

Communal Rights of Land: Indonesia Government Effort to Protect the Rights of Indigenous Group

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Abstract—The rapid development of infrastructure in Indonesia indeed requires a considerable amount of land. This often results in neglect of the rights of indigenous people to possess and utilize their sacred land. The effort to protect the land of indigenous people in Indonesia often fails because of two things: 1) there is no certification of the land and 2) even when the land is certified on behalf of group leader, the land is then sold or rented to other parties hence the failure to protect the existence of indigenous group. To solve this problem, Indonesian's Ministry of Land and Spatial Planning has issued Regulation 9/2015, which then revised by Regulation 10/2016, through which the Minister created a new right of land called communal rights. These rights give joint-ownership land titles to indigenous groups or any groups that have inhabited a land for more than ten years. In addition to guaranteeing their rights to possess a land by giving certification, communal rights are given to prevent the land being transferred to parties other than the indigenous group itself. This paper will explain the basic concept, process, and requirements of communal rights in the framework of Indonesian's land law. This paper will then explain how communal rights can help protecting the existence of indigenous group in Indonesia. Further, this paper will mention several shortcomings of communal rights in the level of regulation as a suggestion for improvements.

Index Terms—Adat law, communal tenure, indigenous group, *ulayat* rights.

I. INTRODUCTION

For several decades, indigenous people have been living in territories that contain great numbers of natural resources. They utilise the natural resources from their own land to sustain their life. The indigenous land has a very sacred philosophy that sometimes it is used as a symbol of indigenous spiritual, tradition and culture. That is why indigenous people have a very deep and strong connection to their land.

The problem arises when the wealthy natural resources in an indigenous land are somehow viewed as business opportunities by the private sectors. To gain a lot of profits, numerous private companies compete to exploit the indigenous land's natural resources, such as mineral, oil and gas, etc. While the private companies are digging for gold, the indigenous groups are tragically marginalised and discriminated by the government who lets the company take their holy land away from the purpose of increasing the economic growth.

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The dispute above has become a serious issue in Indonesia. Several cases filed in Indonesian court concerning the fight over land between indigenous people and the private company. What becomes an irony is that most of the Indonesian ruling courts decide to win the private company over the indigenous people just because these indigenous group does not own any legal certificate to prove the entitlement of the land. Meanwhile, if we look up to the Basic Agrarian Law No. 5 of 1960 (“BAL 5/1960”)— as the single most important piece of legislation governing land rights in Indonesia – there is a government obligation to recognise and fully protect the existence of indigenous land (“*Ulayat Right*”) as long as such indigenous communities still exist in reality.

The Indonesian government has made a progress to reduce the number of indigenous land conflicts. The Ministry of Agrarian and Spatial Planning issued Ministerial Decree No. 9 of 2015 that introduce a new term called communal tenure as a collective right of land ownership specifically given to the indigenous groups. In the previous regulation, indigenous people are only given the authority to use the land and not to own it. Indigenous people now can request and register their land to National Land Agency (“BPN”) and get a legal document to prove the entitlement of their own land. The communal right is not limited to indigenous communities but can be requested by any community that has subsisted on the land for minimum 10 years. This kind of legal breakthrough will strengthen the indigenous entitlement over their land.

This paper will be divided into three parts. Part I introduce the Indonesian regulation concerning the land and explain several titles of land in Indonesia. Part I also describes the existence and implementation of *ulayat* right as a fundamental right of indigenous land in Indonesian Basic Agrarian Law. The implementation of *ulayat* right in Indonesia is somehow problematic, particularly because the *ulayat* right is not registrable under Basic Agrarian Law.

Part II begins with a brief explanation about communal right as the new title of land in Indonesia. The subject of communal right is not only the indigenous groups, but any community that has been living and utilising their land for more than a decade as well. Part II of this paper also describes the procedure for indigenous groups to obtain the communal land title and special circumstances in the issuance of the communal land title itself.

The last part of the paper provides conclusions about the implementation of communal right in Indonesia. In practice, communal right as the formalisation of *ulayat* right has been long left unclear. That is why this paper also provides several recommendations to make communal right to be fully protecting the existence of indigenous land in Indonesia.

