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The Nature of Customary Land Concession in the Customary Law Society

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Abstract*---The customary land concession in the customary law community was based on Article 18 letter B section (2) the 1945 Constitution of the Republic of Indonesia & Constitution No. 5 of 1960 concerning Basic Rules of Agrarian Principles (Peraturan Dasar Pokok-Pokok Agraria or UUPA). UUPA is the legal basis for regulating customary land concession in customary law communities, however, there is a blurring of norms in the ATR Minister Regulation / Head of BPN No.18 / 2019 Article 1 number 2 stated customary rights is communal. After tracing it in the UUPA it does not recognize communal rights but is called customary rights, as stated in Article 3 of the UUPA relating to customary rights. This means that there are vague norms. Whereas in principle is based on Article 16 of the UUPA letter h, that is, other rights that are not included in the rights mentioned in UUPA will be determined by the constitution. The mention of communal rights is not mentioned in the UUPA, then by order of the UUPA it should be determined by constitution, but the reality that appears is a ministerial regulation whereas in article 16 of UUPA letter h said that the mandate is stipulated by constitution then it can be called inconsistent. In addition there are inconsistencies in Article 5 section (4) letter c of the Minister of ATR Regulation / Head of BPN No.18 / 2019 which states that the administration of the Customary Land in the Concession Customary Law Communities includes recording in the land register " if it rests on a higher regulation (lex superior) the laws and regulations referred to namely Government Regulation No. 24 of 1997 concerning Land Registration, in this case communal rights and customary rights are not included in the object of land registration as mentioned in Article 9 Section (1) Government Regulation (PP) No. 24/1997. Minister of ATR Regulation / Head of BPN No.18 / 2019 seems to equate customary rights with communal rights which results in the blurring of norms and inconsistencies that ultimately results in uncertainty in customary land tenure in customary law communities.*
Keywords*---customary land, customary law communities, nature of concession.*

Introduction

Juridical control is based on rights protected by the constitution and generally gives authority to the right holder to physically control the land that is claimed (Purbacaraka & Halim, 1985). Juridical control gives authority to control physically claimed land (Rizal, 2003; Atmaja, 2018). Based on this, it can be seen that customary land tenure in customary law communities has existed for a long time and has been passed down from generation to generation, philosophically customary law communities first existed before the Indonesian state was born. It should be noted that the customary land is a hereditary inheritance in the customary law community. The customary land of the customary law community is essentially the first philosophically born before the Indonesian state was born.

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Constitution Number 5 of 1960 concerning Basic Regulations on Agrarian Principles (UUPA) in Article 3 relating to customary rights is the legal basis for regulating customary land rights in customary law communities, but on one side there are inconsistencies and obscurity of the regulatory norms under it namely in the Regulation of the Minister of Agrarian Affairs and Spatial Planning / Head of National Land Agency Number 18 of 2019 concerning Procedures for Administration of Customary Law Community Customary Land (Minister of ATR Regulation / Head of BPN No. 18/2019) which states in Article 1 number 2 that:

> "Customary Rights of Customary Law Communities or similar are Communal Customary Community Rights to control, manage and / or utilize, and preserve their customary territories in accordance with the applicable customary law and values "

Minister of ATR Regulation / Head of BPN No. 18/2019 mentions that customary rights which is communal, that in principle is based on Article 16 of the UUPA letter h, that is, other rights not included in the rights mentioned in UUPA will be determined by the constitution. The mention of communal rights is not mentioned in the UUPA, then by order of the UUPA it should be determined by constitution, but the reality that arises is a ministerial regulation whereas in article 16 of the UUPA the letter h mandates stipulated by the constitution.

The phenomenon of land disputes has surfaced which is largely a result of land acquisition for infrastructure purposes. Most land disputes occur between customary law communities and the owners of capital and interested government agencies (Poesoko *et al.*, 2014). In order to avoid the occurrence of a dispute, a consistent rule is needed, but what happens is an inconsistency.

Article 5 Section (4) letter c Minister of ATR Regulation / Head of BPN No.18 / 2019 which states that the administration of the Customary Land in Customary Law Community covers the registration in the list of land 'if it rests in higher regulations (lex superior) the intended constitution is Government Regulation No. 24 of 1997 concerning Land Registration (PP No. 24/1997), in this case, communal rights and customary rights are not included in the object of land registration.

As a result of the blurring of these norms and inconsistencies, this can result in losses in providing legal protection for customary land tenure to customary law communities. Then new and consistent new and specific laws and regulations are needed regarding customary land tenure in customary law communities, so what is examined in this study is the nature of customary land concession in the customary law communities. What is the nature of customary land concession in the customary law communities?

