EXAMINING THE PRINCIPLE OF PERMANENT INALIENABILITY: A COMPARATIVE STUDY

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Abstract

The evolution of international human rights instruments and national legislation has strengthened the recognition of indigenous communal ownership institutions, including the Permanent Inalienability Principle. Countries like Australia (Native Title) and Canada (Aboriginal Title) have demonstrated robust commitments to upholding communal property regimes. This comparative analysis employs a normative research approach to examine the parameters of existence and relevance of regulations in maintaining the Permanent Inalienability Principle in Indonesia. The findings indicate a strong legal commitment in select countries to safeguard indigenous ownership rights through accommodation, formulation, and enforcement of regulations.

Keyword : Permanent Inalienability Principle, Ulayat Right, communal property regimes

Abstrak

Instrumen hak asasi manusia internasional, bersama dengan undang-undang tentang hak asasi manusia telah semakin berkembang dan membenarkan lembaga kepemilikan komunal masyarakat adat, termasuk prinsip hak-hak kepemilikan yang tidak dapat dialihkan atau yang melekat dalam masyarakat hukum adat Permanent Inalienabilty Principle, beberapa negara telah sangat kuat dalam mempertahankan / melestarikan rezim hak milik komunal , termasuk Australia yang menggunakan istilah Native Title dan Canada yang menggunakan istilah Aboriginal Title. Artikel ini mencoba menganalisis dengan pendekatan perbandingan untuk melihat bagaimana parameter keberadaan dan relevansi aturan dalam mempertahankan prinsip permanently inalienability di Indonesia, Artikel ini menggunakan metode penelitian normatif dan ditemukan bahwa komitmen hukum di beberapa negara untuk menjamin hak kepemilikan masyarakat adat sangat kuat mulai dari pengakomodiran, perumusan sampai dengan penegakan aturan berkaitan dengan prinsip permanent inaliebility untuk masyarakat adat.

Kata Kunci : Prinsip Permanent Inalienability, Hak Ulayat, Kepemilikan Bersama

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Introduction

In 2000, Hernando De Soto published his work entitled The Mystery Of Capital (Why Capitalism Triumphs in the West and Fails Everywhere Else), in his book Hernando argued that capitalism did not run smoothly in the Third World because the assets of its people, especially houses and land were not legally recognized by the legal system in these countries which he calls extralegal property so that the property loses economic value (dead capital).[1] What is indirectly said is that this is the influence of the concepts of communal ownership, especially in the life of adat (customary) law communities which are commonly called Ulayat Rights.

Along with it, the burgeoning international human rights framework, complemented by national statutes, has legitimized communal ownership institutions within indigenous communities, incorporating the Permanent Inalienability Principle.[2] Consequently, nations such as Australia (Native Title) and Canada (Aboriginal Title) have demonstrated robust commitments to safeguarding communal property regimes.

This article undertakes a comparative analysis to investigate the parameters of existence and relevance of regulations maintaining the Permanent Inalienability Principle in Canada, Australia, and Indonesia, specifically examining Aboriginal Title, Native Title, and Ulayat Right. Utilizing a normative research methodology, this study comprehensively examines the regulatory frameworks governing indigenous land rights. Data sources include relevant journals, research findings, and accessible legal provisions.

[1] R. Edwards,2003, *Native Title: Dead Capital?*, Singapore Journal of Legal Studies, pp. 80-115.

[2] R. E. Bosko, 2014, *Reconsidering the Inalienability of Comunal Ulayat Right: Theoretical Overview*, in The 9th ALIN Expert Forum Land Right Law in Asian Countries, Indonesia,Hal.13-35.

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Assessing the Parameters of Regulatory Effectiveness in Maintaining Permanent Inalienability.
Ulayat Right Ulayat di Indonesia

Recognition of the existence of Adat law communities in Indonesia is contained in the 1945 Constitution, Article 18B(2) of the 1945 Constitution as one of the constitutional foundations of adat law communities states declarative recognition that the state recognizes and respects the existence and rights of adat law communities.[3] Article 18B(2) of the 1945 Constitution of Indonesia recognizes and respects the existence and rights of indigenous communities, subject to four conditions[4]:

a) As long as they remain viable (continuity);
b) Consistent with societal development (compatibility);
c) In accordance with the principles of the Unitary State of the Republic of Indonesia (national unity);
d) Regulated by law (legislative framework).

Furthermore, in the legal framework to recognize the customary rights of indigenous peoples, it initially appeared in Law Number 5 of 1960 concerning Basic Agrarian Provisions (UUPA). Constitutionally, UUPA is derived from Article 33 paragraph (3) of the 1945 Constitution, which specifically regulates state control over land, water, and natural resources.[5] UUPA recognizes that although the state in principle controls these resources, the customary rights of indigenous peoples are still recognized, as long as these rights truly exist, in line with the state's goal of advancing the greatest possible prosperity of the people.

