

# Registration of Ownership Rights Over Customary or Customary Land based on Law No. 5 of 1960 concerning Basic Regulations on Agrarian Principles

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## Keywords

*Agrarian Law, Customary Land, Customary Land Registration*

## ABSTRACT

*Tanah is a place where indigenous people live, and the land also provides a livelihood for them. Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles (UUPA), agrarian law that applies to earth, water, and space is customary law where the joints of the law come from the local customary law community, as long as it does not conflict with national and state interests based on national unity and Indonesian socialism. This research study is normative juridical as the main approach, considering that the discussion is based on laws and legal principles that apply to the issue of customary or customary land registration procedures. Customary land rights are authorities, which according to customary law are owned by customary law communities over certain areas that are the environment of their citizens. This position of authority allows communities to benefit from natural resources, including land, within the area for their survival. The Land Registry is called Recht Cadaster. Conversely, for land rights that are subject to customary law, land registration is not carried out so that it does not produce a certificate, but a proof of payment of tax on land, for example, Girik, and even if a land registration is carried out for land rights subject to customary law, this is known as Fiscaal Cadaster. Although customary land is not the object of land registration, based on the provisions of the Minister of Agrarian State/Head of the National Land Agency Number 5 of 1999, Article 4 paragraphs (1) and (2) stipulate that customary land can be controlled by individuals and legal entities by registering as land rights if desired by the right holder, namely citizens of customary law communities according to the provisions of the applicable customary law.*

## INTRODUCTION

Land is one of the most important factors in human life or immovable property that is vital and in great demand by every citizen, especially in Indonesia where most of the population lives in the agricultural sector. The land is a gift of God Almighty that cannot be separated from the life system of living things, therefore land has a very important function for human life. Every human being needs land as a place to settle, and grow crops, even until death humans need it. Moreover,

most of the Indonesian population earns a living from the land, so various problems arise that concern land or a piece of land.

Indonesia is a country that has many diverse tribes and cultures, as well as a vast area of sovereignty occupied by citizens from various ethnic groups. About the rule of a tribe, many terms will be known including customary land or layout and customary land law. For customary law communities, land has a very important function. The land is the place where people of customary law communities live, and the land also provides a livelihood for them. Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles (UUPA), agrarian law that applies to earth, water, and space is customary law where the joints of the law come from the local customary law community, as long as it does not conflict with national and state interests based on national unity and Indonesian socialism.

Customary land law is the right to own and control a piece of land that was lived by indigenous peoples in the past and present some do not have authentic or written evidence of ownership, and some are based on recognition and are not written. The relationship between customary law communities and land is that they have rights to the land and apply it both outward and inward. Based on the power of the exit, the community as a whole has the right to enjoy the land. Based on the power of enactment into society regulates how each member of society exercises his rights, according to his part, by limiting the allocation of personal demands and rights and withdrawing a certain share of land from the right to enjoy it privately, for the benefit of the community (Ramli Zein,2020).

The relationship between customary law communities and their land is a public relationship as well as a civil relationship, with customary law communities controlling and owning the land. Van Vollen Hoven's tenure and ownership of land by customary law communities is referred to as *beschikkingrecht*. The notion of "mastery" can be used in a physical sense, as well as in a juridical sense.

Tenure in the juridical sense is control based on rights, which are protected by law and generally authorize the right holder to physically control the land he controls, for example, the landowner uses or benefits from the land he controls, not handed over to other parties. Unlike juridical control, which even gives authority to control land that is physically controlled, in reality, physical control is carried out by other parties, for example, someone who owns land does not use his land but rents it to other parties, in this case juridically the land is owned by the landowner but physically carried out by the tenant of the land.

Tanah Ulayat is defined as land shared by the residents of the customary law community concerned. The right to tenure over customary law community land is known as Hak Ulayat. Article 18B paragraph (2) of the 1945 Constitution states, "The State recognizes and respects the unity of indigenous peoples and their traditional rights as long as they are alive and by the development of society and the principles of the Unitary State of the Republic of Indonesia, which are stipulated in law".

