

The Characteristics and Legal Status of Customary Lands (*Tanah Adat*) In Bali

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ABSTRACT

Balinese customary community (Balinese Adat community) recognizes the existence of customary lands (tanah adat) controlled by the unity of customary community in their community life. These customary lands are very important to the lives of customary community in Bali. This paper discusses two main issues, namely: 1) the characteristics and functions of customary lands in Bali, 2) the legal status of customary lands in Bali after the enactment of the Indonesian Act No. 5 of 1960 (Indonesian Basic Agrarian Law). Customary land in Bali has its own characteristics and controlled by the customary village based on customary law (unwritten law). Customary lands in Bali have religious, economic and social functions. From a legal perspective, after the enactment of Indonesian Basic Agrarian Law, the status of customary lands in Bali are recognized and protected as long as in fact those lands still exist.

Keywords: Balinese Customary Lands, Characteristics, Legal Status

INTRODUCTION

It is inevitable that lands have important functions in human's life. Lands have function as dwelling place or settlement and source of living to those who cultivate lands as their livelihood. From many perspectives such as sociology, anthropology, psychology, politic, law, military and economy, lands have high value. Land is a dwelling place, a place to earn for living, to reproduce as well as to conduct *adat* (customs) and religious rituals (Elsa Syarief, 2012, p.1). As a gift from God Almighty, lands are natural resources that are indispensable to human life to meet their needs, both that directly have impact to their life such as for farming or place to reside and also for doing business such as for trade, industry, agriculture, plantation, education, as well for the facilities and infrastructures development (Suardi, 2005, p.1). Considering that lands have a priceless value to human life, therefore, those who feel they have rights on lands will defend their rights from right interference or right encroachment that possibly conducted by other parties. In this context, it is often that land disputes are brought to the court.

In community life, the Balinese *Adat* community (Balinese customary community) especially recognizes the existence of what so called *tanah adat* (customary lands) controlled by the unity of customary law community. These customary lands have very important meaning to the life of customary community in Bali. In the past, Bali was one of the agrarian empire in the archipelago. Due to its agriculture nature, lands on that time had a very important role because those were the source of life (I Gusti Ngurah Tara Wiguna, 2009, p.1).

In *hukum adat* (customary law), land is a very important issue. The relationship between human and land is so strong because of lands are place for human to do activities and continue their life (Adrian Sutedi, 2010, p.31). Long time before this country was established and even long time before the Dutch East Indies colonial era, the lands in Indonesia already regulated by the customary law community or also known as unity of customary law, for

example “village” (“*desa*”) in Java, “*desa pekraman*” (customary village) in Bali and so on. Along with the times, the customary lands as such are still exist and in Bali are controlled by *desa pekraman*. The existence of lands from the perspective of customary law in Bali are really connected with the obligations that it has to be fulfilled by the members (“*karma*”) of the community that occupy such customary lands. Customary lands in Bali have been there since the presence of customary community centuries ago (I Ketut Wirta Griadhi & AA G. Oka Parwata, 2012, p.3). Customary lands are under the control of the unity of customary law that is known as “*hak ulayat*”. This means that those lands are in bond with the unity of customary law, regulated by such unity of customary law and burdened with the obligations towards the unity of customary law for those that have rights to occupy or cultivate it (I Ketut Wirta Griadhi & AA G. Oka Parwata, 2012, p.3)

As explained above, this article will firstly discuss the characteristics and functions of customary lands in Bali and then secondly discuss the legal status of customary lands in Bali after the enactment of Indonesian Basic Agrarian Law.

HISTORY OF THE EXISTENCE OF CUSTOMARY LANDS IN BALI

The historical perspective shows that the existence of customary lands in Bali cannot be separated from the establishment of *desa adat* or *desa pakraman* (customary village). The existence of customary villages with their customary lands also intertwined with the history of Mahayogi Markandya’s arrival to Bali. His purpose to Bali was to develop the Hindu religion teachings. The Markandya Purana’s *lontar* (kind of written document on the palm leaf) mentions that before his arrival to Bali, Bali Island was still a jungle (M. Suasthawa D (1), 1987, p.20).