[3] Alan, M. F., Zulharman, Z., & Butar, F. B. (2024). PRECAUTIONARY PRINCIPLE DALAM PENGELOLAAN LIMBAH B3 PASCA PUTUSAN MAHKAMAH KONSTITUSI NOMOR 18/PUU-XII/2014. Bina Hukum Lingkungan, 6(1), 22–38. Retrieved from https://www.bhl-jurnal.or.id/index.php/bhl/article/view/204

[4] W. Kurina, "Peta Perundang-undangan tentang Pengakuan Hak Masyarakat Hukum Adat"

[5] Abu Dzar Nuzul, A. ., Rahman, F., & Zulharman, Z. (2024). PERAN MASYARAKAT TERHADAP AKTIVITAS PENAMBANGAN MARMER DI KEC. BONTOCANI KAB. BONE PASCA PENGESAHAN UU NO. 3 TAHUN 2020 TENTANG MINERAL DAN BATUBARA. *JURNAL DARUSSALAM: Pemikiran Hukum Tata Negara Dan Perbandingan Mazhab*, *4*(1), 1–22. https://doi.org/10.59259/jd.v4i1.68

The sectoral legislation governing adat rights (hak ulayat) in Indonesia exhibits variability, with each sector tailoring recognition according to its specific interests.[6] Forestry regulations, in particular, demonstrate heightened sensitivity towards indigenous rights, reflecting the intrinsic connection between forest management and the livelihoods of adat communities. Law No. 41 of 1999 concerning Forestry, which initially did not recognize the status of adat forests (ulayat forests), then based on Constitutional Court Decision 35, this provision was revoked, so that the status of adat forests is no longer part of state forests.

The Indonesian Constitutional Court's Decision No. 35/PUU-X/2012 ruled that Articles 5(2) and 5(4), and Article 67 of the 1999 Forestry Law (UU No. 41/1999) are constitutionally invalid. This decision has significant implications for recognizing and protecting adat communities' rights over their adat forests. It emphasizes sustainable and equitable forest management.[7]

Decision No. 35/PUU-X/2012 marks a landmark ruling by Indonesia's Constitutional Court regarding the 1999 Forestry Law. Key takeaways include:

a) Recognition of Rights: Acknowledgment of adat communities' rights over customary forests.
b) Sustainable Forest Management: Emphasis on environmentally sustainable and socially equitable forest management practices.
c) Elimination of Discriminatory Provisions: Invalidating discrimination clauses within the Forestry Law.

However, this becomes a paradox when the Constitutional Court's decision regarding the Formal Recognition of Adat Peoples has been decided but at the technical level or its implementation has not yet been clarified in a

[6] Zulharman. (2023). Kepastian Hukum Dalam Rangka Pengelolaan Wilayah Pesisir dan Pulau-Pulau Kecil Melalui One Map Policy. *Journal of Law and Administrative Science, 1*(2), 17–28. https://doi.org/10.33478/jlas.v1i2.8

[7] W.Kurnia, *Ibid.*

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policy so that in the future it will again raise new problems, at least why technical policies are important to make because:[8]

a) Conditional recognition: Recognition of UUPA depends on potential obstacles to project development.
b) Lack of clear criteria: Unilateral interpretation by the government can misclassify adat land as state land.
c) Allocation of land rights: The UUPA requires the release of customary land for state ownership, which facilitates third-party land grants.
d) Inadequate recognition: Limited recognition of adat peoples' rights exacerbates land disputes.

In the framework of implementing the principle of permanent Inalienability ulayat rights, it is still not supported by a strong regulatory framework. Although the Ministry of Agrarian Affairs and Spatial Planning (ATR) has issued Ministerial Regulation No. 10/2016 concerning Procedures for Determining Communal Rights, this regulation deviates from the principle of inherent ulayat rights,[9] and explicitly contradicts permanent irrevocable ulayat rights. This difference weakens the rights of adat peoples.

Aboriginal Title in Canada

Aboriginal title refers to the inherent Aboriginal rights to land or territory. The Canadian legal system recognizes Aboriginal title as a sui generis, unique collective right to use and jurisdiction over a group territory from an ancestral origin.[10] This right is not conferred from an external source but is the result of Aboriginal peoples' own occupation and relationship to their ancestral territory and the ongoing social structure of the political and

[8] M. Sumardjono, 2014, *Recognition and Protection of the Adat (Costumary Law) Communities : The Indonesia Experience*, in The 9th ALIN Expert Forum, Indonesia. Hlm.40-50

[9] M. Sumardjono, *Ibid.*

[10] M. Sumardjono, *Ibid.*

legal system. Aboriginal title and rights are therefore distinct from the rights accorded to non-Aboriginal Canadian citizens under Canadian law.[11]

Chief Justice Lamer said: A further dimension of Aboriginal Title is the fact that it is communally held. It cannot be held by individual Indigenous peoples because it is a collective right to land held by all members of the Indigenous people. Decisions in relation to that land are also made by the Indigenous people themselves. This is another feature of sui generis customary title and distinguishes it from property interests generally.

