

## **The Role of Custom Law in Settlement of Ulayat Land Disputes**



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**ABSTRACT:** Recognition of customary communal land is a problem that requires an appropriate pattern of handling including customary land in Makassar. This study aims to analyze the dispute resolution approach that guarantees legal certainty and examine the factors that influence the construction of customary community land dispute resolution in Makassar. This research uses normative legal research and empirical legal research. The analytical method used in this study is descriptive analysis obtained from qualitative and quantitative data. The results of the study show that the essence of customary law land dispute resolution can be resolved through positive law mechanisms and customary law mechanisms. As for the settlement of disputes on the object of the dispute through mediation, synchronization/harmonization of laws and the making of regional regulations. Nevertheless, the settlement efforts experienced various obstacles, including internal and external factors.

**KEYWORDS:** Indigenous Land, and its settlement.

### **A. INTRODUCTION**

The second amendment to the 1945 Constitution of the Republic of Indonesia (1945 Constitution of the Republic of Indonesia), specifically in the provisions of Article 18 B Paragraph 2. Underlying the provisions of the 1945 Constitution of the Republic of Indonesia Article 18B paragraph 2 further arrangements regarding Customary Law Communities are placed as part of the arrangements concerning Local government. The term used in this Article is "Customary Law Community Units". 1 The existence and rights of customary law communities are formally recognized by the constitution, more specifically related to customary land rights, but in reality these rights have been continuously violated either by Government and non-government parties.<sup>2</sup>

Land disputes are differences in values, interests, opinions and a perception between individuals and between legal entities (private and public) regarding tenure status and or ownership status. Disputes that arise from the social interaction of indigenous and tribal peoples, will be resolved quickly without letting the problems they experience linger for a long time which will cause the crystallization of problems into more complex problems. the parties to the dispute peacefully or through the mediation of the head of the local customary institution. Recognition and protection of indigenous peoples, until now has been a long debate about patterns recognition and protection. 4 From this background raises several questions. First, what is the role of customary law in settling customary land disputes? Second, what are the constraints faced in resolving customary land disputes?

The role of the customary head in resolving communal land disputes is as a peace judge in customary trials and as a customary decision maker where the parties are binding on the disputed decision. Land has a very important meaning and role for human life, because everyone needs land when they live until they die and given the structure of life and the pattern of the economy, most of them are still agrarian in nature. Soil for human life contains a multidimensional meaning. First, from an economic point of view, land is a means of production that can bring prosperity. Second, politically land can determine a person's position in community decision-making. Third, as cultural capital can determine the high or low social status of its owner. Fourth, land has a sacred meaning because at the end of life everyone will return to the land. Heru Nugroho, Claiming State Power, (surakarta: Muhamadyah University Press, 2001), p.237 Because of this multidimensional meaning there is a tendency that people who own land will defend their land in any way if their rights are violated.

The significance of land for human life and for a country is proven by the constitutional arrangement in the 1945 Constitution Article 33 paragraph (3) that "Earth, water and land are the greatest prosperity of the people". The provisions of this article then become the philosophical basis for land management in Indonesia which is legally regulated in Law Number 5 of 1960 concerning Basic Agrarian Regulations, which later became known as the Basic Agrarian Law (UUPA). UUPA provides a difference in understanding between "earth" and "soil". The definition of "earth" in the UUPA is regulated in Article 1 paragraph (4) which states that: "In the sense of the earth, apart from the surface of the earth, including the body of the earth beneath it as well as those under water." The above article provides an explanation of what is meant by the term "earth", which includes the surface of the earth (which is then called the land) and what is underneath (the body of the earth) as well as what is under the water. Furthermore,

