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Religious Communal Concept of Customary Land Law in the Establishment of National Land Law and Its Application

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ABSTRACT

The religious communal concept implies that land is believed to be a gift from God Almighty and is a joint property of customary law communities, which allows for private and collective land tenure. The concept of customary law is used as the main source in the formation of national land law in the fields of conception, system, principles, and legal institutions. Because the national land law regulated in Law No. 5 of 1960 is of a fundamental nature, its application needs to be completed using the same concept and guided by, among other things, filtered customary law, prohibition of conflict with national interests, etc.

Keywords: concept, communal, religious, customary land

INTRODUCTION

The title of this paper contains two variables of the normative study, namely 'the religious communal concept of customary land law in the formation of national land law' and 'the religious communal concept of customary land law in the application of national land law.' It is essential to get attention from the land law circles of each country, as each country has a different system of land tenure rights, which will affect its formation and implementation in the country concerned.

In the system of land tenure rights, according to western land law, all land is completely divided and is in the hands of legal subjects (individual or corporate legal subjects). This principle is embodied in Articles 519 and 520 of the Civil Code (KUHPerd). The free translation can be stated as "every plot of land always has one". The state is the owner if an individual or legal entity does not own it. Indeed, at that time, there was an assumption that only *eigenaar* or land owners were authorized to grant erfpacht rights, optal rights, and others (Harsono, 1997: 42).

In the feudal land law system, all land is owned or claimed by the ruler (king or sultan). Individuals can only be cultivators on land belonging to the king or lord as 'tenants' and this is called the "doctrine of tenure". This land law system began to develop in the Middle Ages and underlies land law in England and its former colonies. Although the provisions have been changed, the basic concept remains the same in countries that are no longer in the form of kingdoms. The king or crown's position as the land owner is replaced by the state (Harsono, 1997: 46).

In contrast to the system of customary land tenure rights, land ownership belongs to customary law communities. However, each individual from the community can claim it for the benefit of himself and his family, but it is still part of the common land. So individual rights, in this case, are not absolute because it is believed that all common land is a gift from God Almighty to group of customary law community. The legal community is the embodiment of all its members, who have rights in their territory that have civil and public aspects.

The civil aspect is seen from the ownership of the territory, while the public aspect is the authority to regulate the territory for the welfare of its people. This system of land tenure rights adopted by the Indonesian state is known as '*hak ulayat*', and will at the same time influence the formation and application of land law in Indonesia (Setiawan, 2021: 76). Based on that thought, it is deemed necessary to discuss "*how is the religious communal concept of customary land law in the formation of national land law and its application?*"

The purpose of this study is to invite law lovers in the land sector (especially land law in Indonesia) to follow the reasoning of the committee making the Basic Agrarian Law (UUPA) which implements the religious communal concept of customary land law in its formation and application.

LITERATURE REVIEW

1. *The concept of Communal Religious*, in this paper, is a concept implying that the land is believed to be a supernatural gift or God Almighty and a common property of the customary law community, which allows for private control of the land as well as containing elements of togetherness (Harsono, in Sitiawan, 2021: 71) Meanwhile, *land tenure rights* are a series of obligations and/or prohibitions for the holder of the right to do something about the land he is entitled to. Something that is allowed, obligated or prohibited to be done is the content of that right, as well as a differentiating criterion between controls over the land (Setiawan, 2021: 15).

In Indonesia, *there is a hierarchy of tenure rights over land*: first, the Indonesian Nation's Rights, which are regulated in Article 1 paragraph (2) of the LoGA¹, second, the right to control from the state (which has a public legal aspect and is regulated in Article 2 paragraph (2) of the LoGA²; third, individual rights to land, the various types of which are regulated in Article 16 of the LoGA, among others: property rights, business rights, building use rights, usufructuary rights, lease rights, etc.

2. *Ulayat rights* are the authority and obligations of a customary law community that relates to land located within its territory. This right includes all land within the territory of the legal community concerned, whether that has been claimed by somebody or not. Customary law communities are the embodiment of all its members, who have customary rights, not individuals; therefore the subject of customary rights is the customary law community. Calling *ulayat* land means common land of the members of the customary law community concerned. In the customary law library *ulayat* rights are called "*Beschikking Recht*", a name given by van Vollenhoven (Harsono, 1997: 180).

