

# Legal Certainty Of Indigenous People's

*by* Hamidah Hendrarini

---

**Submission date:** 04-Apr-2023 09:57PM (UTC-0400)

**Submission ID:** 2056171988

**File name:** JURNAL\_SCOPUS\_IBUK\_Legal\_Certainty\_Of\_Indigenous\_People\_s.pdf (195.65K)

**Word count:** 3728

**Character count:** 19639

## Legal Certainty Of Indigenous People's Land Rights Inside Indonesian's Agrarian Law

**Hamidah Hendrarini**

UPN "Veteran" Jawa Timur

[Hamidah\\_h@upnjatim.ac.id](mailto:Hamidah_h@upnjatim.ac.id)

**Anajeng Esri Edhi Mahanani,**

UPN "Veteran Jawa Timur

[anajengmahanani.ih@upnjatim.ac.id](mailto:anajengmahanani.ih@upnjatim.ac.id)

**Teddy Prima Anggriawan,**

UPN "Veteran Jawa Timur

[teddyprima.ih@upnjatim.ac.id](mailto:teddyprima.ih@upnjatim.ac.id)

**Eko Wahyudi**

UPN "Veteran" Jawa Timur

[ekow.ih@upnjatim.ac.id](mailto:ekow.ih@upnjatim.ac.id)

**Ronggo Alit**

UPN "Veteran" Jawa Timur

[ronggoalit@unesa.ac.id](mailto:ronggoalit@unesa.ac.id)

**Nabilah Luthfiyah Chusnida**

Universitas Brawijaya

[Nabilahluthfiyah45@gmail.com](mailto:Nabilahluthfiyah45@gmail.com)

### ***Abstract***

Customary Land is a land that communally owned by relevant indigenous community, the ownership rights of indigenous communities owned land is known as Customary rights, Customary rights is a series of authority and obligation of a certain indigenous community that related to the land on their immediate surroundings, Law no 5 of 1960 or Primary Land Act (UUPA) acknowledge the existence of Hak rights, the status of Customary Land could become individual ownership rights if the status of the particular Customary Land had become "state owned land", Customary Land status could be change into individual ownership rights if the status of the particular Customary Land had become "state owned land" aftermentioned before, the steps to transition the state owned land rights into individual ownership rights is regulated on Minister of Agrarian Affairs regulation / Chief of National Land Affairs No 9 of 1999 (Permenag/KBPN No. 9/1999). According to Article 9 Clause 1 Jo Article 11 of Permenag/KBPN No 9 of 1999, The Appeal for Individual ownership rights of state owned land is submitted in written form that addressed to The Minister of Agrarian affairs via The Chief of National Land Affairs Office which jurisdiction encompassed the concerned land

***Keywords: Customary land, Indigenous people, Agraria***

## 1. Introduction

Agrarian as natural resources is one of the most important field in Republic of Indonesia's Economic life. The Development plan that being expanded by the government is aimed to propel various sector that also supported by various sector, just like how Agrarian sector is related to the Economic Sector, that in the spirit of supporting and propelling the fast paced development , natural resources is needed both natural resources for production and land to support and become the foundation of development. Economic Outlook that view Agrarian as factor of production. Land is part of society's life and even determine someone's standing in society and not only for that, a piece of land is viewed as factor of production. but even more, a piece of land also had an Emotional bond with the society

In its Activity, Economic sector became more diserve, there is almost no Natural Resources that havent been explored, the plot of land owned of economic agents like Companies that is part of the government development mission is ever spreading and no region in the entire nation that havent been touched by development activities

The Aftermentioned Phenomenal Development progress in one hand, marked the increasing importance of control over Natural Resources especially a region or plot of lands, this dynamics of development causing the need of lands while the supply is Limited, this also formed the ever increasing seeds of conflict that follows the journey of the development itself, the solution is not solely technical-juridical but also involved the social economic consideration<sup>1</sup>

In the Era of New Order Government an Agrarian Conflict happend in the beginning of Legal instrument in form of statutory provisions that is :

