

## LAND AS THE SOUL OF THE NATION: IMPLICATIONS OF THE TRANSITION OF LAND STATUS IN THE TALANG MAMAK CUSTOMARY LAW COMMUNITY

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### ABSTRACT

The land reflects the identity and spirit of the nation that are ingrained in the life of the Talang Mamak indigenous community, in addition to serving as an economic resource. Change in land status has several implications for their relationship with the land and its management. The purpose of this study is to examine the position of land for the Talang Mamak indigenous people. In addition, it analyses the implications of changing the status of land from customary forest to national park forest. This qualitative study employs the sociological law research approach by looking into the legal facts of the indigenous society of Talang Mamak in light of their relationship, ownership, and management of land. The main finding of this study is that the value of that land, due to its significant meaning and position, cannot be isolated from the Talang Mamak indigenous people. Nevertheless, the change in land status has created gaps and limited rights in forest management, highlighting several implications for the identity of the Talang Mamak indigenous people.

## Introduction

Customary law in Indonesia is acknowledged and stipulated in the Constitution of the Republic of Indonesia. Article 18B paragraph (2) of the 1945 Constitution depicts that the state recognizes and respects customary law community units and their traditional rights as long as they are still alive and abide by the community development and the principles of the Unitary State of the Republic of Indonesia. This article signifies that each customary law community in Indonesia must receive recognition and respect from the state. The state has a crucial role in the recognition and respect for indigenous peoples, although historically, the existence of indigenous peoples was not due to the state. Indigenous peoples existed before the existence of the state. The state exists due to recognition from indigenous peoples (Nation, 2009). Therefore, indigenous peoples should be the first cause or *causa prima* of the birth of the state.

Article 18B paragraph (2), along with its derivative laws and regulations, contradicts the customary law communities. While each community seeks to claim its rights, the state and customary law communities appear to conflict (Firmanda & Latief, 2018). This is evidenced by several cases, such as the conversion of customary forest to state forest, natural resource management by foreign companies established on customary lands of customary law communities, as well as permissible oil and gas management on communal land areas. As demonstrated by Baihaqi (2014) in his research, the prevailing land policy has been highly centralized, leaning toward authoritarianism, and fails to accommodate the interests of the community along with their rights.

Recognizing and respecting the diction contained in Article 18B paragraph (2) of the 1945 Constitution emerges as an obstacle for such communities in implementing their respective customary laws. If the state fails to recognize customary law communities, then all customary rights are deemed non-existent. Indigenous peoples have constantly strived for recognition of their existence before the state administratively (Hidayah & Al-Fatih, 2019), although the principle customary law is in the position of *causa prima* or the first cause.

## Literature Review

The Basic Agrarian Law (UUPA) stipulates clearly in Article 5 that the agrarian law applicable to land, water, and space refers to customary law. The UUPA firmly states that all those concerned with agrarian affairs, including their management, should implement customary law. Besides, the UUPA literally and clearly states customary law as the front guard in agrarian-related management.

The Talang Mamak tribe is one of the tribes residing in Indonesia (Ming, 2010). The Talang Mamak tribe originates from the Proto-Malay or Old-Malay race in Riau. The Talang Mamak Indigenous Tribe (or the Kubu tribe) resides in the Bukit Tigapuluh National Park (TNBT). They inhabit areas designated as traditional or special zones of the National Park. The area of TNBT was originally 127,698 ha based on the Decree of the Minister of Forestry, SK No. 539/Kpts-II/1995. Later, the area was increased to 144,223 ha based on the Decree of the Minister of Forestry, SK No. 6407/Kpts-II/2002. Referring to the data issued by the Riau Provincial Government in 2001, the number of Talang Mamak people living in the TNBT area was 164 people spread across Rantaulangsat, Airbaubau, Nunusan, and Siamang hamlets (Dewi, 2017).