Thus, the *ulayat* rights of customary law communities, in addition to containing the right of common possession of land with its members or citizens, belong to the field of civil law. It also contains the obligations to manage, organize and lead, mastery of its maintenance, designation and use, which belongs to the field of public law. Based on the description above, this religious communal concept

¹ entire earth, water and space, including the natural resources contained therein within the territory of the Republic of Indonesia as a gift from God Almighty are the earth, water and space of the Indonesian nation and constitute national wealth;

² The state's right of control, included in paragraph 1 of this article, authorizes: 1) to regulate and administer the designation, use, supply, and maintenance of the earth, water and outer space; 2) determine and regulate legal relations between people and the earth, water and space; 3) determine and regulate legal relations between people and legal actions concerning earth, water and space.

originates from *ulayat* rights in customary laws, which are used to establish and implement national land law in Indonesia.

In conducting library research, a research similar to this was found, namely the research of I Made Suwitra, with the title "The Religious Communal Concept is the Main Ingredient in the Formation of the UUPA and Its Impact on Customary Land Tenure in Bali". In the Balinese customary community, there is village *ayahan* land, which is controlled by private individuals over village *druwe* (owned) land. The holder is burdened with an obligation (*ayahan*) to the village to do work without being paid for the benefit of the community, regulated in Article 20 of the LoGA. As a result the holder is no longer bound by the obligation (*ayahan*) to the village.

According to the author, the incident was said to have occurred because the religious communal conversion in customary land law no longer existed, and it was contrary to Article 6 of the UUPA, which states that all land rights have a social function (I Made Suwitra, 2010: 7). In this study, on the contrary, both in its formation and implementation, it is mandatory to utilize the religious communal concept.

2. Theoretical Foundations

Development Law Theory: Mochtar Kusumaatmadja

The birth of this theory was motivated by the fact that the historical school (von Savigny) and *Sociological Jurisprudence* (Eugen Ehrlich) were unable to satisfactorily explain what was meant by *volkgeistism* and the values that lived in society. For this reason, efforts are sought to be included in legal products, so the idea arises of people's representatives or parliament, because in the end, the law is made for the community, which according to Roscoe Pound, *law as a tool of social engineering*. This opinion was popularized by *pragmatic legal realism*. In Indonesia, by the legal figure Mochtar Kusumaatmadja, it can be implemented by not using the word '*tool*' which is meant as '*tool*' as it is synonymous with the application of *legalism* which is opposed in Indonesia, but by using the word '*means*'. In addition, the scope of its application is also wider in Indonesia whereas in the United States a *tool* is only a court decision (*Supreme Court*) (Kusumaatmadja, 2005: 81).

Progressive Legal Theory: Satjipto Rahardjo

The legal situation in Indonesia has shifted into a political tool to maintain power, no longer law as a positive tool of social engineering but '*as dark engineering*.' Especially in the era of reformation (1998) the law failed to eradicate corruption. The core of the setback is honesty, empathy and dedication which become expensive items. What is wrong with our laws and how can we fix it? The idea arose to choose a progressive way through a fundamental reversal starting with thoughts, philosophy, and views on the relationship between law and humans; that law is for humans, not the other way around. On that basis, the law does not exist for itself but exists for something wider and greater. Law is not an absolute and final institution but is very dependent on how humans see and use it. In the context of this thought, the law is always in the process of becoming (*law as a process, law in the making*). (Rahardjo, 2009: 76)

RESEARCH METHODS

The study of the two variables mentioned above, namely 'the religious communal concept of customary land law in the formation of national land law' and 'religious communal conception of customary land law in the application of national land law' is a descriptive analysis. The approach for the two variables used a juridical-normative approach. The research activity in searching the data is document study or library research, starting from the personal library and the university library where the author teaches as a land law lecturer. All data, both primary data (laws) and secondary data (books), as well as relevant research (journals), were studied in depth, fully analyzed through qualitative methods and presented descriptively.