In ensuring the Principle of Permanently Inalienability of Customary Rights in Aboriginal Title, there are two reasons that emerge as the underlying basis, the first is to ensure that the needs of indigenous peoples in obtaining protection from the influence of European interference are met. The second reason is the limited ability of indigenous peoples (Aboriginal Title) to obtain land back if the land they own cannot be maintained. Because the source of land for indigenous peoples (Aboriginal Title) only comes from royal grants.[12]

In various cases and court decisions, there are several decisions that have an influence on the existence of this Aboriginal title, including the case of Delgamuukw v. British Columbia (1997) in which important things are determined to prove Aboriginal title: (i) the land must be occupied before there was sovereignty over it, (ii) if the current occupation is relied on as evidence of pre-sovereign occupation, there must be continuity between sovereign occupation and pre-sovereignty, and (iii) in sovereignty, the occupation must be exclusive.[13]

In another case In 2014 the Supreme Court ruled unanimously for the plaintiff in Tsilhqot'in Nation v. British Columbia. Rejecting the government's claim that Aboriginal title only applies to villages and fishing grounds, it instead agreed that Aboriginal title extends to the entire traditional territory of an indigenous group, even if the group is semi-nomadic and has not established settlements in that territory. It also said that the government must

[11] K. McNeil, 2002, *Self-Government and the Inalienability of Aboriginal Title*, MCGILL LAW Journal / Revue De Droit De Mcgill, vol. 47, no. Indian and Aboriginal Law Commons, pp. 473-510.

[12] K. McNeil, *Ibid.*

[13] Bartlett, R., 2001, *The Different Approach to Native Title in Canada*, Australian Law Librarian, Hlm. 32–41

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have the consent of the First Nation holding Aboriginal title to approve development on that land, and that the government can override the wishes of the First Nation only in exceptional circumstances. The court reiterated, however, that areas with Aboriginal Title are not outside provincial jurisdiction, and provincial laws still apply.[14]

Native Title in Australia

Native Title was introduced into law as a result of the landmark Mabo decision in which the High Court ruled that Australian land did not fall within the doctrine of terra nullius – land without title – at the time of European colonisation. This decision recognised Aboriginal and Torres Strait Islander peoples as the first peoples of Australia and that their rights and interests in the land and in the waters remain.

The term used in Australian law to describe traditional Aboriginal land rights is 'Native Title'. This term encompasses the very different uses of resources by tribes, customs and traditions occupying different geographical areas. In Mabo (No. 2), Brennan J said this about the content of Native title:[15]

> "Native title has its origins in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs."

And in Brennan J's explanation this is the spirit of what Native Title is, although it does not yet explain the content of the rights that a tribe may have in a particular territory. However, in another explanation that was later absorbed into the Native Title Act 1993, Native Title can include rights and interests to:[16]

a) Live in the area and build shelters and buildings

[14] Unknown, *Supreme Court expands land-title rights in unanimous ruling*, https://www.theglobeandmail.com/news/national/supreme-court-expands-aboriginal-title-rights-in-unanimous-ruling/article19347252/, diakses pada 28 Maret 2024.

[15] Alison Clarke and Paul Kohler, 2005, *Property Law Commentary and Materials*, Cambridge University Press, New York, Hlm. 173.

[16] Alison Clarke and Paul Kohler, *Ibid.*

b) Access the area for traditional purposes, such as camping for ceremonies
c) Visit and protect places and sites important for hunting, fishing and gathering traditional food or resources such as bush medicines, water, ochre and wood
d) Implement customary law teachings, and engage in cultural activities

Native Title is known in two forms: non-exclusive ownership and exclusive ownership.[17] Ownership can co-exist with non-Indigenous ownership rights such as pastoral stations and this is known as non-exclusive native title - or native ownership throughout the area where there is a common interest with other parties, while Native Title which is exclusive ownership can only be granted in certain areas such as unallocated crown land or areas that have previously been owned by Aboriginal people.

The Native Title claim process requires Aboriginal people to prove that they have had a continuous and unbroken connection with their country since the colonisation of Western Australia in 1829. If an Aboriginal person or group believes they have a Native title right or interest in an area, they need to lodge an application for a native title determination with the Federal Court, which is responsible for administering all aspects of Native title.[18]

Conclusion

International human rights instruments and national legislation have increasingly recognized communal land ownership rights, including the Permanent Inalienability Principle, inherent to indigenous communities. Countries like Australia (Native Title) and Canada (Aboriginal Title) have demonstrated robust commitments to preserving communal land regimes. Conversely, Indonesia's efforts to accommodate this principle remain inadequate, with policies falling short in addressing challenges and providing legal certainty for indigenous communities' livelihoods and inherent rights.

[17] Unknown, *Kimberly Land Council*,[Online].Available: https://www.klc.org.au/what-is-native-title. Diakses pada 9 Maret 2024

[18] Kimberly Land Council,*op cit.*

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