According to the experts, Mahayogi Markandya came to Bali around the 8th AD, after the Dinaya Inscription in 760 AD (I Gusti Gede Ardana, 1982, p.26-27). Considering on that time Bali was still a jungle, Mahayogi Markandya and his followers deforested the jungle and after they considered enough, such lands were then distributed in accordance with the interests and needs. The interests to the lands as such are the common interests of the customary village (*Karang Desa*) and also for the interests among themselves but remain within the area controlled by the customary village, for example the *Tanah Ayahan Desa*, as can be seen from the description that is expressed in the Markandya Purana’s *Lontar* (M. Suasthawa D (1), 1987, p.21). The *Lontar* also discusses various important things in the community concerning *subak* (water irrigation for rice fields), *pekaseh* (the leader of water irrigation for rice fields) and *banjar* (a specific customary organization at the villages that functioned for customary and religious affairs) (I Ketut Artadi, 1980, p.14-15).

From the above description, it is clear that several terms such as village, Kahyangan Village, the lands that were given or distributed by the village to its members (which is now called customary lands), *banjar*, *subak*, and *pekaseh* already existed and known at the time of Mahayogi Markandya’s arrival to Bali.

DEFINITION, CHARACTERISTICS AND FUNCTIONS OF CUSTOMARY LANDS IN BALI

In general, the term of “customary lands” is not known in Bali. But even so, what is meant by the term of “customary lands” is the same as the “village lands”. The village that is meant here is *desa pekraman* (customary village) and not *desa dinas* (official village) (Wayan P. Windia, 2012, p. 3).

There are two types of village in Bali, namely *desa pakraman* and official village. The explanations of those villages are:

1. *Desa pakraman* (before 2001 was known as customary village) has duties and authorities around the area of the implementation of Hindu religion, customary and customary law in Bali.
2. Official village or administrative village has its duties and authorities concerning government administration in the container of the Unitary State of the Republic of Indonesia.

The unity of customary law also has or controls the lands. The lands of the unity of customary law, according to customary law literatures and Indonesian Basic Agrarian Law are known as *Tanah Ulayat*. In Bali, those lands are called as “*Tanah Druwe*” or “*Tanah Duwe*” or “*Tanah Duwe Desa*” (the lands owned by customary village) (Wayan P. Windia, 2012, p.3).

In general, the rights to control the lands in Indonesia can be divided into:

- a. Hak ulayat persekutuan (*Bheschikhingrecht*)
- b. Hak perorangan terkekang (*Ingeklend Inlands Bezitgrecht*)
- c. Hak milik perorangan bebas (*Inlands Bezitrecht*).

In Customary Law, lands that are included in customary lands are *tanah-tanah Ulayat* and *tanah-tanah perorangan terkekang*. While the *tanah milik perorangan bebas* is not called as customary land. Up to this point, therefore, the limitation of customary lands can be given to the lands which are not belong to individual ownership but are belong to the ownership of the tribes, villages and so on. In compliance with Article II of the Conversion Provision of Indonesian Act No. 5 of 1960, the customary lands which are located in Bali are called *tanah hak atas druwe* or *tanah atas druwe desa* (M. Suasthawa D (2), 2001, p.120).

The characteristics of customary lands consisted of three (3) things, namely: (1) the existence of the unity of customary law as the subject of communal rights, (2) the existence of lands/territories with certain limits which are communal lands and (3) the existence of the unity of customary law to conduct certain actions upon such lands. Customary lands are lands which are controlled by customary village and regulated by each customary village’s customary law; therefore, the customary villages have rights to:

1. Set up and organize the use of lands, the inventory and maintenance of lands;
2. Set up and decide the legal relationship between the people and lands;
3. Set up and establish the legal relationship between people and legal action which is related to lands (I B. Putu Suardiarsha, 2003, p.28).

There is always relationship between customary villages and lands, therefore, every single members of the village which controls and occupies or uses the customary lands can be burdened with duties by his/her village. The example duties of village members are maintaining the land fertility, realizing the peace and order by obeying the customary law that grows and develops in the community.

There are various kinds of customary lands (*tanah druwe desa*) in Bali in relation to the function of such lands in customary community (as the territorial area and also one of the wealth of customary village). The various types of customary lands in Bali are as follow (I Nyoman Sirtha, 2002, p.8):

1. *Tanah Druwe Desa* is land provided by the village for the public interest such as for terrain, village hall, and also in some places in the form of dry lands/plantation/forest which is belong to the ownership of the village.

