
Legal Certainty of Land Tenure of Customary Rights by Indigenous Peoples Based on the Administration of Customary Land

Firmansyah Fikri Hayqal¹, Dhimas Pratama Windyarto², Muhammad Haekal Fikri Hartono³

^{1, 2, 3}Master of Notary, Faculty of law, University of Jember

ABSTRACT: The fact that customary land is not included as an object of land registration in Government Regulation No. 24/1997 causes indigenous peoples' control over customary land not to be based on rights that can be proven in writing. This causes the rights of indigenous peoples over their customary land to be marginalised. Following up on this, the Government enacted Minister of Agrarian Affairs Regulation No. 9/2016 on Procedures for Determining Communal Rights to Land of Customary Law Communities and Communities in Certain Areas, which was later revoked and replaced by Minister of Agrarian Affairs and Spatial Planning Regulation No. 18/2019 on Procedures for Administration of Customary Land of Customary Law Communities. Initially, indigenous peoples' land tenure was based on communal rights, and then it was changed to be based on the administration of customary land rights. Therefore, it is necessary to know the scope and purpose of customary land administration and the difference with land registration to understand how to guarantee the legal certainty of the control rights of indigenous peoples over their customary land. This research is normative juridical type by using a legislative approach and analytical approach. The research results show that customary land is not ordered for registration in Government Regulation No. 24 of 1997 concerning Land Registration. The administration of customary land is to record customary land in the land registry book so that it differs from land registration. Recording customary land in the land registry book can minimise *overlapping* disputes between indigenous peoples and private parties.

KEYWORDS: legal certainty, customary law communities, administration of customary land rights

A. INTRODUCTION

Article 19 paragraph (1) of Law No. 5/1960 on Basic Agrarian Principles (UUPA) states that, "To ensure legal certainty, the Government shall conduct land registration throughout the territory of the Republic of Indonesia in accordance with the provisions regulated by Government Regulation." The enactment of the provisions in Article 19 paragraph (1) of UUPA implies the establishment of government regulations governing land registration. In this case, the government regulation on land registration still in force is Government Regulation No. 24/1997 on Land Registration. Referring to the provisions in Article 9 of Government Regulation No. 24/1997 on Land Registration, it has determined the land parcels that are the object of land registration, which are as follows:

- a. parcels of land held under proprietary, cultivation rights, building rights;
- b. and right of use;
- c. management rights land;
- d. waqf land;
- e. ownership rights to a flat unit;
- f. mortgages;
- g. State land.

Given that according to Article 19 paragraph (1) of the UUPA, it is stated that in order to ensure legal certainty, land registration is carried out throughout the territory of the Republic of Indonesia, the question arises why customary land is not included as an object of land registration referred to in Government Regulation No. 24 of 1997.

Unregistered customary land results in the absence of information for the public regarding the boundaries of customary land tenure areas by the indigenous community. In addition, the exclusion of customary land as an object of land registration creates an uncertain situation for indigenous peoples who control their land based on customary rights. The uncertainty has led to the unguaranteed control of customary land by the indigenous people themselves, for example, the dispute between the indigenous people of Petalangan batin Putih and the Tessonilo National Park, which began in 2004. At that time, the Government designated the Tesso

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Nillo forest area as the Tesso Nillo National Park. In contrast, within the forest area, the indigenous people of Petalangan batin Putih depended on the Tesso Nillo forest for their lives and livelihoods.¹

Customary land, which is not included as an object of land registration in Government Regulation No. 24 of 1997, causes indigenous peoples' control over customary land not to be based on rights that can be proven in writing. Meanwhile, disputes often occur between indigenous peoples and rights holders that are detrimental to indigenous peoples. In response to this, the Ministry of Agrarian Affairs and Spatial Planning issued Regulation of the Minister of Agrarian Affairs Number 9 of 2015 on Procedures for Determining Communal Rights to Land of Customary Law Communities and Communities Located in Certain Areas, where the regulation of the Minister of Agrarian Affairs and Spatial Planning exists to implement the objectives of the Decision of the Constitutional Court of the Republic of Indonesia on Case Number 35/PUU-X/2012, namely protecting the rights of indigenous peoples.² Then Minister of Agrarian Affairs Regulation No. 9/2015 was amended by Minister of Agrarian Affairs and Spatial Planning Regulation No. 10/2016 on Procedures for Determining Communal Rights to Land of Indigenous Peoples and Communities Located in Certain Areas.

