

Legal Political Study on Translation of Human Rights in the Indigenous Peoples in Dharmasraya West Sumatera District

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Abstact

The national land law structure in force in Indonesia does not mention and does not prohibit the sale and purchase of customary land rights. The fact in customary law has conditions that must be met regarding the transfer of the sale of customary land rights. If it does not meet the requirements, then buying and selling rights to customary land is said to be a deviation regarding the objectives contained in the customary order. Formulation of the first problem, why the legality of buying and selling rights over customary land of the Malay tribe in Dharmasraya Regency, West Sumatra Province. Second, what is the form of transfer of customary land rights according to customary law and national land law in Dharmasraya Regency and what kind of government legal policy is capable of providing protection to customary community rights relating to customary land rights? This paper is the result of research using the Socio Legal Research method that uses primary data and secondary data is a source of questions with the collection techniques carried out by observation and interviews equipped with literature studies and analyzed descriptively prescriptive. The results of the study found a deviation regarding the



substance of the transfer of title to the Malay customary land. One of the factors is the undeniable development of the age related to economic survival without thinking about the common rights inherent in customary land. The conclusion is that the customary land is a common right of the customary law community. The meaning of collective rights here is not owned by individuals, 'ninik mamak' or customary leaders only. Therefore, the sale and purchase of customary land rights must be returned in accordance with customary law norms attached to the customary law community itself. So that the existence of customary land is maintained in the days to come and is not eroded by time. The future legal politics of the government pays attention to the existence of customary land and recognizes the customary community's customary land to be poured in the form of an authentic deed and poured in the form of a Regency / City Regional Regulation in terms of the transfer of customary rights to other parties, especially investors.

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Tatanan hukum tanah nasional yang berlaku di Indonesia tidak menyebutkan dan tidak melarang mengenai jual beli hak atas tanah ulayat. Kenyataan dalam hukum adat mempunyai syarat yang harus terpenuhi mengenai peralihan jual beli hak tanah ulayat tersebut. Apabila tidak memenuhi syarat, maka jual beli hak atas tanah ulayat dikatakan penyimpangan mengenai tujuan yang terdapat dalam tatanan adat. Rumusan masalah pertama, mengapa terjadi legalitas jual beli hak atas tanah ulayat suku melayu di Kabupaten Dharmasraya Provinsi Sumatera Barat. Kedua, bagaimana bentuk peralihan hak atas tanah ulayat secara legal menurut hukum adat dan hukum tanah nasional di Kabupaten Dharmasraya serta politik hukum pemerintah yang seperti apa yang mampu memberikan perlindungan kepada masyarakat hukum adat terkait hak tanah ulayat? Tulisan ini merupakan hasil penelitian dengan metode Socio Legal Research yang menggunakan data primer dan data sekunder merupakan sumber tanya dengan teknik pengumpulannya dilakukan dengan observasi dan wawancara dilengkapi studi kepustakaan dan dianalisa secara disriptif preskriptif. Hasil penelitian ditemukan adanya penyimpangan mengenai substansi peralihan hak atas tanah ulayat suku melayu. Salah satu faktor yaitu perkembangan zaman yang tidak bisa terbantahkan terkait kelangsungan hidup secara ekonomi



tanpa memikirkan hak bersama yang melekat diatas tanah ulayat. Simpulan yang didapatkan bahwa tanah ulayat merupakan hak bersama masyarakat hukum adat. Makna hak bersama disini tidak dimiliki oleh perorangan, ninik mamak/kepala adat semata. Oleh sebab itu jual beli hak atas tanah ulayat harus dikembalikan sesuai norma hukum adat yang melekat pada masyarakat hukum adat itu sendiri. Sehingga eksistensi tanah ulayat tetap terjaga di masa-masa akan datang dan tidak tergerus oleh zaman. Politik hokum pemerintah ke depan memperhatikan mengenai keberadaan tanah ulayat dan mengakui tanah ulayat masyarakat hukum adat untuk dapat dituangkan dalam bentuk akta otentik dan dituangkan dalam bentuk Peraturan Daerah Kabupaten/Kota dalam hal perindahan hak ulayat kepada pihak lain khususnya investor.

Keywords: legal analysis; customary land rights; indigenous peoples.

Introduction

One of the goals of the Republic of Indonesia is to protect the entire Indonesian nation and all Indonesian blood and to promote public welfare. Land which has an important and fundamental meaning for the lives of people is basically controlled by the State as stipulated in Article 33 Paragraph (3) of the 1945 Constitution which states that: "The earth, water and natural resources contained therein are controlled by the state and used as much as possible for the prosperity of the people" (*bumi, air dan kekayaan alam yang terkandung didalamnya dikuasai oleh negara dan digunakan sebesar-besarnya bagi kemakmuran rakyat*).