This tribe divides the land structure into four parts; village land, hamlet land, agricultural land, and forbidden forest (Zaiyardam et al., 2019). The forbidden forest refers to a forest that is highly guarded by the Talang Mamak customary law community. The forest cover data, based on a study regarding Walhi Riau in Indragiri Hulu for the 2013-2017 period, revealed a loss of 20% of forest cover (2,000 ha) on annual basis due to conversion to plantations, industrial plantation forests (HTI), and settlements. In the Indragiri Hulu district, the residence of around 5,000 Talang Mamak people is spread across 29 kebatinan in five sub-districts of Rakit Kulim, Batang Cenaku, Batang Gangsal, Seberida, and Rengat Barat (Diana, 2019).

The customary forest of the Talang Mamak community, as recognized by the Dutch Resident in 1925, was 48,000 hectares (Basu, 1925). In 2010, the Indragiri Hulu District Forestry Service stated that the

customary forests owned by the Talang Mamak tribe are Sungai Tunu (1,000 Ha), Kelumbuk Tinggi Baner (2,190 Ha), Durian Berjajar Customary Forest (985 Ha), as well as Penyabungan and Penganan Customary Forest (1,800 Ha) (Diana, 2019).

Issues concerning the customary land or customary forest of the Talang Mamak customary law community can be observed in both the government and companies. The issues between the Talang Mamak customary law community and the government have sparked since the forest is turned into a national park forest. In fact, the state has full authority to determine objects in its territory, including when dealing with indigenous peoples as customary forest owners.

Among the problems that arise are, *first*, since the forest is turned into a national park, the Talang Mamak indigenous peoples could not manage their customary forest as they are restricted to do so by the laws and regulations governing national park forests. *Second*, the objective of turning a forest into a national park is to protect the forest and the ecosystems in the forest. In 2010, Patih Laman, the Supreme Traditional Leader of the Talang Mamak Tribe who received Kalpataru, felt disappointed with the government for failing to protect the national park forest from migrants who looted the forest (News, 2010). Patih Laman protested by the Kalpataru (Detik News, 2010).

This signified that the action taken by the government to turn the forest into a national park failed to save the forest. This is because; forest exploitation that affects the local ecosystems and indigenous peoples continuously occurs in the national park forest area. According to Karoba (2007), indigenous peoples have proven to be the best caretakers of the natural environment.

The designation of a national park forest with full management rights given to the government has hence been a fundamental problem for the Talang Mamak indigenous people.

## Methodology

This sociological legal study empirically identified theories that describe the process of occurrence and implementation of law in society (Sunggono, 1996). The research area included villages inhabited by the majority of the Talang Mamak Tribe in Indragiri Hulu. This study was conducted for 5 months (June to November 2022).

Primary data were collected from direct interviews conducted with competent people, including the Head of the Talang Mamak tribe and the Head of BPN Indragiri Hulu, to address the research questions. Next, secondary data sources were retrieved from library research to support primary data. The gathered secondary data were divided into three types; Primary, Secondary, and Tertiary Legal Materials. The Primary Legal Material refers to the customary law of Indragiri Hulu and the main books, which served as the main references in this study. The Primary Legal Material used in this study is the 1945 Constitution, Law Number 5 of 1960 concerning Agrarian Principles. Next, the Secondary Legal Materials are library materials in the form of supporting books and other references in line with the study focus. Lastly, the Tertiary Legal Materials denote library materials that facilitate in interpreting the Primary and Secondary Legal Materials, such as encyclopedias and dictionaries that meet the research needs.

The qualitative research approach was employed in this study. The qualitative data analysis emphasized the quality of the study outcomes and the deductive method was applied to conclude the qualitative analysis. Decomposition to arrive at general conclusions from specific ones was performed descriptively. In doing so, the data were described and analyzed based on the underlying theory to arrive at accurate conclusions.

