

Optimising Collective Resources Towards Public Welfare Through Strengthening The Communal (Ulayat) Rights

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Abstract

*This work is aimed at exploring and finding an appropriate approach to integrate all diametrical interests in optimizing the collective resources, particularly land. This objective is highly important in the light of land as the collective life resources for society. Unfortunately, the government fails to regulate the boundaries of rights, between the rights to land of the state's rights and to land of the customary (Adat) community or communal (ulayat) rights. Constitutionally, the existence of communal rights is recognized, respected and approved by the government, but its implementation is still not manifested proportionally. The government tends to provide rooms and protection for investors based on rational and efficiency reasons to utilize and exploit the land. Conversely, the customary community appreciates the land as its identity viewed from their religious magic view. This diametrical values and interests should be addressed by the government in order to optimize the utilization of the land for the greatest benefit for the greatest number of people. For that reason, this work will offer a utilitarian approach, as the grand paradigm, to integrate those diametrical interests and values, not only for private sectors but also customary (adat) communities, towards the creation of public welfare.****

Keywords: public welfare, collective resources, ulayat rights, diametrical values and interests.

1. Introduction

1.1. Rationales

The strategic investment potentials related to natural resources, such as gold, coal, oil, gas, etc. stand in the areas that are claimed as part of the communal rights (*hak ulayat*) of indigenous peoples (*masyarakat adat*). This reality often leads to the rise of tensions between the interests of indigenous peoples and that of the State pertaining to efforts to utilize strategic natural resources. For this reason, it is necessary to address the issue of regulatory arrangement in order that all of the collective Indonesian resources can be optimized for the greatest prosperity of the peoples.¹ The above regulatory arrangement must be constructed based on the utilitarian concept that emphasizes maximum prosperity for the people. The issue of State's appreciation for the rights of indigenous peoples in the utilization of land for investment purposes — as the conception of the right of land occupation by the State — can be found in the case of plantation companies. At the implementation level, the land use is often in conflict with the right of land occupation by the State regardless of the State's respect and recognition of the land rights of indigenous peoples. Such a conflict happens when it brings about implications that hinder investment activities².

¹ The goal of the state written in the Fourth Paragraph of the Preamble of the 1945 Constitution emphasizes that the State is responsible for the welfare of its people. This means that the state is obliged to organize the general welfare of the people in order to achieve a just and prosperous society, both materially and spiritually, through public services. One of the State's obligations is to provide services in the agrarian field for the people's welfare. The concept of a welfare state law, also known as the modern constitutional state, means that materially the law could bring justice based on the values of Pancasila. The characteristics of welfare state, among other things, are: prioritizing the interests of all peoples; involving the state in all aspects of the people's lives; and replacing the liberal economy with an economic system that is led by the central government. The duty of a welfare state is to generate a general welfare and the state's duty is to maintain the security of its people in a broad sense, namely addressing the social security in every aspect of public lives.

² The conflicts arising from land disputes are originated from the State's interest in providing the land rights to investment activities that do not respect the communal land rights. In addition such activities often do not obey the substantial and structural aspects of the law. This can be seen in cases of land disputes at ex HGU PTPN II located in Deli Serdang, Langkat

The State's recognition of the rights of indigenous peoples to land, in the form of communal rights, is stipulated in the constitutional and operational foundations of Indonesia. However, a legal vacuum — i.e. the absence of comprehensive local policy that guarantees the State's protection to the communal rights of indigenous peoples — still occurs. In addition, the rights of indigenous peoples also often receive an inadequate attention, particularly when the State deals with the provision of land rights for investment purposes. As a result, conflicts happen and hinder the attainment of the goals of the State welfare concepts, as adopted in the conception of Indonesian state law.

1.2. Thesis Statement

As regards the issue above, this article attempts to find an ideal approach to optimizing the collective resources. The act of optimizing the collective resources can only be realized through the embodiments of the concept of the greatest benefit for the greatest number of people, the principles of public interest, social functioning, and social welfare (public welfare).