Research Method

This study uses a type of normative juridical law that is studying and analyzing law materials and issues based on constitutions and regulations and related books. This study uses a type of Approach to the Constitution (*Statute Approach*) and *Conceptual Approach* (Marzuki, 2005), to get the results of research related to the nature of customary land concession in customary law communities.

Results and Discussion

History and Principles of Customary Law

Customary law is growing from the ideas and minds of the people of Indonesia. Then customary law can be tracked chronologically since Indonesia consists of kingdoms, which are spread throughout the archipelago. Socio-cultural reality is constructed by one poet constructed by another poet, and the next poet is reconstructed (Rato, 2011; Gelgel, 2017).

The history of customary law on the basis of the enactment of customary law, which originated in the colonial era and which today still applies, is Article 131 section 2 sub b Indische Staatsregeling (IS). According to these provisions, the indigenous Indonesian law groups and foreign eastern law groups apply their customary law.

Customary law is recognized as stated in the 1945 Constitution of the Republic of Indonesia article 18 letter B section 2 states:

> The state recognizes and respects the customary law community units along with their traditional rights as long as they are still alive and in accordance with the development of the community and the principles of the Republic of Indonesia, which are regulated in the constitution.

Guaranteed recognition and respect for customary law if it meets the reality requirements, namely customary law is still alive and in accordance with community development and ideality requirements, that is in accordance with the principles of the union state of the Republic of Indonesia, and enforceability is regulated in law, in the case that the State recognizes and respects the units customary law communities and their traditional rights.

The word basis is often synonymous with principle, the word basis or principle basically contains the same meaning or understanding, only each of them comes from a different translation source (Sunarto, 2012). *The principle* is something that can be used as a base, as a place to lean on, return something that we want to explain. In the context of law, the term "*principle*" according to the *Black's Law Dictionary* contains the understanding as: "*a fundamental truth or doctrine, as of law ....*" (Black, 1991). *Or it can also contain the notion: "a basic rule, law or doctrine*" (Garner, 1999)

> The principle of customary law according to Ter Haar in the belissingerleer theory states "*de door de gezags, de volkshoofden, de rechters genomen beslissingen welke altijd niet slechts al seen concrete beslissing, maar ook al seen regel voor gelijke gevalen,*" which is more or less translated into decisions that are taken by the decision made the rulers are the leaders of the people, showing the rule of law that applies in society that is the legal form of various symptoms of a free life (Adiwinata, 1983).

Ter Haar gives 4 (four) criteria about the principles of customary law to customary law community, namely (Haar, 1981):

a) There is a group of people;
b) Those who are subject to an orderliness or regulation;
c) Have self-government; and
d) It has its own wealth in the form of material and immaterial.

The principle of customary law, namely the principle of religiosity, that is, the principle-based on God, in this case the principle of religiosity is a vertical relationship between humans and God, in the UUPA listed in article 1 section 2, namely "For all earth, water, and space including natural resources contained in it within the territory of the Republic of Indonesia as a gift from Almighty God."

The principle of religiosity can be found in the provisions of Article 5 of UUPA which relates to agrarian law that applies to land, water, and space is customary law, the principle of religiosity is related to the statement that "the property rights of religious and social bodies insofar as it is used for business in the religious and socially recognized and protected ". From the explanation of the principle that the customary law community with their customary land philosophically has a religious relationship meaning it is a gift from God and their ancestors from generation to generation, it is appropriate to be given the customary land concession rights to the customary law community (Article 49 Section 1 of UUPA).

The Characteristics of Customary Land and Customary Law Community

Characteristics literally mean having special features according to certain dispositions Sidharta (1999), stated that the image or essence of something that appears as a concept contains characteristics or qualities. Quality or characteristics are inherent in the object or thing intended by the concept in question. Therefore, customary land and customary law communities have their own characteristics and forms

a) The form and nature of customary land

Customary land in customary law communities is termed with various terms and names. This is adjusted to the geographical and local customs, customary land has boundaries in accordance with the surrounding natural situation, such as the top of a hill or a river. The names include *ulayat* (minangkabau), *patuanan* (ambon), *panyampeto*, *pawatasan* (kalimantan), *wewengkon* (jawa*), payar / druwe* (bali), *limpo* (south sulawesi), and many more names for customary lands.