The enactment of the regulation of the Minister of Agrarian Affairs and Spatial Planning *a quo* led to the birth of communal rights that indigenous peoples can own by applying to the Regent/Mayor or Governor. However, the recognition of customary land tenure by communities based on communal rights has not yet provided legal certainty for indigenous peoples holding communal rights.³ This is because the recognition of communal rights is at the level of ministerial regulations, and there are indications that communal rights are in conflict with the UUPA.

Three years after the enactment of Minister of Agrarian Affairs Regulation No. 10/2016, it was revoked and declared invalid by the passage of Minister of Agrarian Affairs and Spatial Planning Regulation No. 18/2019 on Procedures for Administration of Customary Land of Customary Law Community Units. To ensure the legal certainty of customary land tenure by indigenous peoples, according to the Regulation of the Minister of Agrarian Affairs and Spatial Planning Number 18 of 2019, it is no longer based on communal rights but by organising the administration of Customary Land of the Customary Law Community Unit in all regions of the Republic of Indonesia. According to Article 5 paragraph (4) of the Regulation of the Minister of Agrarian Affairs and Spatial Planning Number 18 of 2019 states:

Administration of Customary Land of the Customary Law Community Unit, including:

- a. Measurement;
- b. mapping; and
- c. recording in the land registry.

Based on the long flow of customary land regulation to achieve legal certainty for indigenous peoples and the administration of customary land of indigenous peoples, the researcher will discuss whether the Regulation of the Minister of Agrarian Affairs and Spatial Planning Number 18 of 2019 has provided a guarantee of legal certainty for indigenous peoples in their customary land tenure. Therefore, the researcher draws the following problem formulation: Why is customary land not included as an object of land registration according to Government Regulation No. 24/1997. And can the administration of customary land in the Regulation of the Minister of Agrarian Affairs and Spatial Planning Number 18 of 2019 provide legal certainty for indigenous peoples in the control of customary land.

B. RESEARCH METHODS

This research is *normative legal research*, which uses a *statute and analytical approaches*. The researchers used both approaches to find out and analyse how the guarantee of legal certainty in the Regulation of the Minister of Agrarian Affairs and Spatial Planning Number 18 of 2019 for indigenous peoples to control their customary land. The type of legal material in this writing uses primary, secondary and tertiary legal materials.

¹ Shrimanti Indira Pratiwi, *Penyelesaian Sengketa Tanah Ulayat antara Masyarakat Hukum Adat dengan Taman Nasional Tesso Nilo*, Program Magister Kenotariatan, Fakultas Hukum Universitas Brawijaya, 2015, hlm. 20

² Mariska Yostina, *Hak Komunal atas Tanah Masyarakat Hukum Adat di Indonesia*, Program Magister Kenotariatan, Fakultas Hukum Universitas Brawijaya, 2016, hlm. 5

³ Rahadiyan Veda Mahardika, & Gatot Suyanto, *Kedudukan Hukum Badan Bank Tanah Dalam Pengadaan Tanah Untuk Kepentingan Umum*, Jurnal Ilmu Kenotariatan, Vol. 3, No. 2, 2022, P. 62.

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C. DISCUSSION

1. Customary Land in Land Registration according to Government Regulation No. 24 of 1997

Land controlled by indigenous peoples, also known as customary land / tanah hak pertuanan, is a living land environment within the legitimate authority of indigenous peoples.⁴ Customary land has an essential role for indigenous peoples. The land is a place to live and grow crops, a place where members of the indigenous community are buried, and the land is the residence of supernatural beings and spirits of the ancestors. In addition, the land is also permanent in the sense that it does not change. Even though whatever happens, the land will remain. Even from the field of property law, land is a fixed property that the landowner's heirs can inherit.

