LEGAL REMEDIES AGAINST TRADITIONAL LAND SALE AND PURCHASE DISPUTES IN POSITIVE LAW STUDY

Gusti Heliana Safitri, Ekawati, Sarikun, Dina Paramitha Hefni Putri, Khairunnisah
safitriheliana@gmail.com, sarikunkun@yahoo.co.id, sarikunkun@yahoo.co.id,
radinaparamitha@gmail.com, nisa289@gmail.com
Universitas 17 Agustus 1945 Samarinda

Article Info
Received: 2022-01-23
Revised: 2022-04-23
Accepted: 2023-12-12

Keywords:
Legal Efforts, Customary Land, Agrarian

Abstract

Land is an economic driving object for humans and the state whose use cannot be separated from politics and law, as well as the function of realizing mutual benefit. Conflict over customary land is a social phenomenon that can be explained through various sociological bases. This sociological foundation helps us understand the root causes, dynamics and implications of conflicts related to customary land ownership and use. Customary land disputes can vary depending on the culture, traditions and value systems of the indigenous peoples concerned. resolving customary land disputes often requires a deep understanding of the culture and values of the community, as well as respect for their rights in the context of national and international law. In this case, what legal measures can be taken in relation to disputes regarding customary land from a positive legal perspective in Indonesia The research method is a type of normative legal research or research using the rules in existing laws and regulations and research carried out by collecting data directly in the field from competent parties related to the object under study, because it is in the form of secondary data such as laws and regulations. literature books .

The court decision will regulate the land rights and obligations of each party. disputes over the sale and purchase of customary land can trigger reconsideration of customary regulations or land law in Indonesia. This could mean changes in the practice of buying and selling customary land as a form of implementing agrarian reform with settlement. Settlement of land disputes using the ADR mechanism is carried out based on Law no. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, in conjunction with Law no. 48 of 2009 concerning Judicial Power, and various other legal provisions such as Supreme Court Regulation (PERMA) Number 1 of 2008 concerning Mediation Procedures in Court, which has been replaced by PERMA No. 1 of 2016 concerning Mediation Procedures in Court and Regulation of the Head of the National Land Agency Number 3 of 2011 concerning Management of Assessment and Handling of Land Cases which has been replaced by Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia Number 11 of 2016 concerning Case Settlement Land. Mediation is carried out according to the agreement between both parties using the help of a mediator as an intermediary.

I. Introduction

Land is a necessity for living creatures which is a gift from God Almighty to be managed and used as well as possible as a source of life and livelihood. Nowadays it cannot be denied that human need for land continues to increase, both in rural and urban communities. Land is an economic driving object for humans and the state whose use cannot be separated from politics and law, as well as the function of realizing mutual benefit.

Land is a basic need for humans, but the limitations of land both in quantity and quality are not commensurate with human needs which continue to grow. On the one hand, land has grown as a very important economic object and has grown as a material for commerce and an object of speculation, on the other hand, the existence of land must be used and exploited for the greatest welfare of the people (Andrian, 2009).

Indonesia, as a country with an agricultural background, is aware of the importance of land as something that has value in the lives of its people. For farmers in rural areas, land functions as a place to earn a living. For urban residents, land is a place to carry out all daily activities (Soerjono and Soleman, 2001).

Conflict over customary land is a social phenomenon that can be explained through various sociological bases. This sociological foundation helps us understand the root causes, dynamics and implications of conflicts related to customary land ownership and use. Customary land disputes can vary depending on the culture, traditions and value systems of the indigenous peoples concerned. However, several general concepts and principles that often underlie customary land disputes are as follows:

1. Common Ownership: Many indigenous peoples consider land to be the common property of their community, not of individuals. This concept reflects the view that land is the inheritance of their ancestors and must be protected and used collectively for the welfare of the entire community.
2. Spiritual Connection: Often, land in indigenous communities has great spiritual and cultural significance. Land is considered a sacred place that has a special connection to ancestral spirits or certain spiritual entities. Therefore, customary land disputes often involve religious and spiritual considerations.
3. Consensus and Traditional Leadership: Decision making in customary land disputes often involves a process of deliberation or consensus among community members. Traditional leadership, such as tribal chiefs or traditional leaders, can also have an important role in resolving these disputes.
4. Principle of Ecological Balance: Indigenous peoples often have a deep understanding of ecological balance and the importance of protecting nature. Therefore, in resolving customary land disputes, they can prioritize the protection of the natural environment and sustainable principles.