Basic provision of foresty (Law no 5 of 1967, LN no 8) Investment Law, Law no 1 of 1970 about foreign investment and Law no 6 of 1968 that later changed with (law no 25 of 2007, 2007, LN No 67) other than that also appear provisions that is equal to a Law that is Government Provisions, Government Provsion No 40 of 1996 about The Rights of Venture use, Rights Property use, and Rights of Land use, also Government Provision No 4 of 1996 about Ownership of House as dweilling or Housing by a Foreign that domiciled in indonesia

Globalization via WTO regime have pushed the world to develop for granting and bringing convenience for investments to enjoy agrarian source, with that kind of approach it also bring out ideology of Globalization Dominance by enjoying as many agrarian resource as possible, in relation with the summary above the Nation's function is very important as a institution that possess the authority in controlling those resources as a fundamental function that have been regulated in the Constitution

According to the summary up front, the central legal issue that observed in this research is legality of protection of tnah Customary and the legal assistance in the land issue of the indigenous rights by society in large and for farming circle , legal instrument that agreed and implemented by each parties must be appropriate with the morals and not

---

<sup>1</sup> Sjahmunir. Eksistensi Tanah Ulayat Dewasa ini di Sumbar. Pemerintah Provinsi Sumatera Barat. Padang. 2001.

clashed with the legal principle that exist, that is also supported from the equal standing between bussinessmen and consumers in legislation so a win win solution could be achieved.<sup>2</sup>

The problem that happend according to the background is the lack of knowledge in society's part on Customary rights and the process to wholly transfer the rights of land, the case of violation against the Customary land rights is increasing day by day, and for that an innovation is needed with the utilization of technology in form of information device to create a smart and legally aware application, especially legal policy about the rights to obtain Customary Land and the comprehension about agrarian in general, that is more practical, innovative, progressive, and efficient, that connected directly with authorized state agencies and institutions related to land in indonesia

This research is aiming to create an application about the steps and procedure to educate about Rights of Customary Land, Legality, up to the transfer of rights process in accordance to the real condition in society based on the existing law. Becasue in this current condition, many member of society quickly turned to the Police when faced with legal matters, even though police only posessing authority to resolve criminal matter. according to many research tha we've already studied about society's lack of knowledge and understanding about law , This application answers and provides for those needs.

## 2. Method

Study Conceptually on the subject of existing provision in Agrarian law, later analyzing the problem of Customary Rights in indonesia and which solution that want to be achieved from that problem, in relation with the system, began with data gathering and after that, the data will be processed inside database, if a database have been formed then the next process is to design an interface on a media in form of Android, interesting design will ease the user to utilize this application, after the database and design have been fulfilled, the next process is to integrate the system to Android Operating System

The next step is undertaking a test to gauge the performance of Education of Thorough Customary Rights protection's application system , evaluation is done with the goal to compare the output of system with result that already validated by experts, both result will be compared and also will be measured for the accuracy, this steps is the step to do validation process towards the application that already created compared with experts opinions on the matter

---

<sup>2</sup> Soekanto. Menuju Hukum Adat Indonesia. Suatu Pengantar Untuk Mempelajari hukum Adat. disusun kembali oleh Helmy Panuh. Raja Grafindo Persada. Jakarta. 2002.

### 3. Result and Discussion

#### a) Indigenous Society's Customary Rights

Indigenous Society's Law is regulated on Article 3 Basic Agrarian law, that is "with provision on clause 1 and 2 had taken into account, the implementation of Customary rights and also rights that similar in nature originated from indigenous society, as long as its still exist in reality, should be as it is, so it will falls accordingly with National and State Interest, which is also in line with The United Nations and also cannot be clashed with Law and Provision that higher than Indigenous society's law could posses the rights of land in form of rights to manage the land as part of implementation of State's Rights to control the land Article 2 clause 4 Basic Agrarian law, also the acknowledgement of Indigenous Society's communal rights Law (hak Customary ) as written on Article 3 of Basic Agrarian Law, what is meant with Customary rights of Indigenous society is a series of authority and obligation of a certain indigenous community that related to the land on their immidiate surroundings, according to Mochamad Tauchid, Customary Rights is a Rights of a region or Race of People over a plot of land , that filled with Authority to regulate the control and use of land inside their regional environment.<sup>3</sup>