RESULTS AND DISCUSSION

IV Establishment of National Land Law

1. Based on Customary Law

After approximately 15 (fifteen) years, the commandment of Article 33 paragraph 3 of the 1945 Constitution was realized in the form of Law no. 5 of 1960 concerning Basic Agrarian Regulations, also known as Basic Agrarian Law (UUPA) that came into force on September 24, 1960. It is stated in the opinion's preamble in letter A that "... it is necessary to have a national agrarian law, which is *based* on customary law regarding land and is simple and guarantees legal certainty for all Indonesian people,..." According to one member of the LoGA formation committee, the phrase "*based on*" is meant that in the development of national land law, customary land law is the primary source for obtaining the necessary materials, whereas in relation to positive national law, customary land law functions as the main source of law in the formation of national land law, which includes its conception, system, principles, and legal institutions.

a. Conception

In the field of its conception, the formation of national land law is stated in Article 2 of the LoGA: The entire earth, water, and natural resources contained within the territory of the Republic of Indonesia, which are the gifts of God Almighty, are the earth, water, and space of the Indonesian nation and constitute national wealth. The source of this concept comes from the conception of customary land law, which is religious communalism, which allows individual land tenure with land rights that are personal and also contain elements of togetherness.

b. System

In in the field of systems, the formation of national land law regulated in Article 1 (2) of the UUPA: The entire earth, water, and space, including the natural wealth contained within the territory of the Republic of Indonesia, which is a gift from God Almighty are earth, water, and space Indonesian nation and is a national wealth. The source of this system comes from the customary land law system, where the customary law community is the embodiment of all its members, who have customary rights, and not individuals; therefore, the subject of customary rights is the customary law community.

c. Principles

In the formation of national land law, according to the field of principles regulated in Article 9 (2) of the LoGA, among others, every Indonesian citizen, both male and female, has the same opportunity to obtain rights over land and to get benefits and results both for themselves and their families. The principle of such ownership is taken from the kinship system in bilateral customary law (men and women are equal) because this principle is in accordance with the provisions of Article 27 of the 1945 Constitution.

d. Institutions

In technical national land law, PP 27 of 1997 regulates Land Registration, concerning a transaction or event of a transfer of rights (sale and purchase, exchange, etc.) based on clear cash institutions originating from customary law institutions. Under customary law, a transaction will be valid if the "clear cash" conditions are met. The determination of "cash" (available) in the sense of goods and money causes a transition. Clear customary law is carried out before the customary head, while national land law is carried out before the local land deed officials, who are called the Land Deed Officials (PPAT).

In the perspective of Mochtar Kusumaatmadja's development law theory, the national land law, which uses the UUPA as its main rule and contains the five main sources mentioned above, is the law as a *tool of social engineering (law as a means of community reform)* for political authorities in Indonesia to carry out the commandment of Article 33 Paragraph 3 of the 1945 Constitution: "Earth and water

and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people".

V Implementation of the National Land

1. *Law Customary Law as a Complementary*

Considering that Law No. 5 of 1960 was stated as the Basic Agrarian Regulation, which is also called the Basic Agrarian Law, the statement in Article 5 of the LoGA was stated as follows: "*The applicable agrarian law... is customary law ...*" This statement needs special attention considering that developing a national land law is a time-consuming process. As long as the process has not been completed and the existing law is incomplete, customary law norms will *serve as a complement*, stated one member of the committee for the formation of the LoGA (Harsono in Sitiawan, 2021, 79).

From the description above, the perspective of progressive legal theory from Satjipto Raharjo is appropriate to be used as a guide for enforcers in implementing customary law as a complement to national land law. Indeed, this theory does not view the law as an absolute and final institution but rather depends on how humans perceive and use it. In this frame of mind, law is always in the process of being continuously formed. Law is an institution that continuously builds and changes itself towards a better level of perfection. The quality of perfection can be verified into factors of justice, welfare, and concern for people and others. This is the essence of law which is always in the process of forming (*law as a process, law in the making*).

However, the makers of the LoGA also provide signs or conditions for their enforcers in implementing customary law as a complement. With these two conditions, it is believed that the religious communal concept in the application of tenure rights over individual land can be verified for their justice, welfare, and concern for the people as expected by Satjipto Rahardjo (2009: 37).