The difference in the term is not the difference in the fundamental meaning that distinguishes the customary land substantially, because in customary law, especially customary land concession, there are similarities that embody the

same conception and legal principles. Although the designation and legal institutions differ due to differences in language and the needs of the customary law community.
Article 1 Number 13 UUPA said:

> Customary and similar rights from customary law communities, hereinafter referred to as 'ulayat rights' are the authority which according to customary law belongs to certain customary law communities over certain areas that constitute the environment of their citizens to take advantage of natural resources, including land, within the territory, for their survival and life, arising from outward and inner relations between generations and uninterrupted between the customary law community and the area concerned.

Customary rights are rights owned by certain customary law communities or certain areas that constitute the environment of its citizens to take advantage of natural resources, including land in these areas for their survival and life (Soepomo, 1990). Van Vollenhoven who first introduced the term customary rights known as *beschikkingrecht* (rights of land). The inherent characteristic of customary rights is that it can be owned by customary law communities and cannot be owned by individuals (Poesponoto (penterjemah), 1960). The form of the object of customary rights is not only limited to land, for more clearly the form of the object of customary rights consists of land (land), water (water), wild plants and wild animals (Soepomo, 1990).

Customary rights are in areas where a group of customary law peoples resides defending a magical-religious sanctuary. Communities living in customary rights have the right to work on the land, which every member of the community can acquire parts of land with certain restrictions (Rizal, 2003).
The characteristics of customary rights are as follows (Bushar, 1988):

1) Each member is a legal alliance (ethnic, sub-ethnic, or fam) that has the authority to freely work the land that has not been cultivated, for example by opening the land to establish a new residence.
2) For people outside the members of the legal alliance, to do it land must be with a legal alliance permit (customary council);
3) Members of the legal alliance in working on the communal land have the same rights.
4) The legal alliance is responsible for everything that happens in its customary.
5) Customary rights under customary law are in the hand strobe / legal community/village.

Customary land concession in customary law communities in the UUPA is recognized fully and in existence still shows his true identity as a characteristic of customary law in agrarianism which includes togetherness in the context of the welfare of members of the customary law community. Customary land is religious in nature the legal relationship between members of the customary law community and their customary land, which in this case is by the customary law community group is under the leadership of the customary law community.

b) Form and Nature of Customary Law Communities

The definition of customary law community is a community that arises spontaneously in a certain area, the establishment of which is not established or ordered by a higher authority or other authority, with a great sense of solidarity among members of the community as outsiders and using their territory as a source of wealth can only be fully utilized by its members. Members of customary law communities live in harmony in accordance with their customary law, have ties to ancestral origins and / or similarities of dwellings and there is a strong relationship with their land and environment.

Based on the Regulation of the Minister of Home Affairs No.52 of 2014 concerning the guidelines for the recognition and protection of customary law communities in article 1 number 1 states:

> "Customary Law Communities are Indonesian citizens who have distinctive characteristics, live in groups in harmony in accordance with their customary law, have ties to their ancestral origins and/or commonality of residence, there is a strong relationship with land and the environment, and a value system that determines institutions economic, political, social, cultural, legal and utilize a particular region for generations"

Customary law grows from the ideals and minds of Indonesian people. Then customary law can be tracked chronologically since Indonesia consists of kingdoms, which are spread throughout the archipelago (Rato, 2011).
The form and nature of customary law peoples in Indonesia are divided into 4 (four), which are:

1) Customary law communities whose patriarchal family structure (Patrilineal), namely communities whose kinship prioritizes male lineage.

2) Customary law communities whose maternal kinship (Matrilineal) is a society whose kinship prioritizes offspring according to the line of women.
3) The customary law community whose jurisdiction is fatherly (Parental), that is, the community whose kinship does not prioritize male or female offspring.
4) The customary law community which is based on fatherhood switches (Alternative) means that kinship prioritizes male lineage but sometimes follows the female lineage due to environmental factors of time and place (Soekanto, 2015).

The customary law community in Indonesia can be divided into two groups according to their basic structure, which is based on the relationship of a descendant (genealogy) and based on the regional environment (territorial). Legal society or territorial legal alliance is a permanent and persistent society, whose members are bound to a certain area of residence, both in worldly terms as a place of life and in spiritual connection as a place of worship for ancestral spirits. Community or legal alliance.

Inconsistency of Customary and Communal Rights

UUPA in Article 3 related to customary rights is a legal basis. Customary land regulation in customary law communities, but on one side there are inconsistencies and obscurity of the regulatory norms below, namely in Ministerial Regulation ATR / Head of BPN No. 18/2019 which states in Article 1 number 2 that customary law which is communal, that in principle is based on Article 16 of the UUPA letter h, that is, other rights not included in the rights mentioned in UUPA will be determined by constitution. The mention of communal rights is not mentioned in the UUPA, then by order of the UUPA it should be determined by constitution, but the reality that arises is a ministerial regulation whereas in article 16 of UUPA letter h the mandated that it is stipulated by the constitution.