II. INDIGENOUS COMMUNITY AND *ULAYAT* RIGHTS IN INDONESIAN BASIC AGRARIAN LAW

Indonesia Constitution of 1945 stipulates that all land, water, airspace, and natural resources are controlled by the State and must be used to assure the citizen's welfare. To implement this constitutional mandate, the government issued the Basic Agrarian law that sets up Indonesian land management system. The purpose of the law is to make Indonesian land becomes available for distribution to all citizens under various forms of land tenure [1].

There are several statutory rights of land under Indonesian Basic Agrarian Law include: (1) the right of ownership; (2) the right of exploitation; (3) the right of building; (4) the right of use; (5) the right of lease; (6) the right of opening-up land; (7) the right of collecting forest product; (8) and other right not included in the above-mentioned rights which shall be regulated by law made by the legislative [2]. The fullest and strongest right among all is the right of ownership, which is capable of being registered, transferred or mortgaged [3].

The Basic Agrarian Law is established upon indigenous right of land called *ulayat* right. The regulation Number 5 of 1999 entitled 'Guideline to solving the problem of *adat* communities' defines *ulayat* right as follows:

'Ulayat right is a right of land, enjoyed by a specified indigenous community to a specified territory that is the everyday environment of its member to exploit the profit of its natural resources, including land, in the aforementioned territory, for the benefit of their survival and daily needs, which are made clear by physical and spiritual relations of decent between the aforementioned indigenous community and said territory.[4]'

Ulayat right is only eligible for indigenous or *adat* law communities. Indigenous or *adat* law community is a group of people united by a customary law structure as equal members of that legal community through a communal place of residence or through descent [4].

However, the existence of *ulayat* right itself must be in accordance with national regulation and shall not be in conflict with national interest [5]. To obtain *ulayat* right, there are several requirements to be met: (i) *ulayat* must not conflict with national interests or regulations set out in the Basic Agrarian Law; (ii) the land must be under the ownership of a recognized traditional/indigenous community (*adat*) and the land boundaries must be well defined and understood; and (iii) *ulayat* right can be registered and certified only after having been rendered into one of the types of formal land rights recognized in Article 16 paragraph (1) in the Basic Agrarian Law [6]. *Ulayat* right that exists on land administered by BPN and on forest land is administered by the Minister of Forestry and in several cases is also administered by Mines and Energy Agency [7].

Notwithstanding the recognition of indigenous land in national legislation, *ulayat* right is not converted into a statutory land right under the Basic Agrarian Law. Article 3 of Basic Agrarian Law regulates that *ulayat* right is recognised where they continue to exist, but the article does not mention about it being able to be registered. *Ulayat* right can only be

registered if it is converted into statutory rights, such as the right of ownership or right of use [8]. Therefore, indigenous people cannot register their own indigenous land communally on behalf of the indigenous group. This situation puts indigenous people at risk of losing their own land because they do not have any legal document or certificate to prove their entitlement towards the land. As a result, most of the indigenous groups have to register their land in the name of an individual community member, with the agreement that this member will hold the land on trust for the rest of the community [9]. There is a huge potential that the person who acts behalf the indigenous groups to hold the land abuse his position to gain a lot of profits only for himself by selling the land to the other parties. This scenario will be definitely very harmful to the indigenous land and people.

Another problem that may arise from individual registration of indigenous land is that the process of registration can affect the structure of the indigenous community. Haverfield stated that individual registration of land leads to an increasing commodification of land that undermines the customary management systems promoting short-term, individualistic, and profit seeking [10]. The context of customary law in the the indigenous group consists of communal rights and obligations, which are underpinned by social process of consensus, discussion, and deliberation. Individual registrations of indigenous land will threaten traditional structure, which is based on communal and cooperative elements [11]. That is why individual registration is obviously contradictory to the basic principle of indigenous law itself.

