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Comparison Of Customary Law In Indonesia And Australia From The Terms Of Customary Rights Of Customary Law Communities

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Abstract *The research aims to analyze and compare aspects of customary rights in the context of customary law in Indonesia and Australia. Customary privileges are an integral part of the life of customary law communities, which include traditional rights to land. This comparison provides in-depth insight into how two countries with different cultural and legal backgrounds manage and protect the ancestral land rights of their customary law communities. This study uses comparative legal procedures to explore the development, protection, and implementation of conventional rights in the two countries. Factors such as the history of colonialism, legislative changes, and local cultural influences play an important role in shaping the legal framework regarding customary rights. This analysis also includes case studies to provide a concrete picture of how traditional liberties are implemented in real situations in customary law communities. The findings of this research can provide a better view of the challenges and opportunities faced by customary law civilizations in defending the sustainability of their customary freedoms amidst the dynamics of modernization and globalization. In addition, this comparison can be a basis for improving policies and a better legal framework to ensure fair and sustainable protection of customary rights for customary law communities in both countries. This analysis presents a cross-cultural understanding of the management of customary rights and the potential integration of traditional law principles in a modern legal context.*

Keywords: *Customary Law, Ulayat Rights, Indonesia, Australia*

Abstrak Penelitian bertujuan untuk menganalisis dan membandingkan aspek hak adat dalam konteks hukum adat di Indonesia dan Australia. Hak-hak adat merupakan bagian yang tidak terpisahkan dari kehidupan masyarakat hukum adat, termasuk hak tradisional atas tanah. Perbandingan ini memberikan wawasan mendalam tentang bagaimana dua negara dengan latar belakang budaya dan hukum yang berbeda mengelola dan melindungi hak leluhur atas tanah masyarakat hukum adat mereka. Penelitian ini menggunakan prosedur hukum komparatif untuk mengeksplorasi perkembangan, perlindungan, dan implementasi hak-hak konvensional di kedua negara. Faktor-faktor seperti sejarah kolonialisme, perubahan peraturan perundang-undangan, dan pengaruh budaya lokal berperan penting dalam membentuk kerangka hukum mengenai hak adat. Analisis ini juga mencakup studi kasus untuk memberikan gambaran konkrit bagaimana kebebasan tradisional diterapkan dalam situasi nyata dalam masyarakat hukum adat. Temuan penelitian ini dapat memberikan pandangan yang lebih baik mengenai tantangan dan peluang yang dihadapi peradaban hukum adat dalam mempertahankan keberlanjutan kebebasan adatnya di tengah dinamika modernisasi dan globalisasi. Selain itu, perbandingan ini dapat menjadi dasar perbaikan kebijakan dan kerangka hukum yang lebih baik untuk menjamin perlindungan hak adat yang adil dan berkelanjutan bagi masyarakat hukum adat di kedua negara. Analisis ini menyajikan pemahaman lintas budaya mengenai pengelolaan hak adat dan potensi integrasi prinsip-prinsip hukum adat dalam konteks hukum modern.

Kata Kunci: Hukum Adat, Hak Ulayat, Indonesia, Australia

INTRODUCTION

Indonesia adheres to 3 (three) legal systems, namely the Western legal system, the Islamic legal system, and the Customary legal system. Customary law first arrived into impact during the Dutch colonial era, namely the law that applied to native people and foreign easterners. Juridically, customary law was first promoted after Van Hollen stated that customary law is the law that applies to indigenous Indonesian people and made customary law an object of positive legal scholarship. (Pudjosewojo, 2016) During the Dutch colonial era, customary law was given recognition as the law that officially applies to the Indonesian people.

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The customs held by regions in Indonesia are distinct from other regions, Indonesia involves the principle of Bhinneka Tunggal Ika. Customs continue to develop and always follow the times, but do not abandon the traditions of civilization. Therefore, there is customary law which is the original law of society which is a reflection of the culture of the Indonesian nation with unique characteristics that are different from the culture of the Indonesian nation. According to Djojodinegoro, customary law provides the view that society is a community as a unit of life in Indonesian society with the same goals. (Setiady, 2018)

The typical law system has basic elements, namely : (Hartono, 2014)

1. Belief
2. Sense
3. Objectives
4. Principal
5. Position, role and implementation
6. Level or stage
7. Sanctions
8. Authority
9. Facilities

Customary law is an unwritten regulation that lives in the traditional community of a region and remains alive as long as the community still fulfills the traditional law that has been passed down to that community from their ancestors. Thus, traditional regulation and its position in the national legal order is unwritten law but is used in precincts that still adhere to their customs.

