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Juridical Review of Recognition Problems on Customary or Communal Land in Indonesia

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Abstract: The land is a right that cannot be separated from human life. It is a place to earn a living, build a house or residence, and also a place of burial of people at the time of death. It is an essential thing to a human. For there to be no uncertainty of rights between each other, it is necessary to have rules governing the relationship between man and the land. The land law according to customary law rules man's relationship with the land. According to customary law in Indonesia, there are two kinds of land rights, communal rights, and individuals. It makes the existence of customary law dualism in Indonesia. This should be avoided in the field of law because dualism can lead to legal uncertainty in which a situation is contrary to the philosophy and purpose of the law itself. Thus, the question arises how the customary land law arrangements that exist in Indonesia and the customary land law position after UUPA 1960. This research used normative juridical approach method; this approach refers to written regulations or other legal materials that are secondary to see how it is done through field research to obtain clarity about the subject matter. It can be concluded that the customary laws prevailing in Indonesia indicate the existence of a nuance of life or social function of the land in the division of communal land and individual land or individual. The distribution of rights or arrangements on customary land rights indicates an attempt to discipline the use of customary lands to ensure justice. Legal certainty is not guaranteed by only relying on customary land law alone because of aspects of applying the principle of abstract jurisdiction construction in customary land law.
Keywords: Juridical Review, Customary Rights, Communal Rights.

INTRODUCTION

Socio-cultural conditions and the recognition of traditional wisdom that seeks to preserve customary and communal lands that live and thrive in society are often ignored in land management and utilization planning. Article 2 Paragraph (4) of the UUPA affirms that the right of control of the state may be authorized to regions and customary law communities as long as the fact remains. There are still many customary law communities in this country, but the state does not recognize their customary lands. As a result, indigenous and tribal peoples became alienated from their land. Therefore there is a need for revitalization so that they are not displaced from the land of their ancestors only because of the state's claim to make it all as state land which needs to be regulated according to the will of the authorities. The condition is also caused by the unclear arrangement of indigenous and tribal peoples in the law whereas the position of indigenous and tribal peoples in Indonesia have existed long before the positive national law was established. Until now the customary law community is still recognized its existence in the midst of society. G. Kertasapoetra and his friends affirm the understanding of the term communal rights in his book on the law of the land [1]. The UUPA guarantees for the successful use of land state that "Communal rights are the highest right to land owned by any legal partnership to ensure the order of land use. Communal rights are the rights possessed by a legal alliance (village, tribe), in which the citizen (legal alliance) has the right to control the land which its implementation is governed by the chairperson of the alliance (chief/village head concerned).

Communal rights constitute a series of powers and obligations of indigenous and tribal peoples, which relate to the land situated within its territory, which has been described as a major supporter of the life and life of the people concerned (Lebensraum). Such powers and obligations fall into the field of civil law, and some

fall into the field of public law. The authority and obligation in the field of civil law relate to the collective right of the land. Whereas in public law, the task of authority to manage, regulate and lead allotment, control, use and maintenance thereof to the Customary Head. The conception of customary rights according to the customary law has magical communal-religious values that give individual land tenure opportunities, as well as private rights. Communal rights is not an individual right. This is communal because it is a common right of customary law community members to the land concerned [7, 9]. The magical-religious property refers to the communal right as common property, believed to be something of an unseen nature and is a relic of the ancestors and ancestors of the indigenous peoples as the most important element of their lives and livelihoods throughout the lifetime and life .

When viewed from the customary land law system, communal rights can have inward and outward power. Internally, it is related to its citizens while external; it is related to non-members of indigenous and tribal peoples. The main duty of indigenous authorities based on customary rights is to preserve the welfare and interests of members of their legal community, to prevent any disputes arising from land ownership and usage [3, 4]. The subject of communal right is a community of indigenous communion in its entirety, that is, all over the archipelago, the community controlling the communal right should not be in the hands of the private person but must be in the hands of the community. Objects of communal rights include land, water, plants (natural wealth) contained in it and wild animals that live freely in the forest. Thus, communal rights show the legal relationship between legal subjects and certain lands/territories.

As a follow up of Article 33 Paragraph (3) of the UUD 1945 relating to the earth or land, Law No. 5 of 1960 on the basic agrarian law is further referred to as UUPA. The main objectives of UUPA are:

- Laid the foundations for the preparation of national agrarian law, which is a tool for bringing prosperity, happiness, and justice to the State and people, especially the people in the framework of a just and prosperous society.
- Laid the groundwork for unity and simplicity in land law.
- Laid the groundwork to provide legal certainty of land rights for the people as a whole.