According to soerojo Wignjodipoero, there is 2 things that caused one land to possess a very important standing in indigenous law , first, because its nature, where a land is the sole valuable possession that even experiencing any kind of circumstances. Its still awhile in nature , and for some instance its price even became much more expensive, second, because the fact that land is a place of dwelling for a society, it could provide for the members of society, and also the place where deceased member of society buried, it also serve as home for the society's local protective deities and spirits of their ancestors

In the past, when earth's population still fewer in numbers, humans are freely controlling land that they think is fertile enough for farming and other activities, but as the change of time and era happend, in the time when Kingdoms still rules, in Nusantara people also still could freely claimed lands and control the land with the monarch's permission, in that era, Sultans/Kings have a great authority over lands they rule, according to soemarsaid martono, as quoted by soeprijadi "kings have 2 rights over land, first, in form of political rights or public rights that regulate and settling the issue of how large is his realm, and the limits of his rule, second is the rights to regulate the bounty of land according to existing custom"<sup>4</sup>

As times changes and the entry of foreign influence to already established indigenous rule, the control of land in Nusantara also began to change, this explained by Siregar on the following :

According to Indigenous Law concept, at the start all lands is owned by the king which later will be given to his subjects with the rights to use or utilize it, but

<sup>3</sup> Irzal Rias, Decision Reinforcement Of Village Adat Council Institution In Resolving The Disputes Based On Minangkabau Adat Community, SAVAP Academic Research International Vol. 4 No. 6 November 2013.

<sup>4</sup> Helmy Panuh. Pengelolaan Tanah Ulayat Nagari Pada Era Desentralisasi Pemerintahan Di Sumatera Barat. Raja Grafindo Persada. Jakarta. 2012

later that is also experience change in line with the entry of other law via Colonial rule and the entry of religion which values are absorbed (accepted) by Indigenous law, so the freedom of member of society for opening and cultivate that land is becoming increasingly lax. This legal relation between indigenous society with their Customary land bore the Customary Rights, this Customary rights is a communal rights that owned by Indigenous society's and must be recognized and protected by the state, in line with this, nations around the world already possessed an agreement about the recognition and protection of these rights, which is clearly written on Article 14 clause (1) and (2) ILO 169th Convention , which contain the following :

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

Article 14 clearly states that the rights of ownership and control over the land that is traditionally occupied must be recognized. In addition, measures must be taken to protect the rights of indigenous peoples to use land that is not only controlled by them but to which they have long had traditional access to such land. The situation of nomadic people and shifting cultivators needs special attention. The government must identify lands traditionally held by indigenous peoples and ensure effective protection of their rights of ownership and control over their lands.

#### **B Certainty of the Legal Protection of Indigenous Peoples' Customary Land in an Agrarian Perspective**

The implementation of control over these resources is intended for the benefit of its people, so that in this status the State has the role of managing and owning these resources for the benefit of its people. Therefore, the main agrarian Law No. 5 of 1960 emerged as a manifestation of the State's control over resources as regulated in Article 33 paragraph 3 of the 1945 Constitution which states that the State's right to control the earth, water and space is used as much as possible for the prosperity of the people. This means that the State must always provide prosperity for people, the task of the State in the concept of a welfare state is that in addition to protecting the liberties of civilians, it also protects people's livelihood, divided into: (1) direct influence as a result of the recognition and protection of social rights, (2) indirect influence as a result of the formation of government officials equipped with power and expertise, (3) the hope that social problems can be solved with the participation of the authorities.



Efforts to improve the welfare and prosperity of its people with a pattern of development, especially physical development or in real terms, namely infrastructure development. At the infrastructure summit on January 17-18, 2005, Sri Mulyani as Minister of Development Planning/Chairman of the National Development Planning Agency stated that the development strategy carried out in Indonesia was carried out in 3 parts. (1) policies that are directed at sectoral investments that are more commercially profitable, including the construction of toll roads, water, sanitation, ports, and telecommunications. (2) focus resources on sectors that are not commercially profitable such as roads and investment. help the poor and communities who live far away. (3) actively bridge the gap between public and private infrastructure, so it is necessary to prepare a number of regulations to remove obstacles and increase the role or participation of the private sector in infrastructure development carried out by the government The land for infrastructure development is carried out through a land acquisition agency in land acquisition agency in deliberation by providing compensation to those who willing to release or surrender land, buildings, plants, and objects related to land<sup>5</sup>.