Customary land is divided into 2 (two) definitions:

1. "Former Customary Owned Land", popularly known as Tanah Girik, comes from customary land or another land that has not been converted into one of the land rights and has not been registered or certified at the local Land Office. The names may vary: girik, petok, rincik, ketitir and so on; or
2. Land belonging to customary law communities takes the form of titian land, irrigation land, village treasury land, bengkok land etc. This type of land owned by customary law communities cannot just be certified. If anything, land belonging to customary law communities can be released by exchange (ruislag) or by the customary head's release of rights to the land first.

Ulayat land is the common land of the members of the customary law community concerned. The right to control indigenous people's land is known as Hak Ulayat. Ulayat rights are a series of authorities and obligations of a customary law community which relate to land within its territory. Thus, hak ulayat shows the legal relationship between the legal community (legal subject) and specific land/region (the object of the right).⁵ Law No. 5 of 1960, or the Basic Agrarian Law (UUPA), recognises the existence of Ulayat Rights. However, the recognition is accompanied by 2 (two) conditions regarding its existence and implementation. Based on Article 3 of UUPA, customary rights are recognised "as long as they still exist".

Thus, customary land cannot be transferred into freehold land if the customary land still exists, for example, evidenced by the existence of the customary law community or the customary head. Conversely, communal land can be transferred into freehold land if it does not exist or its status has changed to "former communal land".

According to Article 1 Number 1 of Government Regulation No. 24 of 1997 concerning Land Registration, land registration is a series of activities carried out by the Government in a continuous, sustainable and orderly manner, including collecting, processing, bookkeeping, and presenting and maintaining physical and juridical data, in the form of maps and lists, regarding land parcels and units of flats, including the provision of proof of rights for land parcels that already have rights and ownership rights to flats and certain rights that encumber them.

In the implementation of land registration, there are several objects of land registration as stipulated in Article 9 Paragraph 1 of Government Regulation No. 24 of 1997 in the form of:

- a. parcels of land held under proprietary, cultivation rights, building rights;
- b. management rights land;
- c. waqf land;
- d. ownership rights to a flat unit;
- e. mortgages;
- f. state land.

Referring to the object of land registration in the Government Regulation *a quo*, it can be seen that customary land is not included as an object of land registration. The existence of customary rights in Article 3 of the UUPA shows that customary rights have a place and recognition from the State as long as according to the reality they still exist. In the aspect of implementation, the implementation must not conflict with the national interests of the nation and State as well as other laws and regulations of a higher level. In this case, the interests of an indigenous community must be subject to the higher and broader interests of the public, nation and State.⁶

Therefore, it cannot be justified if in the current atmosphere of the country and State there is a customary law community that still maintains the content of the implementation of customary rights.⁷ Therefore, according to Prof Boedi Harsono, customary rights

⁴ Djamanat Samosir, 2013, *Hukum Adat Indonesia Eksistensi Dalam Dinamika Perkembangan Hukum di Indonesia*, Nuansa Aulia, Bandung, hlm. 103

⁵ Maria S.W. Sumardjono, *Kebijakan Pertanahan antara Regulasi & Implementasi*, Kompas, Jakarta, Juni 2001, hal. 56

⁶ Bhim Prakoso, *Pendaftaran Tanah Sistematis Lengkap Sebagai Dasar Perubahan Sistem Publikasi Pendaftaran Tanah*, Journal of Private and Economic Law, Vol. 1, No. 1, 2021, P. 66.

⁷ Ibid.

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will not be registered. Thus, the UUPA does not order their registration and in Government Regulation Number 24 of 1997 concerning Land Registration, customary rights are consciously not included in the class of objects of land registration.⁸

This is because it is technically impossible to register because the boundaries of the land cannot be ascertained without causing disputes between bordering legal communities. In addition, registering customary rights will result in preserving their existence, which is contrary to the natural development of customary rights, which tend to weaken due to the strengthening of individual rights.

2. Legal Certainty of Customary Land Tenure by Indigenous Peoples based on Regulation of the Minister of Agrarian Affairs and Spatial Planning Number 18 of 2019.