## **The Role of Custom Law in Settlement of Ulayat Land Disputes**

the definition of "land" gets an explanation in the provisions of Article 4 paragraph (1) that: "on the basis of the right to control from the state, it is determined that there are various types of rights over the surface of the earth, which are called land which can be given and owned by people either individually or jointly with other people or legal entities". In the provisions above, what is called land is the surface of the earth. Land rights are rights over the surface of the earth, while land includes land, the body of the earth and what is underneath and under water. The relationship between humans and land in customary law has a cosmic-magical-religious relationship, meaning that this relationship is not only between individuals and land but also between a group of community members in a customary law alliance (*rechtsgemeenschap*) in relation to customary rights. The Basic Agrarian Law as positive law The National Land Law recognizes the existence of ulayat land rights, the provisions for recognition of which are set forth in Article 3 with certain conditions. The two requirements that provide the basis for the recognition of customary rights in Article 3, namely the requirements regarding their existence and implementation. Article 3 does not provide determining criteria regarding customary rights.

Adhering to a conception originating from customary law, Maria Sumardjono provides criteria for determining the existence of customary rights which are based on the presence of 3 (three) elements that must be fulfilled in a stimulant manner, namely: 1. subject to customary rights, namely customary law communities with certain characteristics. 2. the object of customary rights, namely land that is located in an area and is the main supporter of the community's livelihood and life for all time (*Lebensraum*).

## **B. RESULT AND DISCUSSION**

### **1. THE ROLE OF CUSTOM LAW IN THE SETTLEMENT OF ULAYAT LAND DISPUTES**

Right to ownership of land in customary law communities is still a crucial problem caused by the government's inconsistency in recognizing the existence of people's rights (Customary Communities) to land ownership. The problem of applying customary law and the functionalization of customary justice institutions is in fact often clashed with formal law. This fact departs from historical realities where decades of colonialism caused European law to dominate the form of legal systems in many countries in the world. Today the movement for human rights, especially the rights of indigenous peoples, is increasingly finding forms and platforms, for example at the UN level there is a Working Group on Indigenous Populations, Working Group on the Draft Declaration on the Rights of Indigenous Peoples, Permanent Forum on Indigenous Issues and many others. In Papua Province, the issue of customary land is very complicated, especially when conflicts arise and claims over customary land. The existence of demands by indigenous peoples triggered extensive conflicts, because in the end one of the tribes from the customary law community won. As a result, other indigenous peoples also want to receive the same compensation. Therefore, other tribes also make claims (demands). Indigenous peoples are of the opinion that by recognizing the existence of customary land, other parties can obtain usufructuary rights over said customary land, if payments have been made through customary parties.

The struggles within indigenous peoples cover issues: self-identity, way of life, rights to land, forests or natural resources (SDA), claims to traditional territories/territories, etc. The conceptual unification of the four dominant factors is "vulnerable" in nature; which makes it easier for the existence and role and demands of indigenous peoples to be marginalized. Indigenous peoples hold fast to their principles and beliefs and laws. he is not easy to accept outside influences that are foreign to him. Old beliefs have always been firmly held and adhered to for generations. Patterns of thinking and talking sober, cash without preamble and taboo something. The customary land dispute that occurred in SOA District, Ngada-Flores-East Nusa Tenggara, was between the indigenous people of Seso village (Meli tribe) and the Waepana village community in the Turewuda area, where the indigenous people of Seso village (Meli tribe) saw and felt that the land they owned was 5 in the Turewuda location is ulayat land passed down from generation to generation by the ancestors to the indigenous people for traditional ceremonial places, grazing fields and labor fields according to the tribes or woe in Seso Village. With this understanding, the indigenous people of Seso Village (Meli Tribe) feel that the people who inhabit and control the location of the land are an usurpation of their rights that have been passed down from generation to generation so that existing customary land and is considered tribal land must always be maintained. . As time went on, during the Dutch government (the kingdom and hamente era), a work contract was made with the Dutch authorities with the Bajawa king as the Chief of the Tribe. It is this dissatisfaction that urges the indigenous people of Seso village to demand that the people of Waepana village return and recognize their customary land rights. On the one hand, it turns out that the ulayat lands controlled by the Waepana villagers already belong to them because they have been given them by the Government based on free State land. And the Waepana village community has been given proof of ownership of the land in the form of a certificate. The people of Waepana Village have owned and cultivated these lands for decades. Why do indigenous peoples in SOA District - Ngada Regency, East Nusa Tenggara Province prefer the settlement method through mediation,