## Results/Findings

### *The Meaning of Land for the Talang Mamak Community*

According to Savigny & Abraham (2002), the law refers to the manifestation of the spirit and soul of the nation (Savigny illustrated the example of the German nation (Reimann, 1989). As elaborated by Savigny, law originates from the various nations in this world with each nation having its national soul. The spirit of the nation differs from one another, as explained by Savigny & Abraham (2002) in "*Das Recht wird nicht gemacht, est is und wird mit dem volke, that is, laws are not made, but grow and develop with the*

people" (Rasjidi & Rasjidi, 2007). Savigny's adage reflects the continuity between existing laws and laws in the past. The law is described in the form of continuity from the past legal reality to the present one. Savigny, in this case, sought to convey the message that historicity is required in legal disclosure (Manson et al., 1914).

Savigny & Abraham (2002) highlighted that the law is not the will of the state, but stems from the life of a nation. State, nation, and law cannot be isolated. As the reality of law derives from the reality of society, the law reflects the consciousness of a nation. The law is determined by the existence of a nation. The law grows with a nation, increases with it, dies at its dissolution, and is a characteristic of it (Basu, 1925). In principle, the law has dual meanings; law as a product of society and law that continues to develop along with the progress of society - law carries an indelible mark from the nation's history (Tamanaha, 2015).

The form and substance of law do not exist and are not standard, but rely on society progress (Chand, 2005). The law departs from the impersonal power found in the spirit and soul of the nation. The law has a special character, is fundamental, and illustrates a mythical reality. Since legal genealogy is society, the law is local wisdom and originates from the habits of a nation (Kutner, 1972). According to Dilcher (2016), the law is only part of the integrative aspect of a nation's culture. Thus, the law is a product of cultural conventions (Zimmermann, 2013).

Land and forests are significant components of the Talang Mamak customary law community. The life of the Talang Mamak customary law community heavily depends on land and forests based on Five Workplaces (*Kerja Lima*): cutting, cutting, burning, slashing, and reaping (Hamidy, 1991).

Since centuries ago, the Talang Mamak customary law community has been living in peace and at one with nature. Their sources of income are from collecting forest products and nomad farming. They have a crucial role in supplying world market demand. Since the advent of the 19th century, the global demand for forest products has escalated, especially for *jernang*, *jelutung*, red/white balam, gaharu, and rattan. Despite the sluggish market for forest products in the 20th century, planting rubber emerges as an economic alternative. Rubber planting certainly makes them more settled, while providing them with a way to defend their land and forests (Gilung, 2012).

As forests and land in the Talang Mamak customary law community can become their property, those forests and land can revert into becoming tribal or customary land. If the land that has been cleared is cultivated or built upon, it can continue to be the individual's property. When the land becomes a jungle due to abandonment, the land becomes tribal land or customary land. This is taken from the customary law: "*Dekat tidak dikenanaan (dikendono), Jauh tak diulangi, Batin Berkuasa*" (Near not noticed (visited), far not repeated, Customary Chiefs in Power).

The customary law on land gives much importance to the relationship between indigenous peoples and the land. An inseparable bond exists between indigenous peoples and their land. This bond creates an interaction that goes beyond the interaction between subject and object, but generates a dimension of spiritual bonding, even in the religious aspect.

Indigenous peoples cannot be isolated from their customary lands, primarily because their existence is determined by their customary land ownership. Consequently, the relationship between indigenous peoples and their customary land creates rights and obligations. Referring to the customary law on land in Indonesia, there are two types of rights:

- i. Communion rights refer to rights to land that are owned, controlled, utilized, and enjoyed by customary law communities in an area. This right is often referred to customary rights.
- ii. Individual rights denote rights to land that are owned, controlled, utilized, and enjoyed by individuals.

Haar (1981) described the relationship between communion rights and individual rights. Those who live in a residential center refer to village communities, while those who live scattered in residential centers that are of equal value to one another in a limited area are known as regional communities.