The control of customary land by customary law communities is recognised by the UUPA as contained in Article 3 of the UUPA which is stated as follows:

"In view of the provisions of Articles 1 and 2, the implementation of hak ulayat and similar rights of customary law communities, to the extent that they still exist in reality, shall be in such a way that it is in accordance with the national and State interests, which are based on national unity, and shall not conflict with other laws and higher regulations."

According to Prof Boedi Harsono, customary rights will not be registered and the UUPA does not order their registration and in Government Regulation No. 24 of 1997 concerning Land Registration, customary rights are consciously not included in the class of objects of land registration. This is because it is technically impossible to register because the boundaries of the land cannot be ascertained without causing disputes between bordering legal communities. In addition, registering customary rights will result in preserving their existence, which is contrary to the natural development of customary rights, which tend to weaken due to the strengthening of individual rights.

However, in practice, the control of customary land with customary rights based on customary law does not provide legal protection for the indigenous community because of the characteristics of customary law whose regulations are not written. Meanwhile, there are many cases in the land sector involving customary land, so the Government should not be ignorant of this.⁹

Therefore, in response to the many land cases involving customary land, the Government enacted the Regulation of the Minister of Agrarian Affairs/Head of BPN number 18 of 2019 concerning Procedures for Administration of Customary Land of Customary Law Communities.

According to the Regulation of the Minister of Agrarian Affairs/Head of BPN *a quo*, the implementation of ulayat rights by a customary law community unit over land in its territory, as long as in reality it still exists, is carried out by the existing law community unit concerned according to the provisions of local customary law.¹⁰ There are criteria to determine that the ulayat rights of the customary law community unit still exist in reality, which include the elements of existence:¹¹

- a. Communities and Customary Law institutions;
- b. The territory where the customary right takes place;
- c. The relationship, interrelationship, and dependence of the customary law community unit with its territory; and
- d. The authority to jointly regulate the utilisation of land in the territory of the customary law community unit concerned, based on customary law that is still valid and adhered to by the community.

Through the Regulation of the Minister of Agrarian Affairs/Head of BPN *a quo*, the Government guarantees the legal certainty of customary land owned by customary law communities by organising the administration of customary land of customary law communities throughout the territory of the Republic of Indonesia. In the regulation, there is no definition of the administration of customary land of customary law communities. However, it is explained in Article 5 paragraph (4) that the administration of customary land of customary law communities includes:

- a. measurement;
- b. mapping; and
- c. recording in the land register.

The administration of indigenous peoples' customary land is carried out based on the stipulation of recognition and protection of indigenous peoples in accordance with the provisions of laws and regulations. In addition, to be able to carry out the administration

⁸ Bayu Indra Permana, et.al., *Legal Certainty of Income Tax Exemption on the Transfer of Rights to Land in the Sharing of Collective Integration Rights*, *International Journal of Social Science and Education Research Studies*, Vol. 2. No. 11, 2022, P. 13.

⁹ Rahadiyan Veda Mahardika, et.al., *Kedudukan Subyek Hukum Ditinjau Dari Hak Keperdataan (Refleksi: Terjadinya Tumpang Tindih Lahan Hak Guna Usaha)*, (Jember: UM Jember Press, 2022), P. 80.

¹⁰ Article 2 paragraph (1) of the Regulation of the Minister of Agrarian Affairs/Head of BPN number 18 of 2019 on the Procedures for Administration of Customary Land of Customary Law Communities.

¹¹ Article 2 paragraph (2) of the Regulation of the Minister of Agrarian Affairs/Head of BPN number 18 of 2019 on the Procedures for Administration of Customary Land of Customary Law Community Units.

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of this customary land, the customary law community unit applies to the administration of customary land of the customary law community unit submitted to the Head of the local Land Office.

Find out the administration of customary land of the customary law community unit is as follows:

- a. Measurement is carried out on the boundaries of the customary land parcel of the customary law community unit that has been determined.
- b. After the measurement, the customary law community unit's customary land is mapped on the land registration map.
- c. Measurement and mapping are carried out in accordance with the rules of measurement and mapping of land parcels.
- d. The customary land parcel of the customary law community unit is given a land parcel identification number with a Regency / City area unit.
- e. The customary land of the customary law community unit is recorded in the land registry.