5. Community Empowerment: Indigenous land disputes are often struggles to protect indigenous peoples' rights to their land. Empowering communities to play an active role in resolving disputes and protecting their rights is an important philosophical foundation.
6. Customary Law and Social Justice: Some indigenous communities have customary law systems that regulate land disputes. These customary laws are usually based on the principles of social justice and traditional cultural values.
7. Cultural Conservation: In addition to environmental aspects, customary land disputes may also reflect a desire to protect a community's cultural and historical heritage, including historic sites and particular traditions associated with the land.

It is important to remember that customary land disputes can be very diverse and specific to each indigenous community. Therefore, resolving customary land disputes often requires a deep understanding of the culture and values of the community, as well as respect for their rights in the context of national and international law. In this case, what legal measures can be taken in relation to disputes regarding customary land from a positive legal perspective in Indonesia?

2. Research Method

Based on the problems that the author presents, the author uses a research method, namely a type of normative legal research or research using the rules in existing laws and regulations and research carried out by collecting data directly in the field from competent parties related to the object under study, because in the form of secondary data such as legislation and literature books. " In this research, the method of access and research is mostly taken from library materials, namely materials that contain new or up-to-date scientific knowledge, or new understandings about known facts or ideas, in this case including books, journals, dissertations or theses and other legal materials. This research on normative legal materials fully uses primary legal materials and secondary legal materials (Johan, 2008) .

3. Results and Discussion

There are so many and complex land problems in the country, the problems in the field are far more numerous than the existing land problems, including, first, land acquisition for development projects in the public interest, which involves adequate compensation and money deposited in court, known as term for consignment money. (Manan Suhadi,: 2020, 3).

In the context of acquiring land to be used for private interests, Law No. 1 of 1967 concerning Foreign Investment, State Gazette 1967 No. 1 Jo. UU no. 25 of 2007 concerning Capital Investment and Law no. 6 of 1968 concerning Domestic Investment (State Gazette 1968 No. 33 Jo. Law No. 25 of 2007 concerning Capital Investment which provides facilities for investors to invest their capital in the industrial and trade sectors has created

an increasing need for land (Mustofa and Suratman, 2013). Regulations in the investment sector have the consequence of a fairly large role for the State in determining the rules in the investment sector in addition to the dynamic factor of the interaction of the interests of the parties. Regulations in the investment sector have shown the development of a regulatory regime towards a regulatory regime. which is facilitative.

In connection with the transfer of customary land used for private purposes, in this case buying and selling customary land is a legal act carried out by the land owner to another person which results in the transfer of rights and obligations over the land. The transfer of land rights can be carried out through a customary sale and purchase agreement carried out privately. This private transfer of land rights is carried out in front of the village head by interested parties to carry out the sale and purchase which is carried out in the presence of witnesses, relatives and neighbors (Hilmanhadikusuma).

The transfer of private land rights is carried out by means of an agreement made on a receipt affixed with a stamp or sealed paper which contains an agreement binding on both parties which must be signed by the parties and witnesses. Transfer of land rights by sale and purchase. carried out privately, can be corroborated by witnesses who are declared valid according to Customary Law.