Therefore, to achieve the prosperity and welfare of the people, in utilizing and using the land that is part of the natural resources must be implemented wisely and in the management handed over to the state [5, 6]. Law Number 5 Year 1960 which is better known as UUPA ideologically has a very close relationship with Indonesian farmers. Since the enactment of UUPA, the formal judicial law has a very strong desire to function the national agrarian law as a "tool" to bring prosperity, happiness, and justice to the state and peasant society in the framework of a just and prosperous society. Because in people's lives especially in rural areas, the land is one of the most important factors of production, because land is one source of life and their lives. Also, customary lands are often associated with cosmic-magical-religious values. Land disputes in the community are increasing every year and occur in almost all regions of Indonesia, both in urban and rural areas.

Land cases that often occur when viewed from conflicts of interest of the parties in land disputes include:

- The People are dealing with bureaucracy.
- The people are dealing with State enterprises
- The people are dealing with private companies.
- Conflict between the people.

In almost every area of land disputes, the parties concerned and authorized to deal with such issues resolve in various ways. The way in which disputes have been solved so far is through litigation and non-litigation dispute settlement. The land law of Indonesia from the colonial era is known to be dualism, which means that European law controls the legal status of land on the one hand, and which is dominated by customary law, on the other. Such circumstances can not be separated as a legacy or inheritance from agrarian politics of the Dutch Indies Government, which also has a reason for the separation between the interests of indigenous people and the interests of foreign capital.

It can be seen from Prof. Ter Haar Bzn's comment stating that by joint effort tried to assure economic favors on land: the living conditions for indigenous people, standing requirements for European plantation entrepreneurs [8]. Regardless, throughout Indonesia, it can be seen the relationships between legal alliances with the land within its territory, or in other words, the legal alliance has the right to those lands, called Beschikkingsrecht. For this term, some scholars

have several different uses of the term, such as 'rights of interest' (Prof. Dr. Soepomo), 'communal rights' (Dr. Soekanto and Prof. Mahadi). It leads us to an understanding that land adat or customary land law in Indonesia has a considerable influence on the pattern of life in customary community law community. But the customary land law issue is not easy. Because it is still under the influence of the dualism of land law that existed during the Dutch East Indies government.

METHODOLOGY

There is the dualism of customary law in Indonesia. This nature is a matter to avoid in the field of law because the nature of dualism can create legal uncertainty, a state that is contrary to the philosophy and purpose of the law itself. Furthermore, in Indonesia later a legislation regulating the land, namely Law No. 5 of 1960 on Land Principal (UUPA 1960). The law was created to hold a unification of national land law.

Thus, some questions arise, among others:

- What are the legal arrangements for customary land law in Indonesia?
- What is the position of customary land law after the entry into force of UUPA 1960?

The purpose of this study is to find out how the customary law of customary law in Indonesia and how the customary land law position after the entry into force of UUPA 1960.

This research uses normative juridical approach, which is an approach that refers to the written regulations or other secondary legal materials to see how the implementation through field research conducted with sociology and interview, so that clarity about the subject matter. In normative legal research, the investigation is initially secondary data, as above to then proceed with research on primary data in the field or against the community or parties involved in the conflict. It is said to be the primary data because that is to be examined is a legal behavior of the land dispute settlement practices that occur. The above approach method is used because considering that the problem under study is related to the way land dispute settlement occurs, which also includes the juridical field. It includes laws and regulations governing the procedures for their implementation and dispute resolution arising. The research specification used is analytical descriptive that describes conflict arising, analyze systematically to get data/information about factors causing conflict, implementation of various rules related to conflict and how to solve the conflict.

RESULT AND DISCUSSION

Customary land law before UUPA

Before the UUPA, customary land still belongs to an alliance and an individual. The customary land they use for their needs in utilizing and cultivating the land, the members of the fellowship in writing. In addition to taking action to use customary land, it must first be known or request permission from the customary head. The customary land still belongs to members of the legal alliance, who have the right to process it without any prohibited parties.

Legal Aspects of customary land in Indonesia

Prof.Ter Haar Bzn states that the relationship between the right of fellowship with individual rights is like a balloon theory [8]. The greater the right of fellowship, the less the individual right. Moreover, conversely, the less the right of fellowship, the greater the rights of the individual. The relationship between them is flowering. The customary land law regarding the right of communion can be seen that the human race exists in a residential center. It is referred to as the village community, or they are dwelling scattered in residential centers of equal value to each other, in an area which is limited, then, in this case, is a territorial society. Such community fellowship, entitled to the land, has certain rights to the land and exercises that right either out or into it. By the entry into force of the right, the communion of customary law communities as a ruling union picks up the proceeds of the land by limiting the presence of others who do such things. Also, as a community entity, they are responsible to people from outside the community for violations in the community's land area. The community, in the sense of its members' words collectively, uses its right of use in the form or by taking advantage of the land and from all living beings that are preserved therein. The society limits the freedom to exercise its members by its rights to the land and for the public interest. Thus, the social nature of the land is happening, valid and sustained clearly.