2. *Terms as a compliment*

a. *Local customary law*

The mention of customary law, in this case, is as stated in Article 56 of the UUP "as long as the law regarding property rights as referred to in article 50 paragraph 1 has not been formed, the provisions of local customary law will apply." What is meant by local customary law is the provisions of customary law in force in the area at the time of the case to be resolved. Although the provisions of the article mention property rights, analogically, it can also be applied to other cases, apart from property rights.

b. *Customary law that has been reviewed*

Given that in its development, customary law is not free from external influences, namely the thoughts of western society, which are individualistic and liberal, as well as the influence of feudal society, which is not in accordance with Pancasila, then the norms of customary law, which will be used as a complement, must be purged of foreign elements or refined until they become pure again. For example, changes in agricultural land revenue sharing agreements and regulations regarding the return (redemption) of pawned agricultural land. The institutions authorized to carry out cleaning, in this case, are legislative authorities (lawmakers), the judiciary in resolving disputes in court, which are based on the wisdom of the judges (Setiawan, 2021: 79).

c. *It must not conflict with national interests.*

The implemented land law must serve the national interest and the state must be placed in the national interest. Because national and state interests must be placed above group and regional interests, let alone individual interests.

d. It must not conflict with Indonesian socialism.

The aim of the struggle of the Indonesian nation is the establishment of a just and prosperous society based on Pancasila, in the language of the LoGA it is called the Indonesian socialist society. In practice, it often raises doubts about whether or not customary law is still in effect, which is contrary to Indonesian socialism. In this case, several laws have provided the answer. For example, regarding the distribution of agricultural land profit sharing (UU 2/1960) and the redemption of pawned agricultural land (UU 56/Prp/1960). In the explanation, it was explicitly stated that the customary law principles in question had been changed because they were deemed to contain elements of extortion, which is contrary to Indonesian socialism.

Is the rule of customary law contrary to Indonesian socialism, if applied to "supply and demand" in free competition? As long as the legislators have not provided an explanation, then, in reality, *it is the desire and legal awareness of the community that must be used as guidelines, while still not forgetting the duties of law enforcers as community guides towards the achievement of the nation's struggle. It must not conflict with the LoGA.*

This prohibition is imposed as a consequence of the LoGA as the basic regulation of national land law because, by itself, there should be no written or unwritten land law regulations that contradict these basic regulations. For example, the provisions of Article 9 paragraph 2: "every citizen of Indonesia, both male and female, has an equal opportunity to obtain a right to land ..." Whereas in customary law, patrilineal communities are only allowed to have land rights for male descendants, and matrilineal people are only allowed to have land rights for female descendants.

e. It must not conflict with other laws.

Because of this prohibition, Article 53 requires the existence of regulations on liens, profit-sharing rights, boarding rights, and agricultural land lease rights, the aim of which is to avoid the existence of elements of extortion. Likewise, the provisions of customary law governing the authority to clear land will no longer apply if the provisions are contrary to the regulations mentioned in article 46. The authority to grant permits to clear land based on the provisions of customary law is often misused by the authorities concerned.

CONCLUSION

Based on the discussion above, it can be concluded that:

1. The concept of religious communal known in the customary land law is mainly contained in the *ulayat* rights of customary law communities and has been mentioned in Article 33 paragraph 3 of the 1945 Constitution and is reaffirmed in the preamble of the opinion letter A of the UUPA which among other things states "the need for a national agrarian law based on customary law on land, ..." The word "**based**" is intended as the main source in the formation of national land law by taking the main material from customary law regarding land in the form of conceptions, systems, principles, and legal institutions. From the perspective of development law theory, the LoGA which contains the five main sources mentioned above is a *law as a tool of social engineering* for the authorities in Indonesia to carry out the mandate of the people's suffering as stated in Article 33 paragraph 3 of the 1945 Constitution;
2. Given that Law no. 5 of 1960 is a basic regulation of agrarian principles, the formation of a national land law towards the availability of a complete written legal instrument is a process and takes a long time. As long as the process is incomplete and requires equipment to avoid a legal vacuum from occurring, customary law norms serve as complements.

In Satjipto Rahardjo's view, the law is always in the process of becoming. The quality of complementing it can be verified in terms of justice, welfare, caring and others. Nevertheless, the LoGA also complements these implementing guidelines, covering, among other things, customary

law that has been reviewed, does not conflict with national interests, must not conflict with Indonesian socialism, and must not conflict with other laws and regulations.

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