What is the role of the customary head in resolving disputes over the customary lands? Mediation is part of an alternative dispute known as Alternative Dispute Resolution (ADR) which is now regulated in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. The mechanism for resolving disputes in this way is classified in non-litigation media, which is a cooperative concept settlement, which is directed at an agreement that is a win-win solution (win). ADR was developed by legal practitioners and academics as a way of resolving disputes that has more access to justice. Therefore, the author is interested in

## The Role of Custom Law in Settlement of Ulayat Land Disputes

conducting further research on customary land disputes by elevating it into a thesis with the title: "THE ROLE OF THE TRADITIONAL HEAD IN THE SETTLEMENT OF ULAYAT LAND DISPUTES THROUGH MEDIATION"

Role as a Mediator in land disputes to obtain a dispute resolution. Land. As a mediator, the customary head plays a role in the process of resolving communal land disputes by being a neutral party or a mediating judge who sees problems from both parties and then finds the best way out for both parties in conflict. Land issues in Indonesia are classic problems, especially in areas far from the center of government. The land dispute itself is in a civil area or realm related to someone's ownership rights over something or someone's control over something which in this context is land control and ownership. One of the problems that often arise in land disputes is disputes related to customary land or customary land. As a country that recognizes cultural customs as a source of law, Indonesia also regulates the status of customary or customary land ownership. This customary or customary land problem often occurs in areas far from the center of government or central government power where there are still many people who adhere to traditional customs.

Communities who still adhere to their customs in the process of resolving disputes usually use a familial approach or are carried out using a deliberation-consensus model led by local customary leaders. Indigenous people mostly use the settlement path outside the court or what is commonly referred to as non-litigation. This method is considered by indigenous peoples as an effective way to reduce the potential for conflicts that will arise in the future by the disputing parties even though for example there has been a court decision.

As we know, there are still many thoughts in indigenous peoples that customary law is above ordinary formal law so that the potential for conflict over a dispute decided by a formal court can still be considered invalid by indigenous peoples. There are main reasons for indigenous peoples to resolve disputes using a non-litigation approach. The first is the problem of implementation time which is not bound and can be implemented in a short time. The second is low cost because it is carried out using mutually agreed customary rules, and the third is carried out peacefully using a deliberation and consensus approach. In the context of customary law in Indonesia and its development, it shows that the complicated formal court process makes the community think that the settlement approach with customary law is better where consensus on a decision is upheld by all the conflicting parties. The presence of customary law that goes far beyond the presence of formal law makes indigenous peoples never have doubts about its implementation and this also reflects how cooperative the attitude of Indonesian indigenous peoples is.

## 2. WHAT OBSTACLES ARE FACED IN SETTLEMENT OF ULAYAT LAND DISPUTES

In an effort to resolve communal land disputes that occur in an alliance, all parties deal with the problem by deliberating with the assistance of the customary head as a mediating judge and a conciliating judge who will help both parties make decisions and restore balance in the partnership. The role of the customary head in the settlement of communal land disputes is as a mediating judge and as a conciliatory judge who will help both parties to make decisions that are mutually beneficial to both parties to the dispute and to restore balance in the partnership. The role of the customary head is a way of knowing the efforts made by the customary head in resolving customary land disputes that occur. The aim is to find out the role of customary heads in resolving land disputes. The issue of customary land has quite broad implications because it involves the existence of a group of people who call themselves customary law communities who feel they have the most rights over the said land. Legal issues causing conflicts or potential conflicts in the Cultivation Rights (HGU) areas of oil palm plantations which are a serious obstacle to the development of oil palm plantations in South Kalimantan. This research uses the socio-legal research method using an interdisciplinary approach between aspects of sociological and anthropological research with a normative approach, which uses a qualitative analysis method, namely by analyzing a data in depth and holistically. The consequence of legal research that uses the socio-legal paradigm is to use a combination of normative juridical methods with qualitative sociological methods.