The peculiar nature of the right of fellowship lies in the reciprocal power of that right to the rights attached to the individual or the individual. When the individual relationship of the land is reduced or if the relationship is ignored continuously, then the rights of the community will be restored as usual, and the right to

the fellowship of the land is brought into effect without any disruption. For example, it may be arranged that such land be part of the poor or new members of fellowship with temporary rights. In some legal environments, the awareness of community relations with the land is evident from the existence of a salvation event at a fixed time in the village's suburban places under community leadership at the time of commencement of the land. While the belief of the existence of a living relationship between man and the land can also be seen clearly at the time of the event, such as the village post-harvest cleaning party and such events. Community members as individuals or individuals may collect the proceeds from the land, in the majority of the customary law environments principally during the cultivation of the land for the land purpose of earning a living, or the following for his family or relatives if the members of the fellowship cross the limits of their use. For example, it is to engage in the land for trading purposes in the sense of self-enrichment, then they will be needed how far as people from outside the fellowship, in which the outward communion rights will apply to them. Again here it can be seen that the nature of the land is of a social nature.

The provisions which can be used as operational basis and function for the settlement of land law disputes are stipulated in Government Regulation no. 24 of 1997 and Regulation of the Minister of Agrarian Affairs / Head of National Land Agency Number 5 Year 1999 concerning Guidance on Completion of Customary Land Rights Community Problems. PMNA No.3 Year 1999, PMNA No. 9 of 1999 and the operational basis of Presidential Regulation No.10 of 2006 on National Land Agency. Article 2 of Presidential Regulation no. 10 of 2006 stipulates the duty of BPN in which stipulates that BPN must implement the government in the field of land in national, regional and sectoral. The next article in the regulation mentions 21 functions of BPN, where one of its functions is to conduct assessment and handling of problems, disputes, cases, and conflicts in the field of land. The deputy for the assessment and handling of land disputes and conflict was established to carry out the function.

The conflict over communal land is one of the most complicated land conflict issues to look for. In this land conflict, in addition to impacting economic issues can also cause broader social problems. The form of a dispute resolution is a series of activities undertaken by the disputing parties using a strategy to resolve disputes.

According to Nader and Todd, the parties can develop some strategies or alternatives in resolving disputes such as:

- Lumping it or just let the case pass and do not need to be extended.
- Avoidance or evasive that the parties who feel harmed choose not to relate again with the adverse party

According to Harsono, various land cases can be grouped into two groups, the first as a dispute that occurred outside the court, generally cultivated to be resolved by the BPN apparatus [2,10]. Moreover, both disputes arising out of a civil dispute, or a State Administration dispute and the settlement being made through a State Court or Administrative Court. Based on the above points it can be concluded that one type of solution can solve not all disputes. The forms of dispute settlement can be grouped into three main groups: either party does the first, the second is done by the disputing parties only, and the third involves a third party. Another dispute settlement form by the parties to the dispute is a negotiation. Dispute resolution of this model is called dyadic settlement to result in a decision or agreement without the intervention or assistance of a third party. Usually, the solution of this model is not based on existing rules but based on the rules that they make themselves.

Dispute settlements involving third parties include settlement in the form of adjudication, arbitration, and mediation. These dispute resolution forms have similarities and differences. The equation is that this form of settlement is triadic because it involves a third party, whereas the difference is that adjudication is a settlement made by a third party who has the authority to intervene and that he can execute a predetermined decision without regard to the will of the parties. In contrast to adjudication, arbitration is a dispute settlement by a third party, and the decision is approved by the parties to the dispute. While mediation is a form of a settlement involving a third party to assist the parties concerned to reach an agreement. The right to open this land is not happening or done just like that. Often this calls for special events attended by indigenous leaders or the local community and the necessity to make certain signs indicating that the land or land has been an individual working on it. Such matters will reinforce the individual's legal relationship

to the land it opens. If it does not exist, then the legal relationship between the land it opens to itself will be so weak that it opens up opportunities for other parties (individuals or individuals) to also claim that it is also the land it opens. Things like this will cause problems about the land. As mentioned earlier, the land issue is prone to conflict.

Sometimes, after a certain amount of time, the land is no longer productive when it first opens. A tenant tiller decides to leave the land and open up new land in the area of the partnership as well. In this case, if the condition of the soil or land shows neglect, the right of fellowship will return as usual. Individual rights are removed. If in the future he wishes to reopen the land, he must start his legal relationship from scratch again, just as he did before. Indigenous leaders also have the right to revoke land use rights for certain reasons. For example, if the old land has long been abandoned, or the cultivator has died without an heir, or because of a specific agreement of indigenous or tribal peoples, or because the tiller has misbehaved the legal community. The cultivation of land or the use of the land to enjoy the results also applies to the head or legal community officers as long as they serve the interests of legal alliances. These lands are often referred to as the crooked land, or in some other places, the leaders of the fellowship may enjoy the proceeds of the land by having labor drawn from their fellow members of the fellowship. More specifically, the crooked land mentioned here is part of the land of fellowship intended for some salary of the village head, regardless of where his assertive origins are, but taken from the land of fellowship.