Customary law communities also recognize the existence of ulayat rights, ulayat means territory or which is a series of authorities and obligations of a customary law community relating to land located within its territorial environment. In a Dutch language book, *Ter Haar, Beginselen en stelsel van het adatrecht* states that in Indonesia each region has certain names for its regional environment, for example the name for a restricted area, in Kalimantan it is called pewatasan, in Java it is known as the name wewengkon, in Bali it is known as prabumian. In Maluku, regional land is generally called petuanan. (Harsono, 2008 : 185 – 186). The understanding and views of indigenous peoples regarding land are supported by the meaning of Customary Land Law contained in the Basic Agrarian Law (UUPA), so that customary land rights can be fought for through the correct legal channels. Customary law regarding land has a special position in the UUPA, because the majority of Indonesian people adhere to customary law so that customary law is the basis for the formation of National Land Law. Land law is a system of independent branches of law that regulates the juridical aspects of land, which are called land tenure rights. The legal provisions governing land control rights can be arranged into one unit which constitutes one system. (Harsono, 2008: 17).

These governing provisions make customary law a forming basis. Santoso, Urip in his article entitled Agrarian Law and Land Rights stated that Customary Law is the main basis for the formation of National Agrarian Law which can be concluded in the Preamble to the UUPA which states;

"That in connection with what is mentioned in the considerations, it is necessary to have a National Agrarian Law, which is based on customary law regarding land, which is

simple, and guarantees legal certainty for all Indonesian people without ignoring elements that rely on religious law."

In the event of a dispute, especially in the sale and purchase of customary land, efforts can be taken. According to Lilik Mulyadi (Sasmitha and Sandra, 2015) he does not agree if it is said that village/customary courts are abolished based on the Judicial Power Law, because customary courts are abolished based on the Law. -Emergency Law Number 1 of 1951 is customary justice in the sense of *inheemsche rechtspraak* , while the authority of customary justice exercised by heads of customary law community units, namely the Village Court (*dorpjustitie*), continues.

In general, people are of the view that disputes or conflicts can only be resolved through the courts (litigation), and forget and ignore ways of resolving disputes through non-litigation channels. Dispute resolution procedures can be divided into two main categories, namely: dispute resolution through the Court, which is commonly called litigation and dispute resolution outside the Court or alternative dispute resolution (non-litigation).

One alternative dispute resolution (APS) outside the court is by means of peace or what is better known as mediation. Settlement of civil disputes by means of peace is intended to find a way out so that the disputing parties resolve it peacefully and then a peace deed is drawn up which is signed by both parties. Peace is basically a system of *Alternative Dispute Resolution* (ADR) or in Indonesian better known as Alternative Dispute Resolution (APS).

Settlement of land disputes using the ADR mechanism is carried out based on Law no. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, *in conjunction with* Law no. 48 of 2009 concerning Judicial Power, and various other legal provisions such as Supreme Court Regulation (PERMA) Number 1 of 2008 concerning Mediation Procedures in Court, which has been replaced by PERMA No. 1 of 2016 concerning Mediation Procedures in Court and Regulation of the Head of the National Land Agency Number 3 of 2011 concerning Management of Assessment and Handling of Land Cases which has been replaced by Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia Number 11 of 2016 concerning Case Settlement Land. Mediation is carried out according to the agreement between both parties using the help of a mediator as an intermediary. Alternative dispute resolution through mediation can generally be used to resolve civil disputes, for example marriage, divorce, including land disputes (Mayasari and Rudy, 2021).

Community-based dispute resolution, which is often referred to as customary courts, is starting to receive attention again, at least in various scientific forums and civil society organizations. The Alliance of Indigenous Peoples of the Archipelago (AMAN), HuMA and *Epistema Institute, and the United Nation Development Program* (UNDP) are several civil society organizations involved in the discourse on reinforcing customary courts. The

various discourses that have developed regarding strengthening customary courts lead to two major concepts regarding what the position of customary courts should be in relation to the established national justice system. The first option is to institutionally integrate customary courts to become part of the national justice system.

In customary law communities, dispute resolution is often carried out outside formal justice by means of deliberation to reach consensus. Communities resolve their disputes outside of formal justice, generally by involving third parties such as religious leaders, traditional leaders and village heads. Patterns of land conflict resolution that occur in society can be in the form of *litigation conflict resolution and non-litigation* conflict resolution . Litigation conflict resolution is conflict resolution that is carried out through normal court institutions, while party resolution is outside the judiciary (*non-litigation)* , which can be done by negotiation, deliberation to reach a consensus, or mediation (Murniwati, *et al* ., 2021).