2. Examining the Normative and operational Foundation of the Communal (Ulayat) Rights in Indonesia.

1.1. Constitutional Foundation for the Communal (Ulayat) Rights: the Indonesian Constitution of 1945, article 18(b).

The 1945 Constitution (the fourth amendment), specifically Article 18B (2) states that “The State shall acknowledge and respect the traditional law community units and the traditional rights thereof as long as they still survive and comply with the community development and the principles of the Unitary State of the Republic of Indonesia, as stipulated by virtue of law”. Despite such a statement, the constitutional mandate contained in the Constitution has not been implemented justly and seriously by the government, especially in the recognition and protection of communal rights and traditional rights of indigenous peoples for the management of natural resources and land reform. The essence of Article 18B of the 1945 Constitution (the fourth amendment) is that the State's main duty is to create the people's welfare through the management of natural resources based on the traditional wisdoms that exist and grow in the midst of society. This means that the realization of the basic rights of indigenous peoples needs to be brought forward because these rights have often been overlooked. By definition, the communities of indigenous customary law are groups of indigenous people who were born and live in the territory of the alliance of customary laws. These people are bound and subject to the customary law that applies in the region. Customary law, according to Snouck Hurgronje, grows and evolves from the development of social reality that is empirically considered right by the community and has been legitimized by the custom authorities. Thus, it has to be obeyed.

1.2. Operational Foundation of the Communal (Ulayat) Rights: the Basic Agrarian Law Act, article 3.

Article 3 of the Basic Agrarian Law states that the implementation of the communal rights and other similar rights of customary-law communities — as long as such communities in reality still exist — must be consistent with the national interest and the State's interest and shall not contradict the laws and regulations of higher levels. By definition, communal rights and other similar rights contained in the literature are called the rights of disposal (*beschikingsrecht*). This definition entails that the state provides recognition (*recognitie*) of the existence of communal rights for those who are entitled to hold the rights. The holders of these communal rights, therefore, shall be requested to bestow their opinions when the process of the right of land occupation is made by the State. However, the holders of the rights shall not hinder the provision of the rights for land occupation if it is deemed necessary for wider interests.

and Binjai, Sumatra, Indonesia. The disputes stemmed from the problems of managing the plantation located at the communal lands of customary people. Until now they have not been resolved completely yet, and even raise increasingly complex issues. The problem arising at PTPN II in the last 5 years was triggered by the discontinuation or the cancellation of land use extension for PTPN II with the total area width of 5873 Ha. The arguments used to justify the cancellation of concession are the lands were still cultivated by communities and/or Deli Serdang, Binjai and Langkat areas were prioritized as General Urban Structure Planning System. Lutfi L Nasoetion, The Policy of Handling problems of Land Use in the Era of Local Autonomy, Papers Presented in a seminar "Problems and Settlement of Land Disputes" organized by the Sigma Conferences in Jakarta on 12-13 March 2002, p. 23.

Normative foundation: The existence of communal rights has been recognized and approved by the constitution 1945, article 18(b). Operational foundation: UUPA, article 3.

Problem:

A lack of government's attention and commitment has been identified as regards the protection of communal rights. This problem has sparked a conflict of interests between the government's interests and that of the community, i.e., customary (*adat*) community. Further implication for this is that the problem will create legal uncertainty, particularly in optimizing collective resources, particularly in investment activities that may exploit the strategic natural resources. The example for this is the exploitation of areas that belong to communal rights of the customary community by the gold mining companies. Ultimately, this issue raises conflicted norms and interests between the interests of the state and that of the customary community.

3. *Identifying the obstacles in protecting the communal rights in Indonesia*

1.1. **Diametrical Interests, Values, and Norms in Protecting and Optimizing Communal rights.**