These problems are the reasons why some indigenous groups never want to register their land. Besides the registration procedure is against with their principle, the individual title of the land obtained from the registration tends to raise more conflicts to the indigenous group itself. Therefore, there are so many indigenous lands with no legal documents exist in Indonesia. This condition is really harmful to the indigenous people because they are risked to lose their land at any time. The situation is getting worse when they cannot defend themselves in front of the court because there is no legal document to prove indigenous land entitlement. Although Basic Agrarian Law protects the *ulayat* right, but in reality *ulayat* right has an extremely weak position, compared to any other statutory rights.

To end the indigenous land conflict and to give more protections toward *ulayat* right, the government has made an effort by introducing a new land title, called communal tenure. Communal tenure is a collective right of ownership that can be registered to BPN. By implementing the communal tenure, the indigenous people can register their land in the name of community and get a legal document as a proof of their land entitlement. This new title of land is in accordance with the communalism and collective principles, which are strongly held by indigenous people.

III. COMMUNAL TENURE

A. Communal Tenure in Indonesia

As what have been mentioned in the previous chapter, BAL

5/1960 defines the fundamental types of rights that may be held by private individuals and entities, and sets out the role of the state with respect to its direct use of land as well as its regulation of private rights and private uses of land. The term communal tenure is not recognised in BAL 5/1960. In referring to the rights of *adat* community over their land, BAL 5/1960 uses the term “*ulayat* rights.” Although recognised, *ulayat* right is not established as a type of land tenure thus unable to be registered. BAL 5/1960 only sets out a provision that regulates *ulayat* rights or similar rights of *adat* community shall be recognized only if it still exists and the interests of the community are not inconsistent with the interests of the Indonesian state [12]. The criteria for determining the validity of a community is set forth in the level of ministerial regulations.

According to the BAL 5/1960, a new type of land tenure can only be established by the law made by the legislative [13]. Meanwhile, communal tenure was established by Indonesia’s Ministry of Land and Spatial Planning in 2015 through Ministerial Decree 9/2015 which was later revised by Ministerial Decree 10/2016 (hereinafter referred to as “**MD 10/2016**”). Therefore, through MD 10/2016, the Minister establishes communal tenure as *hak milik* or the rights of ownership. Communal tenure is defined as a title of land jointly owned by *adat* law community or any group of people that occupy a land within a forest or plantation area [14]. By this definition, communal tenure is essentially the same as the rights of ownership, but it is owned by a group of people. Consequently, communal tenure holds the same value as the rights of ownership that, according to Law 5/1960, is the strongest and fullest rights over land. This right of ownership is unlimited in time and capable of being sold, bequeathed, transferred, and mortgaged [15].

It can be inferred from the explanation above that communal tenure is a formalization of *ulayat* rights, but it is established as a right of ownership – one of registrable land tenure. Therefore, communal tenure has both public and private aspects. It has private aspect in essence that the land can be transferred or mortgaged just like any other rights of land. It has public aspect in essence that the land and resources within belong to the whole member of the community. Therefore the decision to utilise the land and the common pool resources within shall be communally agreed and done for the good of the group.

The community, in this sense, needs to establish two sets of rules: (i) those rules that constitute the community as an entity in the eyes of the state and (ii) those that define internal rules of benefit sharing [16]. In the case of Indonesia, this set of rules is established in *adat* law, a customary and unwritten law that is passed from a generation to the next.

B. The Subject of Communal Rights

According to MD 10/2016, communal tenure can be given to two subjects: (i) *adat* law community and (ii) any group of people that occupy a land within a forest or plantation area [17]. For the first group, the issuance of communal tenure is constructed merely as “inauguration” or formalisation of the rights that have already existed. Meanwhile, for the second group, the issuance of communal tenure is constructed as an administration of new rights of land [18].

In MD 10/2016, *adat* law community is defined as a group of people bind by a customary legal order (*adat* law) as members of a legal entity due to their similarity of residence or their ancestry. Therefore there are four elements to be fulfilled before declaring a group to be an *adat* law community: (i) the group shall live in *gemeinschaft* order; (ii) there shall be an institution within the *adat* authorities; (iii) there shall be a clear territory inhabited by the group; and (iv) there shall be a legal order (*adat* law) upheld by the group [19].