2. *Tanah Pekarangan Desa* is land which is controlled by Customary Village that is given to the members of the village (*krama desa*) as a place to build houses, in which every members of the village receive almost the same land area by conducting duties (*ayahan*) in the form of labor or material to the Customary Village.
3. *Tanah Bukti* is land in the form of rice fields or fields which is controlled by the Customary Village which is given to the official of Customary Village or *Prajuru* of the village as their living as long as the person in concerned is still on his term of office.
4. *Tanah Pecatu* is land which is controlled by Customary Village which is distributed to the village members by conducting duties to Customary Village as the distribution of mutual cooperation on the deforestation to form the village.
5. *Tanah Pecatu Dalem* is rice field lands or fields that are given by *Dalem* or the King to someone by conducting his/her duties to pay tribute "*upeti*" or to give his/her labor (*ayahan*) to *Dalem* or the King.
6. *Tanah Laba Pura* is land which is controlled by the Customary Village that is used for the needs of the Temple both for place of the Temple or even in the form of rice fields or fields which its harvest s will be given for the needs of the Temple.
7. *Tanah Ayahan Desa* is rice field lands or fields which is controlled by customary village that the use of it are given to the village members (*krama desa*) with rights to enjoy the result, by conducting duties (*ayahan*) in the form of labor or material to customary village.

Suasthawa Dharmayuda classifies this village land into two, namely: village land in a broad sense and village land in a narrow sense. The village lands in a broad sense are as follow (Wayan P. Windia, 2012, p.4):

1. Village land which is including market land, terrain, and graveyard land.
2. *Tanah Laba Pura* or *Tanah Milik Desa*, land for the purpose of the Temple controlled by customary village.
3. *Tanah Pekarangan Desa*, land as place to build houses for village members
4. *Tanah Ayahan Desa*, productive land owned by the village but used by the village members.

The village lands in a narrow sense are limited to village lands which are directly controlled by the *desa pakraman* as stated in number 1 above.

Meanwhile, Wayan P. Windia classifies village land in Bali based on its location (Wayan P. Windia, 2012, p.5):

1. Village Lands which are located in *tegak desa* (Balinese traditional residence place), such as *Pekarangan Desa* lands, *tegak pura* (the lands of village that are meant for the location of the temples as the holy places), *telajakan desa* (the lands of village that are difficult to be used maximally because the amounts of those lands are small)
2. Village lands which are located outside the *tegak desa*
 - a. Located in *wewengkon* or *wewidangan desa* (territory of the village), can be in the form of *tegak pura*, *tanah laba (duwe) pura*, *tanah ayahan desa*

- b. Located outside *wewengkon desa*, can be in the form of *laba pura* and *tanah ayahan desa*.

Based on the various types of customary lands in Bali as mentioned above, there are several elements that reflect the characteristic of the customary lands in Bali such as:

1. The customary lands in Bali which is controlled by the customary law community itself as well as customary lands in Bali which is controlled by individuals that subject to the provisions determined by such customary law community.
2. The customary lands are regulated and in the bond of the unity of customary law. In addition, those who receive rights to occupy or cultivate such customary lands are burdened with obligations by the the unity of customary law.
3. The obligations for the community who occupies and controls the customary land (*tanah druwe desa*) exist in the form of obligations so called *ngayahang* (the obligation to serve the Temple), such as:
 - a. Labor, which is preparing himself to *ngayah* at the village and *ngayah* at the Temple/*Kahyangan Desa*, for example working together to clean the Temple, fixing the Temple, celebrating the ritual ceremony and so on.
 - b. Material, which is preparing money or other materials. For example to pay dues (*peturunan*), expenditure (*pepeson*) like rice, coconut leaves, fruits, eggs and so on which are used for every activities in the village or Temple (M. Suasthawa D (1), 1987, p.51).

The customary lands referred to in Bali are generally not supported with certificate of rights as regulated in Indonesian Basic Agrarian Law, although the Conversion provisions can be used as the basis to grant right upon such customary lands. The fact is that such customary lands have not been converted into rights regulated in Indonesian Basic Agrarian Law. Therefore, such lands are remaining and recognized as *hak ulayat*.

In 1986 the government issued a decision concerning Temple in Bali which is recognized as religious legal entity that possible to possess ownership right upon lands. This is the realization of Government Regulation No. 38 of 1963, in the form of Decree of the Minister of Home Affairs No. 556/DJA/1986, dated 24-9-1986; the contents are as follow (I Ketut Wirta Griadhi & AA G. Oka Parwata, 2012, p.9):

1. Appoints Temple as Religious Legal Entity that can have ownership right upon lands.
2. Confirms that *palemahan* lands which have united function with Temple that already owned by the time this Decision Letter was issued, converted into Right of Ownership.

Based on such provisions above make clear that *tanah laba pura* as part of customary lands in Bali can be converted into right of ownership, in which the subject of such right is the Temple.