1.1.1. **Individualism vs Collectivism**

According to the legal provisions contained in the legislation, the status of customary rights is recognized when its existence can be proven. This shows that the conception of the Indonesian national agrarian law gives individual rights to the holders of land rights. However, the communal rights should be subject to the national interests, which are positioned in the higher order and oriented towards the collective achievement of well-being of all (utilitarian). In controlling individual and collective interests, differences of interpretation often arise. In this relation, communal rights can be taken into account and recognized during the process of devolution of land tenure rights, especially those that involve state interests or other interests as authorized by the State. The State could rationalize the tenure based on the formal jurisdiction of the existing regulations, but these communal rights do not have a clear measure of legal validity as they cannot be proven by legal written evidence. Consequently, this gives more emphasis to the formal jurisdiction (positive law)³ that becomes the target of the utilization, application and allocation of land rather than the formal jurisdiction of the living laws whose principles and values are used and held by the indigenous communities of communal rights. The values embraced as the living law by indigenous peoples in the customary community largely depend on the nature of their alliances. Thereby, the communal rights exist only within the territorial alliance and genealogical territorial alliance.⁴

Conceptually, the communal rights give more emphasis to the collectivity of indigenous people alliances. In the area of communal law, intervention is made by the head of various legal alliances, such as the head of villages or the board of village management. Therefore, if a problem arises with regard to indigenous lands, the existing management will solve it. In the communal agrarian law, there are principles of law as part of the legal community. In relation to the legal community, Lili Rasjidi states⁵: "The legal community is a set of various entities (legal unity) that bind and relate one another in a well-organized way. The entity that forms the legal community may be an individual, group, organization, or state legal bodies and other unities, whereas the tool used to regulate the relationship among various legal entities is called the law, i.e. a unified system that is composed of various components ". According to the communal law, land has very important position in the community life. Based on its nature, land is the only wealth entity that has permanent or beneficial merits when it is cultivated productively. Thus it can give life to the alliance of indigenous peoples.

The customary law suggests that the rights on indigenous lands be attached to seigniorial (disposal) or communal rights. This denotes that the community has certain rights over the land that applies both externally and internally. The external rights of the legal alliance of indigenous communities may be in the form of reaping the yields of the forest products such as building materials, firewood, resin and foodstuffs. All of these kinds of land are potentials for farming as well as supporting the entire life of the inhabitants.

³ According to John Austin, "Positive laws, or laws strictly so called, are established directly or immediately by authors of three kinds: - by monarchs, or sovereign bodies, as the supreme political Superiors". John Austin, *The Province of Jurisprudence Determined*, Edited by Wilfrid E. Rumble, Cambridge University Press, New York, 1995, p. 118.

⁴ Mertokusumo, *Perundang-undangan Agraria Indonesia (Indonesian Agricultural Legislation)*, Liberty, Yogyakarta, 1988, p. 12

⁵ Lili Rasjidi, *Hukum Sebagai Suatu Sistem (Law As a System)* PT. Remadja Rosda Karya, Bandung, 1993, p.70

The internal rights may be in the form of regulations pertaining to the rules of harvesting the land products for all members of the alliance so that each member will surely receive a legitimate part. This is done through the restriction of individual rights.

The overall principles of law that grows and develops due to the social interaction among individuals are very closely linked to the utilization of the lands among members of society so that disputes can be avoided and thus the utilization of lands can be arranged the best it can. This matter is regulated in the communal agrarian law. The provisions of this agrarian law will materialize the rights and obligations pertaining to the land rights.

1.1.2. Exclusivism vs. Inclusivism

The national development for the land ownership through the concept of the rights of land occupation by the State provides exclusive rights to the land holders, e.g. investment activities oriented toward efficient and effective production. For that reason, the State has an obligation to provide legal certainty for investment activity in the form of capital investment. The appeals that attract investors to invest will depend on the legal system applied. Thus, the existing legal system should be able to create certainty (predictability), justice (fairness) and practical utility (efficiency)⁶. This is certainly different from the conception of customary law that is more oriented toward the interests of the alliance of indigenous peoples.

The rights of land under the customary law provide not only authorities but also obligations for those who own or cultivate the land. Therefore, those who receive individual rights must utilize the land, and not abandon it. When they abandon the land, then the individual rights will be revoked and the land will belong to the communal alliances. In the same vein, if an individual right is maintained continuously or lasts for generations, the communal rights will be weakened and eventually they become non-existent.