Customary rights are a series of authorities and obligations of a customary law community, relating to land located within its territory. Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles (UUPA) recognizes the existence of Customary Rights. The recognition is accompanied by 2 (two) conditions, namely regarding its existence and its implementation. Based on Article 3 of the UUPA, customary rights are recognized "as long as they exist in reality".

Customary land or layout has been used by customary law communities for generations for various social and economic purposes, including for public and social facilities, rice fields, and plantations. While the rest is in the form of wilderness. In conditions in the field, related to the customary land utilization business sector, its use is more developed for economic activities in the primary agricultural sector including the livestock sub-sector. Only a small percentage use customary land for the mining or quarrying sector. The customary land status of customary land law can be used as individual property rights if the customary land status has become state land.

## METHODS

This research is juridical-normative law research, namely research on the provisions of laws and regulations that apply as positive law in Indonesia (Jonaedi Efendi and Johny Ibrahim,2020).

Secondary research data is collected through literature studies related to legal issues or problems raised in research (Bambang Waluyo). Secondary data from the research results are analyzed qualitatively and systematically so that conclusions are obtained from the problems discussed (Burhan Ashshofa, 2020). The research data is described in clear, effective, organized, coherent, and logical sentences to facilitate analysis and discussion of problems (H. Ishaq).

## **RESULTS AND DISCUSSION**

### **Customary Land in Indigenous Peoples' Law**

Customary land is land that has been controlled and used for generations by indigenous peoples. Customary land is known as customary land, customary land is a piece of land on which there are customary rights of a particular customary law community. Customary law itself is a series of rules that bind a society that is not written and originates from customs that grow and develop in a particular community which is then accepted into law for generations. Customary land rights are authorities, which according to customary law are owned by customary law communities over certain areas that are the environment of their citizens. This position of authority allows communities to benefit from natural resources, including land, within the area for their survival.

The community and resources in question have a relationship outwardly and inwardly hereditary and are not broken between the customary law community and the territory concerned, therefore the conception of customary land rights according to customary land law includes magical communalistic-religious values that provide opportunities for individual land tenure, as well as personal rights, however, customary land rights are not the rights of individuals. So it can be said that customary land rights are communalistic because they are joint rights of members of customary law communities over the land concerned.

The characteristics of the existence of customary land based on Permenag/KBPN No. 5 of 1999, Article 2 paragraph (2), stipulate that customary rights are considered to still exist if: a) There is a group of people who still feel related by their customary legal order as citizens with a certain legal alliance, who recognize and apply the provisions of the alliance in their daily lives; b) There is a certain customary land which is the living environment of the citizens of the legal alliance and where they take the necessities of their daily lives; c) There is a customary legal order regarding the management, control, and use of customary land that applies and is obeyed by the citizens of the legal alliance.

Customary rights can have inward and outward powers. Inward power means dealing with its citizens, while power applies outward to non-members of customary law communities called "foreigners or outsiders", for this reason, the main obligation of customary rulers originating in customary land rights is to maintain the welfare and interests of members of their legal communities and to guard against disputes over the control and use of land. In the event of a dispute, then the customary ruler is obliged to resolve it. As for the power to apply outward, the customary land rights of customary land law are maintained and implemented by the customary ruler concerned. Foreigners or people who are not citizens of the relevant customary law community and intend to take forest products, hunt, or clear land, are prohibited from entering the land environment of a customary law community without the permission of their customary law ruler.

When viewed from the point of view of the form of customary law communities, the land environment may be controlled and owned by a certain customary law community or several customary law communities. The customary right of existence in the UUPA has been recognized, but the recognition is still followed by certain conditions, namely: "existence" and regarding its implementation. Therefore, customary rights can be recognized as long as they exist in reality. The point is that in areas where the right no longer exists, it will not be revived.