Settlement of land conflicts through negotiation is carried out by the parties to the dispute to obtain an agreement for both parties in a *win-win solution* , so that neither party feels disadvantaged. Settlement of land disputes by deliberation and consensus is carried out by the parties to resolve the dispute by involving the families of the parties witnessed by religious leaders or community leaders. Meanwhile, resolving land disputes through mediation is where the parties appoint certain parties whom they respect and respect as mediators in the settlement.

The reasons underlying the opinion that the civil justice system actually provides firm recognition of the existence of customary justice and provides broad space for the implementation of this recognition include (Balubun *et al* ., 2019): 1) The implementation of the provisions of articles 130 HIR, 154 RBg which regulate obligations the judge to reconcile the parties before the case is examined at trial; 2) The principle of active judge applies, namely that the judge as chairman of the trial must actively lead the examination; 3) Applying the principles of simplicity, speed and low cost; 4) The application of the principle *of judicare secundum allegata et probata* or known as the principle of passive judge, meaning that the judge is bound to the subject matter of the case submitted by the parties; 5) *The principle of ius curia novit applies* , meaning that judges are not just mouthpieces for the law, but have the independence and ability to resolve every problem submitted to them (Mustofa and Suratman 2015).

4. Conclusion

In disputes over the sale and purchase of customary land, if the dispute over the sale and purchase of customary land reaches court, the court will give a decision. This decision can benefit one of the parties or even both. The court decision will regulate the land rights and obligations of each party. customary land buying and selling disputes could trigger reconsideration of customary regulations or land law in Indonesia. This could mean

changes in the practice of buying and selling customary land as an agrarian reform with a settlement. Settlement of land disputes using the ADR mechanism is carried out based on Law no. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, *in conjunction with* Law no. 48 of 2009 concerning Judicial Power, and various other legal provisions such as Supreme Court Regulation (PERMA) Number 1 of 2008 concerning Mediation Procedures in Court, which has been replaced by PERMA No. 1 of 2016 concerning Mediation Procedures in Court and Regulation of the Head of the National Land Agency Number 3 of 2011 concerning Management of Assessment and Handling of Land Cases which has been replaced by Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia Number 11 of 2016 concerning Case Settlement Land. Mediation is carried out according to the agreement between both parties using the help of a mediator as an intermediary.

Refrences

Adrian Sutedi. (2009). Transfer of Land Rights and Registration, Sinar Graphics, Jakarta, 2009.

Balubun, C. Skukubun, Y. Renyaan, C. Yennu, and R. Rumnyan. (2019) "Legal Analysis of Customary Land Dispute Resolution," *Patriot* , vol. Vol.12, no. 2, p. 104.

Boedi, Harson. (2012). Indonesian Agrarian Law. Collection of Land Law Regulations: Jakarta: Djangkat

Soerjono Soekanto and Soleman B. Taneko, Indonesian Customary Law, Fourth Printing, PT. Raha Grafindo

Johan Nasution. (2008). *Legal Research Methods,* Mandar Maju, Bandung Persada, Jakarta

Mustofa and Suratman. (2015). Use of land rights for industry, Sinargrafika, East Jakarta,

Mayasari and Rudy. (2021). "Judicial Analysis of the Mediation Process in Alternative Resolution of Traditional Land Disputes in Bali," *KERTHA WICAKSANA* , vol. 15, no. 2, p. 90–98, doi: 10.22225/kw.15.2.2021.90-98.

Murniwati, Z. Nurdin, and A. Rosari. (2021). "Settlement of Land Disputes on High Heritage Properties that Have Been Certified Through KAN Koto Tuo Balaigurah Agam West Sumatra," *Soumatera Law Review* , vol. 4, no. 1.