As a follow-up to Article 33 Paragraph (3) of the 1945 Constitution relating to land or land, Law Number 5 of 1960 concerning Basic Agrarian Regulations was issued, hereinafter better known as the LoGA.

In fact, land use is in accordance with the provisions of the LoGA with various types of land rights such as ownership rights, building rights, business use rights and so on. As a result of the use of land in



accordance with human needs through legal actions often lead to legal relations, for example ownership of land rights. One of the rights held by a customary law community group is customary rights. UPPA did not mention an explanation of customary rights which in the customary law literature was called (*Beschikkingsrecht*). Customary rights as a juridical technical term is a right that is inherent as a specific competence in the customary law community, in the form of the authority to manage and regulate their land with inward and outgoing behavior.

Regulation of the Minister of Agrarian Affairs / Head of the National Land Agency Number 5 of 1999 Concerning Guidelines for Settlement of Customary Rights Rights of the Customary Law Community, as a regulation derived from the LoGA in Article 1 Paragraph (1) which reads:

"Customary and similar rights from customary law communities, (hereinafter referred to as *ulayat* rights) are authorities which according to certain customary law over certain areas which are the environment of its citizens to take advantage of natural resources, including land, in certain areas, for its survival and livelihood, arising from outward and inward and unbroken relationships between the customary law community and the region concerned "

(Hak ulayat dan yang serupa dengan itu dari masyarakat hukum adat, (untuk selanjutnya disebut hak ulayat) adalah kewenangan yang menurut hukum adat tertentu atas wilayah tertentu yang merupakan lingkungan hidup warganya untuk mengambil manfaat dari sumber alam, termasuk tanah, dalam wilayah tertentu, bagi kelangsungan hidup dan berkehidupannya, yang timbul dari hubungan lahiriah dan batiniah turun temurun dan tidak terputus antara masyarakat hukum adat tersebut dengan wilayah yang bersangkutan).

While G Kartasapoetra emphasized the definition of customary rights as the highest rights to land owned by a legal alliance (Nagari/Desa, Suku) to ensure orderliness in the utilization/utilization of land. Customary rights are rights owned by a legal alliance (Nagari/Village, Tribe), where the community members (the legal alliance) have the right to control the land, the



implementation of which is regulated by the chairman of the association (the Chief of the Tribe / Head of the village concerned) (R.G Kartasapoetra, Kartasapoetra, A.G, and Kartasapoetra 1985:88).

Conception of customary rights according to customary law there are values (*Komunalistik Religius Magis*) that provide opportunities for individual land tenure, however customary rights are not the rights of individuals. So that it can be said communal rights are communalistic because they are shared rights.

In the customary legal order of the Minangkabau tribe which becomes philosophical of civilized life especially for leaders in a group or tribe that is called *Hak Bapunyo, Ganggam Bauntuak* (Right to Own, Handheld Reserved). *Bapunyo* Rights means that customary land is a common property of people or tribes which is used solely for the welfare of members of the clan or tribe.

While *Ganggam Bauntuak* is designated by the customary head/ninik mamak to members or their nephews to work on and collect proceeds from the land with the right to manage communal land for survival.

Based on the above, it is interesting to study related to the customary land rights of the Minangkabau tribe in the Province of West Sumatra. The land was recognized by the Malay tribe itself as a customary land which became a noble teak as an inheritance inherited from the ancestors of the Malay tribe.

Based on the above background, it is interesting to do a research. The problem raised is why the customary land rights in the case of buying and selling do not meet the legality of customary law and should be like whether the transfer of rights to customary land in accordance with customary law and does not violate national legal provisions.

The intended purpose in this paper is to find out, explain, and analyze the legality of the transfer of rights and how the transfer of rights to the Malay tribal communal land in Dharmasraya Regency.



Discussion

The Concept of Land Rights in Customary Land

According to Boedi Harsono, the provisions stipulated in Article 3 of the LoGA are concluded 2 (two) conditions for the recognition of customary rights, namely (Boedi 2003:166–167):

a. Regarding its existence.

Customary rights are recognized as long as in reality they still exist in areas where such rights no longer exist, will not be revived. Regions where there are no customary rights, new communal rights will not be born.

b. Regarding the implementation

The exercise of customary rights must be such that it is in accordance with national and state interests, which are based on national unity and may not conflict with other higher laws and regulations.

Customary law in Indonesia generally shows a traditional, religious, togetherness, concrete and visual style, open and simple, Can be changed and adapted, not codified, deliberation and consensus (Hadikusuma 1992:33). Customary law in a broad sense has a very vital position in the development and development of national law, because customary law is essentially a core element of national law (Wignjodipoero 1983:38).