One of them is regulated in customary law is customary rights. Customary rights are rights that exist and are owned by customary law communities in Indonesia with unique characteristics and are called sui generis. Customary rights are liberties owned by a tribe, village association, or usually by a village that controls all the land and its contents within its area. (Sudiyat, 2013) Customary rights are regulated in Article 3 of Law Number 5 of 1960 concerning Basic Agrarian Principles Regulations, which are then called UUPA. In this article, it is stated that traditional rights originating from customary law communities which are by national interests and based on national unity can be implemented as long as they do not contain conflicts in the law. So, it can be seen that there is the presence of customary rights owned by customary law communities which are given recognition by the state. (Santoso, 2014)

However, in Indonesia, the mechanism for determining the existence of customary rights is unclear because it has not been regulated normatively in higher regulations in

Indonesia. It can be proven by the case of the Enggros Tribe and the Nafri Tribe who experienced a dispute over land rights as traditional land with the scarcity of an explicit determination by the Regional Government regarding the customary law community's customary rights as to who has authority over the land. (Rahmadi, 2022)

Issues related to customary rights are different from the law that regulates traditional rights in Indonesia and the determination of native title in Australia, which is stipulated about the subject holding the rights and the implementation of the native title determination mechanism, which gives clear rules and is applicable in nature. So, the topic that will be raised in this journal is a comparison of customary law in Indonesia and Australia regarding customary rights in Indonesia.

METHODOLOGY

The research method in normative legal research is legal research that places law as a normative system of expansion. (Achmad, 2015) The approach used is a comparative approach where this approach is used to compare the legal regulations that provide regulations regarding determining the existence of customary rights in Indonesia and the Native Title Act in Australia. The data is collected in this journal by using the literature study technique which is analyzed using deductive logic.

RESULTS AND DISCUSSION

The Existence of Ulayat Rights in Customary Law in Indonesia

Customary rights relate to the recognition of traditional law communities. Recognition of customary law communities means that the state, both legally and politically, provides recognition, respect, protection, and opportunities for the development of customary law communities and their traditional rights within the Unitary State of the Republic of Indonesia. With this recognition, the state has legalized a customary law community that has rights to the natural resources it owns, and the state must protect these rights from disturbances or threats. (Gayo, 2018)

Legal recognition for customary law communities is that they bear rights and are legal subjects who are equal to other legal matters. (Surpha, 2019) Regulations relating to determining the existence of customary law rights by customary law communities in Indonesia have undergone developments by current developments based on Article 18 B paragraph (2) of the 1945 Constitution which states that the state provides recognition and respect for the unity of customary law communities and also their traditional rights as long as they are still

alive and following the principles of the Republic of Indonesia as stipulated in the law. Then, in Article 3 of the UUPA, it is stated that recognition is also given to the customary law community's conventional rights as long as they still exist. (Adharinalti, 2013)

Customary rights owned by customary law communities are a set of authorities and obligations of a traditional regulation community relating to land located within their territorial environment. (Harsono, 2013) Customary rights in customary law neighborhoods are declared to still exist if they fulfill the following elements:

1. There is still a group of people as a particular customary law association which is a customary law community;
2. There are still areas that are the customary law community's customary land which are given awareness as jointly owned land as lebensraum
3. There are still traditional rulers who are given recognition by their customary law residents and carry out daily activities as executors of conventional rights. (Santoso, 2013)

Previously, customary law associations were regulated in the Ministerial Regulation of ATR/BPN Number 10 of 2016, the criteria for ancestral law community customary rights over land were deemed to still exist if they fulfilled the following criteria: (Abdurrahman, 2014)

1. Community and customary law institutions;
2. The area where customary rights take place;
3. Relationship, linkage, and dependency of customary law community units and their territories;
4. Authority to jointly regulate the use of land in related customary law citizens in unit areas based on customary law that is still in force and adhered to by the community.

With the revocation of Ministerial Regulation Number 10 of 2016, the regulations relating to determining customary rights are increasingly blurred and deeper into a gray area. Then, it was regulated again in Minister of Home Affairs Regulation Number 52 of 2014 about Guidelines for the Protection and Recognition of Customary Law Communities. However, in this Permendagri, there is no determination of the existence of customary rights as part of the recognition of ancestral law citizens. (Wiranata, 2016)

However, then, another regulation was given in the ATR/BPN Ministerial Regulation Number 18 of 2019, where the government administers the customary land of customary law community units in Indonesia. These administration activities include measuring, mapping, and recording activities in the land register. The determination of customary rights must first be determined by the Regent or Mayor, then administrative activities are carried out which are then recorded in the land register.