Customary land law is the rules of indigenous peoples implemented for managing their land. Customary land rights, according to customary law, are:

- i. *Ulayat* rights refer to land rights that are jointly held by all members of the customary law community. *Ulayat* land is land whose customary rights are held by customary law communities (Purbacaraka & Halim, 1985).
- ii. Individual rights denote land rights granted to individuals within and outside a village (in the area of customary land). The six types of individual rights are: property rights (*inlands bezitrecht*), voting rights (*voorkeursrecht*), rights to enjoy the results (*genotrecht*), usufructuary and processing rights, compensation rights (*ambtelijk profijt recht*), and purchasing rights (*naastingsrecht*) (Sudiayat, 2007).

Indigenous individuals can meet their needs for life because they own forests, land, and water. The area inhabited by an indigenous community is called *ulayat* land. *Ulayat* land refers to an area that is owned and jointly maintained by indigenous peoples to provide as much welfare as possible to its citizens.

The land is a treasure of high value among customary law communities, mainly because the land is a source of life. The land is said to be human life because the land is a place for all humans to carry out activities for life sustenance, such as rice fields, livestock raising, farming, and fish ponds.

The amount of land will not increase and yet the number of people is always increasing. This positions land as an important component and causes people to fight for and defend their land. Land conflicts occur when everyone sees land as a profitable object. The human way of thinking about land is economic and commercial. Human relations with land are viewed in two relationships, namely:

- i. Humans as land users or use-oriented law; humans depend on land products and humans are controlled by the nature due to their dependence. Since humans do not do much in their management but only depend on nature, humans become subject to being influenced. This perspective is applied by some indigenous peoples, especially those whose way of life is nomadic (moving around).
- ii. Humans as partners of nature (land) - a perspective that positions humans and nature (land) as sharing mutual influence. The existence of both complements each other, thus indicating a harmonious, relational-structural connection between the two. When humans manage land, they must understand that the position of land is not only to meet human needs, as the land itself should be given due importance. Humans are not the only subject that influences, but positions equally that nature is also subject (Firmanda, 2018).

Humans and land share a long history, starting from the fact that land belongs to all humans and humans may use any land, and land may be owned by some groups of people or individuals. Based on the numerous ownership relationships between humans and land, it is crucial to clarify the status of ownership of the land.

The Talang Mamak customary law community positions the earth as the mother, while the sky is the father. The existence of land, forests, and natural resources makes the earth a viable place for people to be born and live. This confirms that the position of land is significant to the Talang Mamak customary law community, in which land is described as a mother who gives birth, cares for, raises, and provides food, as well as where humans are buried. This concept is elaborated in Hamidy's (2012) book about the text read during burial of the deceased that Hasbullah Kamal once recorded:

*"Salam di bumi dengan di langit, Bumi diakui Ibu Langit diakui Bapak, Ambung Angin Saudara Nyawa, Kayu Kayan Akar Daka, Kau Datang dari Allah, Nan Halus Pulang ka Tuhannya, Barakat-barakat jalanmu diluruskan Allah, Rasi Tanah Pulang ka nan suci"*.

A similar concept was reiterated by the Resident Assistant Obdeyn from Indragiri, who recorded another version by the Talang Mamak customary law community,

*“Bumi ibu langit bapak, Air sudara kayu daka, ambun angin sudara nyawa, Rasi tanah balik ka tanah, Rasi air balik ka air, Gandarusa gandarusi, Tabus salah tumbuh di lambah, Kalau berdosa di puji, Kalau basalah disambah, Nyawapun kombali kepada Tuhan”.*

## Discussion

### *Shift in Status of Land: Change of Identity*

Customary land prior to Law Number 5 of 1960 concerning UUPA belonged to the association (community), individuals, and the king. The use of customary land necessitated permission from competent authorities who were customary leaders, including *datuk*, *ninik mamak*, *penghulu*, and customary heads.