Customary rights have certain characteristics, these characteristics are (Dharmayuda 1987:57):

- a. Only the legal alliance itself and its citizens are entitled to freely use the wild lands in their territory;
- b. Outsiders may only use the land with the permission of the power of the alliance, without the agreement being considered a violation;
- c. Community members may benefit from the area of customary rights with the aim of the needs of his own family, if used for the benefit of others he is seen as a stranger, so he must get permission first. While foreigners are only allowed to take



benefits in the area of customary rights with the permission of the customary head accompanied by payment of tribute to the customary alliance;

- d. The legal alliance is responsible for everything that happens in its territory, especially in the form of acts against the law which constitute offense;
- e. Customary rights are not relinquished, transferred, exiled forever;
- f. Customary rights include land that has been cultivated, or is controlled by individuals.

Based on the above, the Minangkabau tribe has its own definition of ulayat land. Ulayat land is a "Nature Reserve" (Cagar Alam) of people which usually consists of forests far from settlements and shrubs that are close to settlements, usually at the foot of hills. The traditional proverb says "*Utan Jauh Diulangi, Utan Dakek Dikundano*", meaning that the forest is far in *datangani re*, the near forest is picked up. Repeated means to be signed or visited to take forest products such as wood, rattan, resin, honey, and other forest products. *Dikundano* means to be opened, processed, worked, planted and if necessary inhabited at any time by establishing a shelter in the forest to keep the produce from being eaten or damaged by animals.

There are three (3) types of customary land in the legal system of the Minangkabau indigenous people (Edison 2010:272):

- a. Ulayat Nagari, i.e. forest land outside protected forest areas (Nature Reserves) or state forests is not included in areas that have become tribal or ulayat communities;
- b. Ulayat Suku, namely forest land created by state forest areas and ulayat nagari, has not yet become the customary rights of a clan within the tribe;
- c. Ulayat Kaum, which is a forest that has been freed from the authority of ulayat nagari, tribal ulayat, and is not considered private land.

Thus the use of ulayat land is for the welfare of the members of the clan or tribe or nagari concerned, which in daily implementation is



under the supervision and control of the ninik mamak leader of the people who are in the nagari for the ulayat nagari land, ninik mamak the tribal leader for ulayat land tribe, and mamak head of inheritance for the communal land of the people.

The Concept of National Land Rights

The right to land is inseparable from the eternal rights of the nation which is inseparable from Article 1 Paragraph 3 of the BAL which states that: "the relationship between the Indonesian people and the earth, water and space as meant in Paragraph 2 of this Article is an eternal relationship" (*hubungan antara bangsa Indonesia dan bumi, air serta ruang angkasa yang termaksud dalam Ayat 2 Pasal ini adalah hubungan yang bersifat abadi*).

The Indonesian nation is a large nation, the duties and obligations of management cannot be carried out alone by the government as the power and as the nation's officers. Likewise, the control of land for individuals or other legal subjects as holders of land rights. These individual and private land rights in the conception of national land law contain an element of togetherness. The togetherness or community element exists in every land rights, because all land rights are directly or indirectly sourced from the nation's rights, which are joint rights. After all the land that was individually claimed was part of the shared land.

The LoGA states that there are various types of land rights contained in Article 4 Paragraphs 1 and 2, which read as follows:

"Based on the state's right to control as referred to in Article 2, it is determined that there are various rights to land surface land, called land, which can be granted to and owned by people, both alone and together with other people and legal entities. ".
(Paragraph 1)

(Atas dasar hak menguasai dari negara sebagai dimaksud dalam Pasal 2, ditentukan adanya macam-macam hak atas tanah permukaan bumi, yang disebut tanah, yang dapat diberikan kepada dan di punyai oleh orang, baik sendiri maupun bersama-sama dengan orang lain serta badan hukum). (Ayat 1)



"The rights to land referred to in paragraph 1 of this Article give the authority to use the land concerned, as well as the body of the earth and water and the space above are only needed for the interests directly related to the use of the land within the limits according to the Act. this law and higher regulations ".
(Paragraph 2)

(Hak-hak atas tanah yang dimaksud dalam Ayat 1 Pasal ini memberi wewenang untuk mempergunakan tanah yang bersangkutan, demikian pula tubuh bumi dan air serta ruang yang ada diatas sekedar diperlukan untuk kepentingan yang langsung berhubungan dengan penggunaan tanah itu dalam batas-batas menurut Undang-undang ini dan peraturan yang lebih tinggi). (Ayat 2)

Judging from the elaboration of the Article above, land rights are absolute rights for legal subjects. So it can be concluded that the right to land is the right of someone who has the right to land who is authorized to use or take advantage of the land that is his right.

