for the needs of family life and themselves, not for trading. The result of exit is a prohibition on outsiders to take advantage of customary land, except after obtaining a permit and after paying a recognition fee, as well as a prohibition on restrictions or various binding regulations on people to obtain individual rights to agricultural land.
2. Individual rights to customary land consist of customary property rights (*inland bezitrecht*), in which the person concerned has his energy and business continuously invested in the land, so that its power is increasingly real and recognized by other members. The power of the clan or alliance is diminishing while the power of the individual is getting stronger. This property right can be canceled if it is no longer cultivated, the owner leaves the land, or because the obligations imposed are not fulfilled.



3. The right to collect land products (genotrecht) and the right to withdraw the proceeds. This land is principally the communal property of an ethnic unit, but everyone can collect the produce or take whatever is produced by the plants on the land. In the Minangkabau tribe, ulayat land is divided into nagari ulayat land, tribal ulayat land, and tribal ulayat land. These three types of soil are referred to as “high heritage land”. Apart from that, it is known as “lower inheritance land”, namely lands that are obtained by someone from gifts, grants, or for clearing their own land.

The form of tenure rights that apply according to customary law is actually based on a noble goal. The characteristics of land tenure rights according to customary law are the nature of land cannot be controlled absolutely, the nature of land tenure is inclusive, the nature of land cannot be traded, human nature and the results of their work are more valuable than land. Broadly speaking, the Customary Law Community cannot be separated from land ownership because they have the original right to control the land. This right is the first to appear compared to other rights arrangements. The rights issued by the government to indigenous peoples are recognized rights (Arba, 2016).

The rights of indigenous peoples to land are the rights of indigenous peoples that must be protected by the state as an organization of power for all the people, because the rights of indigenous peoples to land are the rights of indigenous peoples to control the land as the main supporter of the life and livelihood of the community concerned for all time. The acknowledgment of the BAL on the application of customary law in national land law also includes the exercise of state control over land granted to customary law communities with their customary law in each applicable area. The submission of implementation by the UUPA to the customary law community is in accordance with what is written in Article 2 paragraph (4) of the LoGA "The right to control from the state can be delegated to autonomous regions and customary law communities, just as necessary and not contrary to national interests. , according to the provisions of Government Regulations".

4. CONCLUSION

If there is a dispute over land rights with the communal rights of the legal community, the law must be enforced which can be resolved through land dispute resolution through courts (litigation). The purpose of dispute resolution through litigation is to obtain legal certainty. Non-litigation dispute resolution or alternative dispute resolution. Alternative dispute resolution is a responsive expression of dissatisfaction (dissatisfaction) dispute resolution through a confrontational and *zwaarwichtig* litigation process. There is dissatisfaction with the judicial system (dissatisfied with the judicial system) because it takes a long time, is very expensive, can lead to enmity, which is expected to be a win-win solution that provides benefits.

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