Article 5 paragraph (4) letter c Minister of ATR Regulation / Head of BPN No.18 / 2019 which states that the administration of Customary Land in Customary Law Community covers the registration in the land register 'if it rests in higher regulations (*lex superior*) legislation the intended law is PP No. 24/1997 regarding land registration, in this case, communal rights and customary rights are not included in the object of land registration. As Article 9 Section (1) PP No. 24/1997 mentions the objects of land registration include:

a) parcels of land owned with ownership rights, cultivation rights, building rights, and usage rights;
b) land management rights;
c) waqf land;
d) ownership rights over the unit of flats;
e) mortgage right.

The meaning of customary rights differs from communal rights, in terms of the etymology of ulayat originating from the word *ula-yat* which comes from the Minangkabau custom while the communal is derived from the European *communal* word, in terms of etymology alone it has different origins. 18/2019 seems to equate customary rights with communal rights which results in the blurring of norms eventually resulting in uncertainty in the control of customary land in customary law communities.

> According to Maria S.W. Sumardjono, Customary rights have both a public and a civil dimension while communal rights have only a civil dimension. Customary rights more broadly encompass the authority of customary law communities to regulate (1) land/territory as their living space related to their utilization including its maintenance; (2) legal relations between customary law communities and their land; and (3) legal actions related to customary land in the customary law community. The civil dimension of customary rights appears in the manifestation of customary rights as shared (Sumardjono, 2015).

Customary rights have both a public and a civil dimension, meaning that customary rights encompass the authority of customary (public) communities, while communal rights only have a civil dimension, meaning communal rights as a shared right. This means that customary rights and communal rights are different.

The formation of Minister of ATR Regulation / Head of BPN No.18 / 2019 is in principle obligatory based on UUPA's orders, this is based on the principle of establishing legislation which is the crystallization of article 5 of Constitution No. 12 of 2011 concerning the Formation of Laws and Regulations, it is stated in article 5 that informing laws and regulations must be carried out based on the establishment of good laws, namely the clarity of objectives, institutions, hierarchy, material content can be implemented. The principle of *Lex superiori derogat legi inferiori*, i.e. higher laws and regulations will paralyze lower laws and regulations (Mertokusumo, 2002).

Hans Kelsen put forward his theory regarding the level of legal norms (*stufentheorie*), where he argues that legal norms are tiered and multi-layered in a hierarchical arrangement, where a lower norm applies, is sourced, and is based on more norms high again, based on basic norms (*grundorm*) (Farida, 1998). A legal norm is always based and rooted in the norms above, the highest norm (basic norms) on which the underlying norms depend.

So based on the theory of the level of legal norms (*stufentheorie*), Regulation of the Minister of ATR / Head of BPN No.18 / 2019, does not have a place of dependence and or this basic foundation because in the UUPA does not mention customary rights are communal.

In the Theory of Legal Reasoning (*Legal Reasoning Theorie*), according to Berman (Shidarta, 2000), the characteristic of legal reasoning is to realize consistency in the rule of law, then based on the Theory of Legal Reasoning (*Legal Reasoning Theorie*) the need for a consistent thing in the formation of legislation, in this matter ATR Minister Regulation / Head of BPN No.18 / 2019 can be said to be inconsistent, this is because UUPA does not mention customary rights is communal as well as orders on UUPA, other rights that are not included in the UUPA are determined by constitution, however unfortunately stipulated by ministerial regulation, this matter is not consistent with UUPA's orders.

Conclusion

The meaning of customary land control by customary law community is the control of customary land rights in the form of land where the authority according to customary law is owned by the customary law community over a certain area arising from physical and spiritual-religious relations having spaces which naturally manifested in related geographical unity social and cultural elements that are formed based on historical developments for generations and are not interrupted between the customary law community and their territories.

That the scope of ontology, epistemology, and axiology in the ATR Minister Regulation / Head of BPN No.18 / 2019 has not yet fulfilled the value of legal usefulness and certainty, has not been beneficial because communal rights and customary rights are different meanings, have not yet reached legal certainty due to inconsistencies and opaqueness The norm causes legal uncertainty regarding the determination of customary rights, even though it has given justice to the customary law community with the government's initiative to issue ATR Minister Regulation / Head of BPN No.10 / 2016 and ATR Minister Regulation / Head of BPN No.18 / 2019.

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