The implementation of customary rights in the UUPA is regulated in Article 3. Based on the provisions of Article 3 of the Law, it can also be understood that customary rights are recognized as separate land right if they meet two requirements, namely that the right exists (exists) and the implementation of the existing right must be following national and state interests and must not conflict with the provisions of the law.

## Land History in Indonesia

During the Dutch colonial era or before the enactment of UUPA No. 5 of 1960 in Indonesia adhered to colonial agrarian law which was legal dualism. Legal dualism is something that is made, not arising, and exists because of nature and this is also the basis for land law in Indonesia at that time so that land rights are divided into 2 groups, including 1) Western rights that are subject to laws applicable to European groups, namely written western civil law such as Eigendom rights, Opstal rights, Erfpacht rights, and Gebruik rights. 2) Customary rights that are subject to the laws applicable to indigenous people, namely customary law such as customary property rights.

Based on the Overschrijving Ordonantie Stb. 1834 No.27, land registration is carried out by the Land Registry Office on lands subject to Western law to provide legal certainty which results in proof in the form of certificates given to the right holders. This Land Registry is called Recht Cadaster. Conversely, for land rights that are subject to customary law, land registration is not carried out so that it does not produce a certificate, but a proof of tax payment on land, for example, Girik, and even if a land registration is carried out against land rights subject to customary law, this is known as Fiscaal Cadaster.

Fiscaal Cadaster aims not to provide legal certainty but to determine who is obliged to pay taxes on land. As for the basis for determining the tax object based on the status of land both as western right land and customary right land, while the taxpayer is the right holder, without paying taxes to the fiscal cadaster is meaningless and valuable as proof of rights to a piece of land, so that with this legal dualism it causes various problems between groups and the Constitution so that it is considered not following the ideals of unity and unity of the Indonesian nation.

As for the background of the discussion of agrarian law, namely: a) There is no guarantee of legal certainty for all people. b) Domain Verklaring raped the rights of the people. c) Dutch East Indies agrarian law is dualistic which can cause problems between groups. d) Customary agrarian law contains many defects and variegates so sometimes it does not guarantee legal certainty.

With the ratification and promulgation of UUPA (Law No. 5 of 1960) on September 24, 1960, dualism in the field of agrarian law was abolished. All land is directly controlled by the State as the organization of the strength of the Indonesian nation at the highest level and has the authority to 1) Regulate and administer the allocation, use, supply, and maintenance of earth, water, and space. 2) Determine and regulate the rights that can be had over earth, water, and space. 3) Determine and regulate legal relations between persons and legal acts concerning earth, water, and space.

The Basic Agrarian Law No. 5 of 1960 is expected to eliminate dualism in land law and at the same time can provide justice, benefit, and legal certainty as well as land rights. The mission of this UUPA is contained in the provisions of the UUPA namely the Agrarian Law which is still in force today partly composed based on the objectives and joints of the colonial government and partly influenced by it, contrary to the interests of the people and the State in completing the current national revolution and universal development.

Agrarian Law has a dualistic nature with the enactment of customary law in addition to agrarian law based on Western law, for indigenous people this colonial agrarian law does not guarantee legal certainty related to everything mentioned in the above considerations of the need for a national agrarian law based on customary law on land, which is simple and guarantees legal certainty for all Indonesian people by not ignoring the elements that Relying on religious law.

Efforts are made to achieve legal certainty by registering land, which is contained in Article 19 of the UUPA and this article orders the government that all Indonesian territories be held land registration which is Recht Cadastre which is mandatory for the rights holders concerned. The operational basis of land registration is PP. Number 10 of 1961 concerning land registration which in its implementation is carried out by the Land Registration Office and in its outline has the main task of measuring and mapping all land parcels throughout Indonesia and including the administration of its administration, land registration of land rights and the transfer of these rights as well as the provision of proof of rights which is the most powerful evidentiary tool.