The concept of state control over natural resources, especially related to the land, cannot be separated from the right of control over land which consists of the rights of the Indonesian people to land, the state's control over land, the Customary rights of indigenous peoples, and individual rights to land consisting of: - land rights, land waqf property rights, mortgage rights, all of which are based on customary law, so that as long as the concept of ownership is sourced and based on customary law, which in the principles in the UUPA, because as a basic form, it must naturally animate the implementation of the UUPA and implementing regulations, thus in making implementing regulations the UUPA must animate the principles contained in the UUPA [5]. However, in the era of globalization, investment activities that are the backbone of development will distort the rights of the Customary, this is what often occurs in conflicts between investors and indigenous peoples or the government and indigenous peoples, due to different perspectives.

Customary rights are not individual property rights, but have a private dimension and have tenure rights guaranteed by UUPA No. 5 of 1960, article 3 because customary law is the main basis, but not all of them that customary law is the main basis but also as a complement, namely the characteristics of customary law. its nature is regulated in article 5, article 56 and article 58 of the LoGA. Customary rights are a series of authorities and obligations of customary law communities, which relate to land located within their territory, which is the main supporter of the livelihoods and lives of the community concerned throughout the ages, namely those related to the joint rights of ownership of the land, including public law, in the form of duties. and the authority to manage, regulate and lead the allocation, control and maintenance.<sup>6</sup>

---

<sup>5</sup> Erizal Jamal.dkk. Struktur dan Dinamika Penguasaan Lahan pada Komunitas Lokal. Laporan Penelitian PSE. Bogor. 2001.

<sup>6</sup> Divisi Statistik Sektor Riil. Survei Triwulan III-2018 Perkembangan Properti Komersial. Departemen Statistik Bank Indonesia. Jakarta. 2018.

Soil has an important meaning in human life. In the teachings of Islam it is believed that humans themselves come from the land and will return to the land. In everyday human life, there are numbers of bloodsheds caused by land ownership disputes, even a family can sometimes be broken due to land disputes. “In the Javanese ethnic law community, the philosophy that says *sedumuk batuk senyari bumi, yen perlu ditohi pati* (even that an inch of his land, if needed, will be defended until he dies)”<sup>7</sup>

Soil is one of the main sources of human life. Fruits and plants that are consumed by humans are the result of the land, both rice fields and plantations. The point is that humans in their lives cannot be separated from the land, because humans live and work on land. In this case the Batak ethnic legal community declares the land *ulos na sora buruk* (a cloth that will never rot)..<sup>8</sup>

In practice, many indigenous peoples have lost their Customary rights because the State uses the principle of legal certainty more than the principle of justice. This can be seen in the Minister of Religion Number 5 of 1999 which contains provisions on land that has been owned by an individual or legal entity that holds land tenure rights under the UUPA, and is owned or handed over by an OPD, legal entity or individual referring to and in accordance with the legislation. and the existing regulations cannot be implemented by the Customer's rights on it. Customary law communities are people who use unwritten law, so they do not have evidence of their Customary Land. So, if there are other parties who have evidence such as a certificate, then the party holding the evidence wins, even though it may in fact be a Customary land. Law enforcement that treated like “business as usual” has become routine work and mechanical in nature it forgets the movement of society that continues to change in various aspects of life. The law is thus only seen from a static point of view but is forgotten in terms of its progress. In fact, this progress also reflects a higher change in the demands, values and expectations of the law. Based on

### Acknowledgments

Indigenous Peoples are entitled to Article 3 of the LoGA, namely, “With the provisions of Articles 1 and 2, by enforcing customary rights and similar enforcement powers, customary law communities have determined that the national interest, as long as the facts remain. Legally, customary law communities have the right to exercise their land rights in the form of administrative powers in the context of exercising state management power. City rights law community in the sense of Common Article 3 UUPA Customary law communities are a set of powers and obligations of the general legal community in in relation to real estate located within its territory.