During the Dutch colonial era, the land law stemmed from the application of both Dutch law and indigenous peoples' law (customary law). Customary land laws that were implemented during the Dutch era included *ulayat* land, private land, business land, and *gogolan* land, while Dutch land laws consisted of *eigendom* right land, *erfpacht* right land, and postal right land (Soedjendro, 2005). The transfer of land ownership at that time was executed via transfer of names through *overschrijving ambtenaar* after the sale and purchase took place in front of a notary.

During the Japanese colonial period in Indonesia, the rules governing land did not change. The use of law regarding land involved Western law and customary law. Only one law was related to land during the Japanese colonial period, namely Law Number 17 of 1942, which took effect on June 1, 1942 in Indonesia.

After gaining independence, Indonesian laws relating to land from the colonial period were still used. Article II of the Transitional Rules of the 1945 Constitution stipulates: “All existing state agencies and regulations are still in effect immediately as long as they have not a new one shall be held according to this Constitution.” Upon considering that the rules governing land using Western law were not in accordance with the conditions of the Indonesian society, Law Number 5 of 1960 was introduced in 1950 in light of UUPA.

The UUPA regulates the transfer of land ownership, particularly land with the status of property rights, as contained in Article 20 of UUPA that reads, “property rights are hereditary, the strongest, and the most complete things that people can own over land.” Property rights owned by people can be transferred and transferred to other parties. Article 26 of the UUPA depicts that the transfer of ownership of land can be performed by: buying and selling; exchange; grant; gift with will; giving according to custom, and other acts intended to transfer property rights.

The transfer of land ownership in UUPA is elaborated in Article 18 by stating that in the public interest, including the interests of the nation, the state, and the common interests of the people, land rights can be revoked by providing adequate compensation and abiding by the law. The transfer of land ownership, which was originally held based on property rights, can be transferred to state ownership for the public, common, national, and state interests.

Transfer of land ownership is classified into two types: (a) full transfer of land ownership (e.g., buying and selling of land) and (b) partial transfer of land ownership – a transition that occurs in the form of a transfer of land rights, so that the land ownership is still held as a proprietary right, but the ownership of the land rights is given to a third party, as stipulated in the Cultivation Right (Articles 28-34 UUPA), building use rights (Articles 35-40 UUPA), usage rights (Articles 41-43 UUPA), rental rights for buildings (Articles 44-45 UUPA), rights to clear land and collect forest products (Article 46 UUPA), as well as Land Rights for Sacred and Social Purposes (Article 49 UUPA).

Iman Sudiyat, in his book entitled “Hukum Adat”, depicts that land law concerning the transfer of land ownership or the transfer of land rights is divided into three types: selling pawns, selling offhand, and selling annually. The National Land Law, which main provisions are stated in UUPA Number 5 of 1960, serves as the legal basis for owning and controlling land by other people and legal entities to fulfill their needs for business or development. Individual land rights are always sourced from the Indonesian Nation's Rights to land Article 1 paragraph (1) of the UUPA. Each tenure right to land in the National Land Law

includes the rights of the Indonesian nation over land Article 1 paragraph (1), state control rights Article 2 paragraph (1) and (2) of UUPA, as well as individual rights to the land comprising of land rights (primary and secondary) and collateral rights to land (Basuki, 2003).

Procedures deployed to obtain land rights rely on the status of the available land; State Land or Private Land. For State Land, the land acquisition procedure involves the application for rights. As for land with the status of Land Rights (primary rights), the procedure to acquire the land is through the transfer of rights (buying and selling, exchange grants, and exchange) (Basuki, 2009). Every land right obtained from title must be registered at the Land Agency Office (BPN) (formerly the Agrarian Office) in each Regency/Municipality (interview, head of BPN Indragiri Hulu, 20/10/2022).

*Ulayat* land refers to the shared land of the members of the customary law community. The land tenure rights of indigenous peoples are called *Ulayat* Rights. *Ulayat* Rights denote a series of authorities and obligations of a customary law community, which is associated with the land located within their territory. For instance, UU no. 5 of 1960 or the UUPA acknowledges the existence of *Ulayat* Rights, along with two conditions: its existence and implementation. Article 3 of the UUPA depicts that customary rights are recognized as long as they exist in reality (Harsono, 2008).