SPM Number 10 of 1961 itself has only been declared valid in the regions of Java and Madura while for outside Java and Madura, it is further determined by the government in stages according to the needs of the regions concerned depending on the preparation in each district, so that with

that there are many letters made by notaries or letters made by the sub-district head with various variations and without going through the PP procedure. Number 10 of 1961.

Thus PP. Number 10 of 1961 has not been able to convince the people in registering land through the right channels, namely through procedures made by the agrarian agency. Therefore, improvements were made and the PP came out. Number 24 of 1997 concerning land registration where PP. Number 24 of 1997 still maintains its purpose and the system used which has essentially been stipulated in the UUPA.

### **Ownership of Customary Land Rights**

The regulation of customary land has been mentioned in Article 3 of Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles. The article reads "Bearing in mind the provisions of Articles 1 and 2 the exercise of customary rights and similar rights of indigenous peoples, so far as they exist, shall be such that they are following the interests of the National and the State, which are based on the unity of the nation and shall not conflict with other higher laws and regulations".

At the level of implementing regulations, Government Regulation Number 24 of 1997 concerning Land Registration has been ratified which is an amendment to Government Regulation Number 10 of 1961. However, in this Government Regulation, customary land is not included in the object of land registration.

This is related to Article 9 paragraphs (1) and (2) of Government Regulations, namely paragraph (1) that the objects of land registration include: 1) Land parcels owned with property rights, business use rights, building use rights, and use rights. 2) Land management rights. 3) Waqf land. 4) Property rights over flats. 5) Rights of dependents. 6) State land.

Whereas in Paragraph (2) it is stated that in state land as the object of land registration as referred to in paragraph (1) letter f, the registration is carried out by recording land parcels which are state land in the land register. Although layout land is not an object of land registration, based on the provisions of the State Minister for Agrarian Affairs/Head of the National Land Agency Number 5 of 1999, in Article 4 paragraphs (1) and (2) it is stated that "Ulayat land can be controlled by individuals and legal entities with how to be registered as a land right if desired by the holder of the right, namely members of the customary law community according to the provisions of the applicable customary law. Then, government agencies, legal entities, or individuals who are not members of the customary law community concerned, can control ulayat land after the land is released by the customary law community or by its citizens following the provisions and procedures of customary law that apply.

Procedures for determining land rights of customary law communities, that customary law communities can be granted land rights if: 1) Consecutive physical control for 10 years; 2) Still holding the collection of crops in certain areas and surrounding areas to meet daily needs; 3) To be the main source of livelihood and livelihood of the community; 4) There are social and economic activities that are integrated with people's lives.

In the previous rule, namely in the provisions of Article 24 (2) of PP No. 24 of 1997 concerning land registration, it was stipulated that a person can be recognized as a land owner if he has physically controlled the land for 20 consecutive years with good ethics, and during that time no party has any objection to the control of his land.

In general, customary land has 2 meanings:

1) The "Former Hak Milik Adat" land, which according to its popular term is Tanah Girik, comes from customary land or other lands that have not been converted into one of the lands with certain rights (Proprietary, Right to Use Buildings, Right to Use or Right to Use Effort) and have not been registered or certified at the local Land Office. The names can vary: girik, petok, rincik, ketitir and so on;

2) Land belonging to customary law customary communities, which forms such as foothold land, irrigation land, village cash land, crooked land, etc. For this type of land belonging to customary law communities, it cannot be certified casually. Even if there is, land belonging to customary law communities can be released utilizing ruislag or through the release of rights to the land first by the customary head.

Land former customary property rights in the form of Girik, if the party who wants to carry out the certification process is the original owner listed in the customary land, then there is no need for sale and purchase first. If inheritance has occurred, for example, it must be preceded by making inheritance information and inheritance procedures as usual. Meanwhile, if the acquisition of rights is carried out through the buying and selling mechanism, it must first follow the buying and selling process.