Essentially, *adat* law community is different from the indigenous group. Djuweng and Moniaga (1994) explained that in Indonesia, the majority of people are indigenous society, but not all them are *adat* law community. *Adat* law community refers to what Article 1 (1.a.) of the 1989 ILO convention called as Tribal People, which are the people living in a free country whose social, cultural, and economic condition are different from majority of the population of that country and whose status is governed partly or entirely by their customs and traditions or by special laws and regulations [20].

The second category of the group that may be granted a communal tenure is a community that has inhabited a land within a forest or plantation area. But, to be granted the communal tenure, the group shall prove the following: (i) they have physically occupied the land for at least 10 years consecutively; (ii) for that time being they still gather resources from the earth or utilize the land directly to fulfill their daily needs; (iii) the land is the main source of life and livelihoods; and (iv) there are social and economic activities integrated with the life of the community [21].

Specifically for the second category of the group, the community may organise themselves as a cooperation, a unit within a *desa*, or other types of group [22].

If granted, the certificate of communal tenure may be registered under the following options (i) all members of the *adat* law community; (ii) the leader of the *adat* community; (iii) representative of the community; (iv) member of a cooperation established within the community; (v) a unit within a *desa* (sub unit of a district); or (vi) leader of other type of community groups [23].

C. Procedure and Requirements

In Indonesia’s laws of the land, the registration of land can be done in one of two ways: systematically and sporadically. In systematic land registration, a number of lands within a specified area are registered at once, based on governments’ initiative. Meanwhile, in sporadic land registration, the land is registered based on the request of private individuals or entities [24]. This also applies for the registration of communal tenure. In June 2016, Indonesia’s Ministry of Land and Spatial Planning has reportedly issued communal tenure certificates to nine *adat* law communities in Papua as a systematic land registration [25].

MD 10/2016 regulates that the groups who wish to have communal tenure may file their application to a local government’s land office. The application consists of administrative and other relevant files to prove that the group is qualified to have communal tenure over a land. After the application is filed, the mayor or the governor whose territory

covers the requested land will appoint an ad-hoc team consisting of government officials that handle land affairs, forestry, and natural resources; expert in *adat* law; representatives of the community; and representative of the NGO concerning in *adat* community. This team will then investigate whether communal tenure shall be granted to the applying group. The investigation consists of administrative verification and field inspection [26].

If the team finds that there is indeed an *adat* law community qualified to have communal tenure over their land, the team will submit the investigation report to the mayor or the governor. The mayor or the governor will then issue a decree stating the existence of an *adat* law community and their land. This decree will be delivered to the respective government's land office so that the land can be registered under a communal tenure [26].

If the team finds that there is indeed a group occupying a land within a forest area qualified of communal tenure, the team will send the investigation report to Ministry of Forestry so that the land can be released from the forest area. After being released, the land office will issue a certificate of communal tenure for the group [26].

If the team finds that a group occupying a plantation area is qualified of communal tenure, the team will send the report to the individual or entity who owns the tenure of *hak guna usaha* (a tenure that gives the holder a right to exploit a land for plantation or other types of enterprise) over the land. This individual or entity will then be asked to voluntarily release part of their plantation area to the state. The state, through the government's land office, will then issue a certificate of communal tenure for the group [26].

In the case of the tenure holder not willing to voluntarily release part of their plantation area, they can file a motion to the land office. The land office will then send a request to Ministry of Land and Spatial Planning to settle the matter [26].

D. Special Circumstances

As said above, communal tenure has both private and public characteristic. This is manifested in the Article 23 MD 10/2016 that regulates the transfer of the land under communal tenure. The land with communal tenure issued for *adat* law community can only be transferred according to the respective customary law. While the communal tenure issued over the land that is previously within a forest or plantation area can only be transferred due to inheritance [27].

This shows that even though communal tenure grants the right of ownership – the strongest and fullest right of land – the tenure comes with a limitation. In the practical level, this limitation can restrict the abuse of land rights by transferring the land and resources to the party other than *adat* law community itself hence the failure to achieve the goal to protect the indigenous group.