Another thing that makes such an aspect vulnerable to conflict is because of the principle that the land of fellowship or it is not transferable (onvervreemd baarheid). It means that when there is a difference of ownership between the legal partnership of the boundaries of the land, each legal association shall defend its rights by all means. They will never allow their rights to the land they have claimed, which may have taken place for a long time, just casually. There is a magical-religious value that exists between the land of fellowship and the community of fellowship which makes it firmly applicable to them. Herein lies the need for the role of government or higher authorities to make laws that have or guarantee legal certainty in the land sector, avoiding land conflicts between customary law communities. It should be emphasized that in the It is the opinion of Prof. Van Vollenhoven. So that inward and outward function can be concluded as the right of use by every citizen of communal area and land for the sake of mutual interest in the society of communal area and other alliance. There are also individual rights in the legal order of communal society, including land ownership; the right which members of the partnership have to the communal right. The concerned does not have full power over the land owned or mastered it. It cannot be freely controlled because this property still has a social function. Such social functions will be visible and discussed further in the subsequent subject. Thus, if the fellowship at any time required the land, then the right of property could become the right of the fellowship again.

The right to enjoy is the right that a fellowship entrusts to a person to collect the proceeds from the land for a single harvest. This right is similar to the rights enjoyed by foreigners or outsiders of the communion land. However, individual fellowship members are not required to pay certain fees or compensations. Purchased rights are the rights granted to a person to buy land to the exclusion of others. It happens because the buyer is a relative of the seller, or his neighbor, or is one member of the same fellowship. The right to collect results because of the title of the right granted to a person or an individual holding a certain position within the customary law association and that right shall remain in possession of the office concerned. Right to use is the right granted to a person to take the proceeds from a piece of land. For example, in Minangkabau [11], there is a right or an inherited rice field, while members of the fellowship have the right to use the land of the heirlooms that are distributed for them to be collected.

After the UUPA, the customary land in Indonesia has changed. Everything concerned with customary land such as communal rights, about the sale and purchase of land and so on changed. If before UUPA came into effect, customary rights still belonged to local customary law alliances that had been controlled for a long time from their ancestors. However, after the UUPA, customary rights are still recognized, as this can be seen from article 3 of the UUPA, customary rights and similar rights of indigenous and tribal peoples are still recognized as long as in reality the community still exists. If, due to the occurrence of the individualist process, often this communal right began to be urgent, which gave special

recognition to the rights of individuals. Growing and strengthening individual rights in indigenous and tribal peoples leads to the depletion of communal rights. It is recognized by the government as long as the fact remains. If it is not necessary to establish a new customary land, the customary rights recognized in that article are not customary rights as in the past with the interests of the National and the border states with that the customary rights in question shall not be contrary to the laws and other regulations. In addition, there are also changes that occur on the customary land law before and after the entry into force of BAL. It can be seen for example, in this case, the sale and purchase of land. Before the UUPA, the sale and purchase of land are often done only verbally and without form

CONCLUSIONS

It can be concluded that the customary laws prevailing in Indonesia indicate the existence of a nuance of life or social function of the land, moreover in the division of communal land and individual land or individual. The distribution of rights or customary land rights arrangements indicates an attempt to discipline the use of customary land to ensure justice. However, legal certainty is not guaranteed by relying on the customary land law, due to aspects of applying the principle of abstract jurisdiction constructions in customary land law. It is where the role of government as the ruler to establish a professional registration of customary land to ensure the legal certainty in the field of agrarian. The government through various means has sought to assure legal certainty over customary land. Given the extent of land that has not been registered and compared to the available apparatus and funding capacity, it is expected to take a long time to complete the land registration as a whole. In addition to the Government's efforts to provide assurance and certainty of land rights, there are still certain concerns for the idea of land registration and customary land certification, as it will reduce the sustainability of customary lands themselves. Of course, this is unreasonable. Since the effort in the field of land registration aims to provide legal certainty to the right holder and so to the object, so avoid unnecessary disputes. By registering customary land based on laws and regulations while observing customary land laws that apply nationally, in fact, we have given a sign to the land, which can be transferred, which can be inherited. Of course the Government's efforts to safeguard against any deviation from the customary provisions applicable in the plot of land, beginning with a certificate of ownership and ownership of the land.

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