The concept of the transfer of customary land

Since the promulgation of the LoGA that eliminates the dualism of land law in Indonesia, the notion of transferring land rights or known as buying and selling of land can be interpreted as buying and selling land in terms of customary law, given the applicable agrarian law based on customary law. In the LoGA the terms transfer of rights or sale and purchase are only mentioned in Article 26 Paragraph 1:

"Transfer of rights or sale, exchange, gift, gift with will, gift according to custom and other actions intended to transfer ownership and control are regulated by Government Regulation"

(peralihan hak atau jual beli, penukaran, penghibahan, pemberian dengan wasiat, pemberian menurut adat dan perbuatan lain yang dimaksud untuk memindahkan hak milik serta pengawasannya diatur dengan Peraturan Pemerintah).

According to customary law, the sale and purchase of land is an act of transferring land rights that are clear and cash. Terang means that the act of transfer of rights must be done in the presence of the customary head, who acts as an official who bears the regularity and legitimacy of the act of transfer of rights so that the act is known to the public. Cash means that the act of transferring rights and paying



the price is carried out simultaneously. Therefore, cash means the price of land is paid in cash, if in fact the price of the land has not been paid in full, the price shortfall is considered to be the buyer's debt to the seller.

It is different from the object of customary land, because in adat it has a "long tambourine batanggo down" (level up and down stairs) meaning that in buying and selling of customary land according to customary law must get a permit together with members of other customary law communities. The position of customary leader or 'ninik mamak' is the highest top of the agreement and has the role of giving permission that customary land can be traded if it has fulfilled the four elements (4) because heirloom assets including ulayat land can be sold or mortgaged (Dirajo : 2013 : 233-235):

- a. *Maik tabujua di tengah rumah* (dead body in the middle of the house), if the body is not buried due to lack of funds so it becomes a shame and shame for the family, because it is obligatory for the customary leader or 'ninik mamak' to find a solution so that the corpse can be buried properly according to custom. Therefore, the inheritance of the people must be sold or pawned as needed.
- b. *Gadiah gadang alun balaki* (an old girl does not have a husband), according to the custom that used to apply in Minangkabau, an adult girl must immediately find her husband. When you are an adult and have not gotten a husband, this is a disgrace to the family and its people. To cover this, all efforts must be made to get a match and this requires funds and costs. Therefore it is legitimate if heirlooms are pawned or even sold to achieve that goal.
- c. *Rumah gadang ketirisan* (a traditional house that must be renovated), means the cost of repairing a gadang house that has drained roofs, or which has weathered walls, or which has holes and broken floors or poles. All costs are taken from the sale of heirlooms. Because the function of the gadang house is used for the benefit of the people and also a place to stay for parents or nephews.



- d. *Mambangkik batang tarandam* (improving the economic order and progress of the people), the intention here is to establish a headman. Both the new headman and the deceased. With the aim that the leader in a people is always there, therefore for all event costs can be taken from the pledge or the sale of the inheritance of the people.

In the case of obtaining permission to sell or pawn with four (4) reasons above, the act must not be intentionally carried out immediately at that time. The customary leader or 'ninik mamak' tries to find a solution or another solution so that it does not reach the selling/mortgaging of inheritance including Ulayat land.

Conclusion

The customary law of the Minangkabau tribe is familiar with the term that has become a philosophical civilized life, especially for leaders in a group or tribe, namely the Bapunyo Right, Ganggam Bauntuak (*Hak Bapunyo, Ganggam Bauntuak*). Whereas customary land is jointly owned by customary law communities, the common meaning here is not owned by customary leaders / ninik mamak or individuals.

Element four (4) because the inheritance including customary land can be sold or mortgaged, namely:

- a. *Maik tabujua di tengah rumah* (corpse lying in the middle of the house);
- b. *Gadiah gadang alun balaki* (1d girl doesn't have a husband);
- c. *Rumah gadang ketirisan* (traditional house which must be renovated);
- d. *Mambangkik batang tarandam* (improving economic order and progress of the people).

Therefore, the sale and purchase of customary land rights must be returned in accordance with customary law norms in accordance with the four elements that have been agreed upon by indigenous peoples. So that the existence of ulayat land will be maintained in the future



and will not be eroded by the times. The government must be able to direct its legal politics in the context of maintaining customary land rights in customary communities not to move into the hands of investors only because of mere profit considerations, but must also consider the welfare of local indigenous peoples. In the future regulation, especially customary rights on land must be able to protect indigenous peoples and be able to benefit the state and third parties (entrepreneurs).

In addition, the future legal policy of the government must pay attention to the existence of customary land and recognize the customary community's customary land to be poured in the form of an authentic deed and set forth in the form of Regency/City Regulations in terms of transfer of customary rights to other parties, especially investors. []

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