Disputes are different interests between individuals or institutions on the same object that are manifested in the relationships between them. Well, one of the most common disputes is land disputes. Land disputes usually occur not only between individuals, but also between groups. There are various ways to resolve the land dispute itself, but what are the steps? Check out the full explanation in this article regarding land disputes and examples of cases in Indonesia.

- What is a Land Dispute?
- Legal basis governing land disputes
- Steps to Settlement of Land Disputes
- Examples of Land Disputes in Indonesia

ulayat, to find out the causes of ulayat land disputes and what obstacles are encountered in efforts to resolve the disputes that occur.

As for the obstacles in efforts to resolve disputes, namely:

- a. The lack of role of the customary head as a mediating judge and conciliating judge
- b. Unclear customary land
- c. Indigenous land is not recognized
- d. Difficult to hold meetings

## The Role of Custom Law in Settlement of Ulayat Land Disputes

e. Witnesses who do not want to be witnesses

Ulayat rights as a distinctive competence in customary law communities, in the form of authority or power that manages and regulates the land in its entirety with internal and external conductivity. While ulayat means territory, so that Ulayat land is the land of certain customary law communities. According to Boedi Harsono (2005: 185) customary rights in their basic form are a right from the partnership over the land that is inhabited, while its implementation is recognized both by the legal community itself, as well as the head of the partnership on behalf of the legal community. Ulayat rights are a series of authorities and obligations of a customary law community, which relate to land located within its territory which is the main supporter of the livelihood and life of the community concerned at all times (Lebensraum).

### C. CONCLUSION

Land disputes are differences in values, interests, opinions and a perception between individuals and between legal entities (private and public) regarding tenure status and or ownership status. The life of a traditional society is a reflection of a harmonious life that the constitution aspires to as a civilized society. The definition of civil society according to Nurcholis Madjid refers to the Islamic society that the Prophet Muhammad had built in Medina. According to him, civil society is a society that is civilized, upholds human values, and is advanced in mastering science and technology. According to Emy Yunita Rahma Pratiwi in the book *Citizenship* (2021), civil society is a civilized society that upholds values, norms and laws, supported by mastery of science, faith and technology. The definition of civil society is a social system that grows based on moral principles. In traditional societies, the dynamics in society are protected by customs. Community living habits

which is communal, mystical and religious makes them far from hostility or conflict or disputes, fellow tribesmen understand and respect each other with one word or reference, namely the customary head or pakem anem of each clan. Ulayat rights are a series of authorities and obligations of a customary law community, which relate to land located within its territory which is the main supporter of the livelihood and life of the community concerned at all times (Lebensraum).

The problem of applying customary law and the functionalization of customary justice institutions is in fact often clashed with formal law. This fact departs from historical realities where decades of colonialism caused European law to dominate the form of legal systems in many countries in the world. In an effort to resolve communal land disputes that occur in an alliance, all parties deal with the problem by deliberating with the assistance of the customary head as a mediating judge and a conciliating judge who will help both parties make decisions and restore balance in the partnership.

### D. SUGGESTION

In order for land disputes with customary rights of indigenous peoples to get a good and wise resolution, it is advisable for the Government to have all legal products related to patterns of tenure and ownership of land that are contrary to the 1945 Constitution of the Republic of Indonesia and the UUPA, repealed and/or adapted to customary law rules or norms that develop in society according to the dynamics in existing communities that are still valid and binding on indigenous peoples' associations. It is hoped that the government can provide serious support and attention in building and empowering indigenous peoples in a spirit of pluralism through active communication, optimally supporting the implementation of regional regulations on customary law communities, focusing on development based on local wisdom and minimizing the emergence of discrimination against society in general.

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## The Role of Custom Law in Settlement of Ulayat Land Disputes

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