Customary lands (*tanah druwe desa*) are intertwined with the existence of customary village in Bali which has its own characteristics. The characteristics of customary village which is social religious in nature can be seen from the existence of *Kahyangan Tiga* in every customary villages and every ceremony activities carried out in mutual cooperation by the members of customary village (*krama*) (I Ketut Wirta Griadhi & AA G. Oka Parwata, 2012, p.9).

The lifestyle of customary community in Bali which is based on the teachings of Hindu religion and the philosophy of *Tri Hita Karana*, also affecting the customary lands in Bali which serves to support the existence of customary village in carrying out the *Dharma Agama* (teachings in Hindu religion), supporting the implementation of development for the interest of customary community and also the economic interest of each village members (*krama adat*) itself. In relation to that, the customary lands have functions as follow: 1) Religious function, in relation to *ayahan* or obligation to support the development of temples in customary village, 2) Social function, in order to participate in social community side development, 3) Economic function, that such customary lands also strived to provide economic benefit to the owner or person who controls it.

THE LEGAL STATUS OF CUSTOMARY LANDS IN BALI

Customary lands are lands under the control of customary law community both for its control which are in the hands of the customary law community themselves and that is in the hands of individuals. In other words, customary lands are lands under the control of *hak ulayat* of the customary law community.

In Indonesia, according to Article 18B paragraph (2) of the 1945 Indonesian Constitution (Amendment) as well as the provision of Article 3 Indonesian Basic Agrarian Law, in a legal perspective, the status of customary land as tanah ulayat is recognized and protected as long as in fact still exist. With regards to those provisions, it can be considered that the rights of customary community (*inter alia: hak ulayat*) is recognized and respected by the National Act and Constitutional. This recognition and protection has been widely accepted.

According to Boedi Harsono, the provision of Article 3 Indonesian Basic Agrarian Law must be accompanied with two conditions with regard to the recognition of *hak ulayat*:

1. With regard to its existence; *hak ulayat* is recognized as long as in fact it still exists. In the area where that right is no longer exist; such right will not be turned on again. In the area where *hak ulayat* is never existed, then the new *hak ulayat* will never be issued.
2. With regard to its implementation; the implementation of *hak ulayat* shall be in such a way that in accordance with the national and state interests that is based on the unity of the nation and shall not be in conflict with other higher regulations and laws (Parlindungan, 1978, p.13).

In addition to Budi Harsono's view, Parlindungan, another expert of Indonesian Agrarian Law, states that Article 58 Indonesian Agrarian Law also important to be considered to recognize the existence of *hak ulayat*. There are three elements for the recognition of hak ulayat: it still exists in the community (still a fact of life); it shall be adjusted with the national/state interest; and it is not in contrary with other regulations and laws.

Regarding the existence of customary lands in Bali, beside that is recognized under Indonesian Constitution and Indonesian Agrarian Law that is also protected under Regional Regulation of Bali Province No. 3 of 2001. Based on Article 9 paragraph (5) of that regulation, village lands cannot become the ownership of individuals. This provision clearly provides protection upon customary lands, so, those are still under the control of customary law community.

CONCLUSION

Customary land in Bali has its own characteristics. Customary lands are lands controlled by the customary village and regulated by the customary law (*hukum adat*). Therefore,

customary village has the right to regulate and administer the use of lands. The customary lands in Bali are within the bond of the unity of customary law, regulated by the unity of customary law and burdened with the obligation to serve by the customary village to those who has right to occupy or cultivate such lands. The customary lands in Bali have functions in the economic, social and religious sectors. From a legal perspective, customary lands are protected and recognized under Article 18B paragraph (2) of the 1945 Indonesian Constitution (after the amendment), as well as Article 3 and Article 58 of the Indonesian Basic Agrarian Law. In addition, the legal status of customary lands in Bali which are known as *tanah druwe desa* are recognized and protected under Regional Regulation of Bali Province No. 3 of 2001 as long as in fact still exist.

Regarding the rapid development of tourism in Bali that needs so many lands to support investment activities for tourism as well as there are many cases concerning customary lands that lately get attentions, therefore, the government, especially the National Land Agency (*Badan Pertanahan Nasional*), needs to conduct mapping and data collection to ensure which lands that belong to the lands of customary community and which lands that are privately owned. For the better legal certainty, it is likely that certificates of all types of customary lands are needed to be issued under the ownership status of the customary community or customary village (*desa pakraman*).

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