Certification of customary land in terms of land law is known as land registration for the first time, which is land registration activities carried out on land registration objects that have not been registered. There are two types of this activity, first, is systematic land registration, initiated by the government. The second is sporadic land registration carried out independently / on the initiative of the landowner. These two activities do not need to be preceded by the buying and selling process. Furthermore, regarding the limit of land ownership, it refers to the right of ownership of land. Only Indonesian citizens and certain legal entities can have ownership rights to land.

Based on Article 1 of Government Regulation Number 38 of 1963 concerning the Appointment of Legal Entities That Can Have Land Ownership Rights, (PP 38 of 1963) these legal entities are: 1) Banks established by the state; 2) Agricultural Cooperative Associations; 3) Religious bodies, appointed by the Minister of Agriculture/Agrarian Affairs, after hearing the Minister of Religious Affairs; 4) Social agencies, appointed by the Minister of Agriculture/Agrarian Affairs, after hearing the Minister of Social Welfare.

The limit of the area of freehold land for individuals or legal entities in Indonesia depends on the use or utilization of the related land/land, including the following:

#### 1. Farmland

Based on Article 3 paragraph (3) of the Regulation of the Minister of Agrarian Affairs and Spatial Planning / Head of the National Land Agency Number 18 of 2016 concerning Control of Agricultural Land Tenure (Regulation ATR / BPN 18/2016), the area limits of control and ownership of agricultural land for individuals are as follows: a) not densely populated, at most 20 hectares; b) less densely populated, at most 12 hectares; c) moderately populated, at most 9 hectares; or d) very densely populated, at most 6 hectares. Meanwhile, restrictions on agricultural land ownership for legal entities are following the decree granting their rights.

#### 2. Land for residential houses

The Decree of the Minister of Agrarian State/Head of the National Land Agency Number 6 of 1998 concerning the Granting of Land Ownership Rights for Residential Houses (Kepmen Agraria/BPN 6/1998) limits the acquisition of property rights over land for residential houses by individuals to no more than 5 plots of land covering an area of no more than 5,000 square meters. But the ministerial decree does not specify restrictions on land ownership for residential houses by legal entities.

In customary land registration, all documents and requirements must be completed first and then registered with the local Land Office, then a series of land registration activities begin. The Land Office will review the location and measure the land, issue a picture of the situation/letter of measurement, process the Committee's consideration, announcement, ratification of the announcement, the applicant pays the Land and Building Rights Acquisition Duty (BPHTB) according to the area stated in the situation drawing/income money, and finally, the issuance of land certificates. Usually, this process takes three months, but it can also be more, depending on the conditions in the field.

## CONCLUSION

The rights of indigenous peoples with Article 18B paragraph (2) of the 1945 Constitution have provided proper protection for the existence of indigenous people's rights, including their customary rights. Indigenous peoples in Indonesia are constitutionally recognized. This constitutional support strengthens understanding and awareness to respect and protect the rights of indigenous peoples. In addition, Article 3 of Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles (UUPA) also recognizes the customary rights of indigenous peoples or similar.

The customary right of existence in the UUPA has been recognized, but the recognition is still followed by certain conditions, namely: "existence" and regarding its implementation. The

implementation of customary rights in the UUPA is regulated in article 3 which reads as follows: The implementation of customary rights must be such that it is following national and state interests, which is based on national unity and does not conflict with higher laws and regulations.

Customary rights are recognized as separate land right if they meet two requirements, namely that the right exists (exists) and the implementation of the remaining rights must be following national and state interests and must not conflict with statutory provisions. Although customary land is not an object of land registration, based on the provisions of the Minister of Agrarian State/Head of the National Land Agency Number 5 of 1999, Article 4 paragraphs (1) and (2) states that "Customary land can be controlled by individuals and legal entities by registering as land rights if desired by the right holder, namely citizens of customary law communities according to the provisions of the applicable customary law". Then government agencies, legal entities, or individuals not citizens of the customary law community concerned, can control customary land after the land is released by the customary law community or by its citizens following the applicable customary law provisions and procedures.

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