Referring to the provisions of Article 1 point 1 of Government Regulation Number 24 of 1997 concerning Land Registration, it is stated that:

"Land registration is a series of activities carried out by the Government continuously, continuously and regularly, including collecting, processing, bookkeeping, and presenting and maintaining physical data and juridical data, in the form of maps and lists regarding land parcels and units of flats, including the provision of proof of rights for land parcels that already have rights and ownership rights to units of flats and certain rights that encumber them."

Based on the definition of land registration, it can be concluded that land registration includes two main activities, namely:

- a. measurement and mapping of land parcels and their registration in land registers; and
- b. registering rights in the land book registers on behalf of the right holders (including the provision of title deeds).

Thus, there are two main lists that must be fulfilled in order to achieve legal certainty of land rights, namely, the land registry and the land book. By having one's name registered in the land registry and the land book, one is guaranteed legal certainty. The location of the legal guarantee is after it has been registered in the relevant land book. This is in accordance with Article 29 paragraph (2) of Government Regulation No. 24/1997 on Land Registration which states as follows:

"The recording in the land book and the recording in the measurement letter as referred to in paragraph (1) shall constitute evidence that the right concerned, its right holder and the land parcel described in the measurement letter has been legally registered in accordance with this Government Regulation."

According to Prof Boedi Harsono, the guarantee of legal certainty in the agrarian sector, especially in the land sector, requires:

- a. the availability of written legal instruments which are complete and precise, and consistently implemented;
- b. effective implementation of land registration.

The administration of customary land of Indigenous peoples in Regulation of the Minister of Agrarian Affairs/Head of BPN No. 18/2019 on Procedures for Administration of Customary Land of Indigenous Peoples provides a written legal instrument for the control of customary land of Indigenous peoples. The administration of customary land of customary law communities has similarities with the concept of land registration in Government Regulation Number 24 of 1997 concerning Land Registration. The difference lies in the administration of the customary land of the customary law community unit is only registered in the land register book, not recorded in the land book.

The registration of customary land in the land registry book does not provide a guarantee of legal certainty aimed at land registration activities in Government Regulation No. 24 of 1997. However, with the existence of written legal rules regarding the administration of customary land of the customary law community unit, customary land administration activities can be carried out and provide clarity of information and assertiveness regarding the boundaries of the customary land tenure area by the customary law community unit.

In addition, by regulating the administration of customary land of indigenous peoples, the control of customary land by indigenous peoples is no longer contrary to the UUPA as it was when the Minister of Agrarian Affairs and Spatial Planning Regulation No. 10/2016 on Procedures for Determining Communal Rights to Land of Indigenous Peoples and Communities in Certain Areas was still in effect. The administration of communal land of customary law communities does not create new rights and is not carried out with the motive of preserving the existence of customary law communities, but only collects data on land parcels controlled by customary law communities. With clear and accurate information for the public regarding land parcels controlled by indigenous peoples, it can reduce arbitrary actions that can harm indigenous peoples who live and depend on their lives in the customary land area.

D. CONCLUSION

Customary rights are not registered because the UUPA does not order their registration. Furthermore, in its implementing regulations in Government Regulation 24 of 1997 concerning Land Registration, customary rights are consciously not included in the class of land registration objects. This is because it is technically impossible to register because the boundaries of the land cannot be

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ascertained without causing disputes between bordering legal communities. In addition, registering customary rights will result in preserving their existence, which is contrary to the natural development of customary rights, which tend to weaken due to the strengthening of individual rights.

The Administration of Customary Land of the Customary Law Community Unit provides a written legal instrument for the control of the customary land of the customary law community unit. The mere registration of customary land in the land registry book does not provide a guarantee of legal certainty. However, with the existence of written legal rules regarding the administration of customary land of indigenous peoples, customary land administration activities can be carried out and provide clarity of information and assertiveness regarding the boundaries of customary land tenure areas by indigenous peoples. With the clarity of information related to customary land parcels and the firmness of their boundaries, it can reduce land cases/disputes involving customary land.

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