Determination of Native Title in Australia

Native title was implemented in Australia in 1994, where this stipulation proposed a mechanism system where indigenous peoples in Australia could submit a claim for recognition of native title to land or waters in Australia and also with a body called the National Native Title Tribunal. The essence of the native title determination procedure is that the applicant is a customary legal community within the Aboriginal tribe. The Aboriginal tribe then submits its claim that it feels it has native title to the institution by bringing the required evidence such as the name of the applicant, the group to which it belongs, and the land or waters with the claim of native title. The NNTT institution has a special function to provide assistance, facilities, and determination of these claims. (Bosko, 2014)

The NNTT agency then carries out an investigation into the submission and then meets and confirms the party who is related to the claim being submitted. The party who submits the claim is usually an Aboriginal tribe, and then the party carries out mediation to resolve the claim. If the mediation is not completed then the decision authority is completely handed over to the court to decide. (Desvalini, 2019)

The interesting thing about Native Title is that if there are grazing rights and pastoral leases in the native title area then this does not necessarily result in the elimination of the existence of the native title. There is a rule that land objects in the same area and which have several rights can be worked on and cultivated together as long as these uses do not conflict with each other. In these regulations, native title is something that contains authority in the form of using agricultural land and even carrying out activities for purposes such as religious rituals. (Cticchley, 2015)

The Australian Parliament intended this regulation to be a special law for Australia's indigenous people, namely the Aboriginal and Torres Strait Islander peoples. The government wants to protect the rights of all its citizens, especially indigenous peoples, by providing recognition of international standards in the protection of human rights.

Comparison of Determination of Ulayat Rights and Native Title in Indonesia and Australia

It can be seen that there are very striking differences between the two types of customary law in Indonesia and Australia in explaining customary rights. The existing law in Indonesia regarding determining the existence of customary rights is very far behind Australian customary law with the title Native Title as a legal regime that provides recognition and protection to the communal rights of the Aboriginal customary law neighborhood.

In Australia, the legal regime entitled Native Title is a form of legal protection for Aboriginal people as indigenous people. Compared with Indonesia, Indonesian customary law does not yet regulate the traditional liberties of customary law communities in Indonesia. From a subject perspective, in the determination, in Australia, the native title is used specifically for Aboriginal and Torres Strait Islander tribes, but in Indonesia, only the phrase property rights are used so there is no clarity as to who the intended subject is. (Beeson, 2013)

In customary law, there is a principle that traditional land cannot be transferred permanently. This principle is also known as the inalienability principle. This principle also applies in Australia. But if you look at the reality in Indonesia, more and more people tend to move towards individualization. If this individualization continues to develop, especially in Customary Law Communities, there will be many land plots taken and made in the names of individual individuals. When it comes to ownership rights that are still included in customary ownership rights, they are still subject to the authority of Ulayat Rights, but the problem is that if the customary ownership land is converted using the conversion provisions of the Basic Agrarian Law, then the ownership rights become ownership rights under the regime. UUPA and is no longer under the jurisdiction of Ulayat Rights. Certification is indeed carried out to create legal certainty, but its significance in Indonesia is not very obvious because the legal regulations are still confusing, plus there are problems at the implementation level. If you look at the Australian context, legal certainty is provided by directly establishing special laws for Aboriginal people and Torres Strait Islanders through the Native Title Act. The significance of this regulation is also very obvious. That's one of the differences that exists.

In this research, there is indeed a tendency to encourage immediate legal improvements related to the mechanism for determining the existence of Ulayat Rights in Indonesia. The comparative study in this research has also explained the superiority of the legal mechanism for determining native title in Australia compared to the legal mechanism for determining Ulayat Rights. However, with this comparative study, this research does not intend to recommend "plagiarism" in making legal improvements. The advantages of the legal mechanism for determining native title in Australia can be studied further carefully and adapted to the Indonesian context in making legal improvements so that the laws created remain compatible with Indigenous Law Communities.

CONCLUSION

The conclusions in this research show that there are similarities and differences in the legal mechanism for determining Ulayat Rights in Indonesia and determining native title in

Australia. Similarities only exist in making it possible to use court mechanisms when there are problems that cannot be resolved in the determination process. The differences between the two regimes are in several aspects, namely related to the regulation of legal provisions related to determination, the subject of rights, authority or institutions and their processes, as well as the significance of legal regulations.

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