IV. ISSUE OF COMMUNAL TENURE

Communal tenure is not a new term in the management of land. FAO explained that communal tenure refers to a situation where a group holds secure and exclusive collective

rights to own, manage and/or use land and natural resources, referred to as common pool resources, including agricultural lands, grazing lands, forests, trees, fisheries, wetlands or irrigation waters [28]. Therefore, communal tenure is not merely the right to own a land but also right to manage and utilise the resources. This particular component of communal tenure seems to be missing in the definition of Indonesian communal tenure. Communal tenure, in MD 10/2016, is only defined as collective rights of ownership of the land, but not the resources. It also does not mention about the right of the community to manage and use the resources based on their custom.

Meanwhile, based on the research conducted by National Law Commission of Indonesia in 2004, the concept of *adat* community includes following elements [29]:

- 1) a group of people living together in a certain territory;
- 2) the group is seen as something natural thus there is no desire from the member of the group to dismiss the existing bond;
- 3) the group has common interests;
- 4) the group has their own authority;
- 5) the group has their means to manage land, water, and natural resources within; and
- 6) the group has their origin from passing generation or common ancestor.

Referring to these elements, *adat* community considers the natural resources within their *ulayat* land as a common pool resources originated from their ancestor and are passed from generation to generation. They believe that they have to create a harmonious relationship with the mother nature because their life strongly depends on it. They see the forests as a source of their livelihood by providing a place to farm, hunt, and gather foods, as well as a resting place of their ancestral spirits [29].

Therefore, communal tenure should have included the right to manage the land (*hak pengelolaan*) as well – which in BAL 5/1960 is defined as the right to manage land for a specific purpose as approved. If this particular right is not clearly defined, instead of protecting the existence of indigenous group, MD 10/2016 will further jeopardise the *ulayat* rights owned by the community by reducing the meaning merely as a title of land

Furthermore, the issuance of the MD 10/2016, that regulates communal tenure as a registrable land tenure, should not forget that essentially *ulayat* rights are always there as long as they still exist in reality and are not contrary to the nation's interests – as regulated in BAL 5/1960. *Adat* communities in the territory of Indonesia has existed even before Indonesia is established as a nation. These *adat* communities “gave up” their land to the state so that it could be united as a nation. Therefore, the issuance of communal tenure certificate should be seen as government's effort to support the existence of *adat* community, instead of government's effort to define the existence of *adat* community. By saying this, each *adat* community that lives within the territory of Indonesia should be recognised and protected even though their communal tenure is not certified by the state.

V. CONCLUSION

Despite the confusion in defining communal tenure within the framework of *ulayat* rights in Indonesia's law of the land, MD 10/2016 shall be seen as a great breakthrough in the effort of protecting the existence of the indigenous group and their rights over their sacred land. Even though each *adat* community has its traditional land tenure system, which in BAL 5/1960 is recognized, *adat* system only worked to satisfy the needs of the community and custom, but did not provide certainty, public access or knowledge, transferability or legal relationships [30]. To overcome these shortcomings, the state has to regulate these *adat* rights of land ownership and resource management to provide more certainty.

Communal tenure, in this sense, as established through MD 10/2016, is a more applicable formulation of *ulayat* rights that have been long left unclear in Indonesia. The formalization of *ulayat* rights in the form of communal tenure certification will guarantee the rights of the community over their land and give stronger legal force for the community to defend their lands when a dispute arises.

For further revision, there should be a clearer provision in regulating communal tenure which stands on both public and private ground. Some of the issues that have to be clarified are: Can the land be transferred to another party for business activity? Can the community cooperate with the third party in utilizing their land? If so, what kind of cooperation is allowed? Who is the legally competent subject to represent the community in each legal action concerning the land? What happened when the community no longer meets the qualification to possess communal tenure?

Other than advised revision above, communal tenure should be defined more clearly as a right to collectively own a land and manage the resources in a way decided by the community. Furthermore, the issuance of communal tenure as registrable land tenure should not be seen as a mean to define the existence of *ulayat* rights. Even though the *ulayat* rights are not certified or registered, these rights should be protected and recognised as long as they still exist in reality and are not contradictory with the nation's interest.

By defining clearer provisions of communal tenure, the aim to protect the rights of the indigenous group over their land and resources will be easier to achieve.

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