All activities of indigenous communities involve land, as land is a key element in performing customary law community activities, including the Talang Mamak indigenous community. Many indigenous communities assert that land is their dignity. If people do not own land, their dignity is lost. In other words, land affects human existence, and thus, people without land have a lower existence.

The presence of the state reflects the social contract of society. Most Indonesians belong to indigenous groups of people, which have existed long before the establishment of the state. After the initiation of the state, the government had attempted to manage natural resources in Indonesia, including the management of forests. Issues like the New State Capital (IKN) and indigenous forests, for example, are recent cases that have gained international public attention, indicating a neglect of indigenous rights.

Indigenous communities in IKN are concentrated in two regencies, namely Penajam Paser Utara and Kutai Kartanegara. In Penajam Paser Utara, there are the Paser indigenous communities and several sub-ethnic Dayak Kenyah and Dayak Modang communities. In Kutai Kartanegara, there are communities from various ethnic groups, including Kutai, Dayak Modang, Benuaq, Tunjung, Kenyah, Punan, and Basab. Land conflicts in the IKN area have the potential to disconnect communities from their ancestral land, which is their main identity (Hidayat, 2022). On the other hand, it also indicates a lack of alignment between the development mission and the empowerment of indigenous communities. Furthermore, there is no provision in the IKN Bill that addresses Indigenous Communities. In fact, there is not a single mention of “customary” in the draft IKN Bill (Cahyadi, 2022).

In this context, National Law cannot be relied upon, partly due to the complex, multi-level, sectoral, and restrictive process of recognizing indigenous communities and customary land. Indigenous communities with weak legal foundations from a national legal perspective find it increasingly challenging to assert their ownership (Bakker, 2023). Meanwhile, the Indigenous Communities Bill, which was expected to address these issues, has not provided certainty. This is a factor that makes indigenous territories easily claimed and taken by others.

The substance of the Presidential Regulation Number 88 of 2017 regarding the Settlement of Land Tenure in Forest Areas offers legal protection for the rights of communities who control land in forest areas. Hence, it is crucial to implement a policy of settlement of land tenure in forest areas. Article 4 Paragraph (1) stipulates that land tenure in forest areas controlled and utilized by parties (individuals, agencies, social/religious bodies, and customary law communities who control and use land parcels in forest areas) must meet the following criteria:

- a. The land parcel is physically controlled by the party with good intentions and openly;
- b. land parcels are not contested; and
- c. land parcels are recognized and justified by the customary law community or the head of village concerned and confirmed by the testimony of a trusted person.

Article 4 Paragraph (2) Land Tenure in Forest Areas, as referred to in Article 2, stipulates the following:

- a. plots of land that have been controlled and utilized and/or have been granted rights over them before the said plots of land are designated as forest areas; or
- b. plots of land that are controlled and utilized after the said parcels of land are designated as forest areas.

As stated in Article 5 paragraph (1), land tenure in forest areas, as depicted in Article 2, is controlled and utilized for settlements, public and/or social facilities, arable land, and/or forests managed by customary law communities.

### Conclusion

*Ulayat* land, as the soul of the nation for the Talang Mamak customary law community, has proven its significance due to the position of land and forests in their lives. The relationship between land and the Talang Mamak customary law community is an inseparable one. All activities carried out by the Talang Mamak customary law community involve land as the main element. The community places land as a matter of self-respect; a community without land loses its self-esteem.

Given the importance of the study's findings, this study recommends policymakers to provide legal certainty regarding land ownership for the Talang Mamak indigenous people. Eliminating complex bureaucratic processes and overlapping regulations between local and central governments is a primary issue to be addressed. This legal certainty not only governs land ownership but also safeguards cultural heritage and local wisdom. Additionally, developers or companies should pay attention to and accommodate the living law held by the community through generations, and involve them in an equal dialogue process.

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