Efforts to improve the welfare and prosperity of the people through development patterns, especially physical development or especially infrastructure development. At the Infrastructure Summit 17-18 January 2005, Sri Mulyani, Minister of Development Planning and Head of the

<sup>7</sup> Tampil Anshari Siregar, *Pendaftaran Tanah Kepastian Hak*, Fakultas Hukum Universitas Sumatera Utara, Medan, 2011 halaman 1.

<sup>8</sup> *Ibid.*



National Development Planning Agency, said that the development strategy implemented in Indonesia was implemented in three parts. Strategies aimed at making sectoral investments more economically viable include the construction of toll roads, water supply, sanitation, ports and telecommunications. Focus resources on economically unviable sectors such as roads and invest in helping the poor and remote. Therefore, it is necessary to prepare a set of regulations to remove obstacles and increase the role or participation of the private sector in land, buildings, facilities, and land-related goods in government-managed infrastructure development.

## References

### *Journal Article*

Sjahmunir. Eksistensi Tanah Ulayat Dewasa ini di Sumbar. Pemerintah Provinsi Sumatera Barat. Padang. 2001.

### *Book*

Divisi Statistik Sektor Riil. Survei Triwulan III-2018 Perkembangan Properti Komersial. Departemen Statistik Bank Indonesia. Jakarta. 2018.

Erizal Jamal.dkk. Struktur dan Dinamika Penguasaan Lahan pada Komunitas Lokal. Laporan Penelitian PSE. Bogor. 2001.

Helmy Panuh. Pengelolaan Tanah Ulayat Nagari Pada Era Desentralisasi Pemerintahan Di Sumatera Barat. Raja Grafindo Persada. Jakarta. 2012

Irzal Rias, Decision Reinforcement Of Village Adat Council Institution In Resolving The Disputes Based On Minangkabau Adat Community, SAVAP Academic Research International Vol. 4 No. 6 November 2013.

Soekanto. Menuju Hukum Adat Indonesia. Suatu Pengantar Untuk Mempelajari hukum Adat. disusun kembali oleh Helmy Panuh. Raja Grafindo Persada. Jakarta. 2002.

Tampil Anshari Siregar, *Pendaftaran Tanah Kepastian Hak*, Fakultas Hukum Universitas Sumatera Utara, Medan, 2011.

# Legal Certainty Of Indigenous People's

## ORIGINALITY REPORT

7%

SIMILARITY INDEX

6%

INTERNET SOURCES

3%

PUBLICATIONS

4%

STUDENT PAPERS

## PRIMARY SOURCES

- 1** Submitted to Universitas Sultan Ageng Tirtayasa  
Student Paper 1%
- 2** Jenny Kristiana Matuankotta, Eric Stenly Holle. "State Recognition and Respect for the Rights of Customary Law Communities in the Maluku Islands Region in the Exploitation of Forest Resources", SASI, 2022  
Publication 1%
- 3** Submitted to University of Lincoln  
Student Paper 1%
- 4** Adonia Ivonne Laturette. "Ulayat Right of Customary Law Community", Pattimura Law Journal, 2017  
Publication 1%
- 5** Submitted to UIN Syarif Hidayatullah Jakarta  
Student Paper 1%
- 6** Annelies Zoomers. "Globalisation and the foreignisation of space: seven processes driving the current global land grab", The Journal of Peasant Studies, 2010 1%

7

layan.hukum.uns.ac.id

Internet Source

1 %

---

8

www.neliti.com

Internet Source

1 %

---

9

Submitted to School of Advanced Study

Student Paper

1 %

---

Exclude quotes Off

Exclude matches < 1%

Exclude bibliography On

# Legal Certainty Of Indigenous People's

GRADEMARK REPORT

FINAL GRADE

/0

GENERAL COMMENTS

Instructor

PAGE 1

PAGE 2

PAGE 3

PAGE 4

PAGE 5

PAGE 6

PAGE 7

PAGE 8