1.1.3. Materialism vs Spiritualism

The agrarian laws — especially the communal rights — have been known to have an ever-lasting relationship between the land and the citizens of Indonesia. This relationship becomes sacred and brings forth a religious magical relationship between the owners of the land and the land owned within indigenous communities. The customary law community has the right to land, i.e. the tenure and ownership of the land under the scope of customary law. The communal right has a very broad sense because it gives various rights to members of the community to use the land as a residence (settlement) including a graveyard, farmland, grazing area, forest product harvesting, animal hunting grounds, and other forest animal catching. All of these are done under the control of the alliance of communal rights that monitor and restrict the acts of its community. In this relation, Ter Haar suggests that the enactment of communal rights is two-fold: internally it regulates the rights and obligations of indigenous community members; externally it regulates the rights and obligations of outsiders and the right to defend their communal rights against interference from outside⁷. The existence of the rights and obligations, utilizations and applications of communal rights is the main subject of the customary agrarian law. Thus, the traditional society gives a magical-religious (*magischreligius*) attribute to the tenure of this land.⁸ In the same vein, the land is very much valued because it becomes a residential area for the owner, provides livelihood, and becomes the burial place for him and his family. Of more importance is that it becomes a place for the unseen spirits or guardians that are often regarded as protectors of the local community if the land is well-maintained.⁹

4. *Designing the strategic approach in integrating the diametrical interests, values and norms in optimizing the collective sources*

1.1. Embodying the greatest benefit for the greatest number of people

With reference to the Constitution of 1945 as the conception of constitutional values, the embodiment of public interests concerning the implementation, utilization and allocation of land should become the targeted priority.

⁶ Hulman Panjaitan, *Hukum Penanaman Modal Asing (Foreign Investment Law)*, Ind-Hill Co, Jakarta, 2003, p. 9-10

⁷ Ter Haar Bzn, *Beginnselen en Stelsel van Adatrecht/ Principles and Composition of Customary Law*, Translated by K. Ng. Soebakti Poesponoto, Pradya Paramita, Jakarta, 1958, p. 71

⁸ Soerojo Wigjodipoero, *Pengantar Asas-Asas Hukum Ada (Introduction to the Principles of Customary Law t)* PT. Gunung Agung, Jakarta, 1984, hlm. 197

⁹ Koentjaraningrat, *Manusia dan Kebudayaan di Indonesia (Man and Culture in Indonesia)* Djambatan, Jakarta, 1979, p. 340

The embodiment of these public interests requires a legal framework and the conception of the implementing rules to identify the effectiveness of the recognition of indigenous communal rights that go hand in hand with national interests. This is intended to avoid conflicts in the investment activity. Such an embodiment is meant to transform the legal function as a means of development to ensure that the change occurs in a systematic way¹⁰ because the law cannot be separated from the value system embraced by its society.¹¹

1.2. Embodying the Public interest in optimizing the land for public welfare.

To create prosperity and justice for indigenous peoples— as the goal of national development — a harmonious relation between the government and indigenous communities is required to improve the well-beings of all at both infrastructure and superstructure levels. To do so, the embodiment of law should be made through regulations, ranging from the production of legislation to local regulation. This aims to create a harmonious relationship between the business people and indigenous peoples. The relationship may be in the form of interaction between the communities, business people — as the main actors of development — and the government — as the party obliged to direct, create, organize an atmosphere that supports the development. For this purpose, it is required to sustain mutually complementary attitudes as a system to achieve development goals. The purpose of this harmonization is thus to create a regularity of law-governed action.

1.3. Embodying the Social Function Principle in optimizing the land for

To optimize the social function of the land in the investment activities covering the utilization, implementation and allocation of the land, formulations of harmonization of legislation, either vertically or horizontally, are required. The example for this is the application of partnership concepts for the land use to create the welfare of the community. By doing so, disputes over land that can hamper the investment activities can be overcome.

5. Closing remarks

1.1. Conclusion

In exercising its power to attain the public welfare, the government has an authority to manage natural resources for the greatest prosperity of the people. Among other examples, this authority includes the rights of land occupation by the State. These rights become an instrument aimed at utilizing the natural resources for the maximum welfare of the Indonesian people. This implies that the State has the right to occupy the land, water and natural resources contained therein, including outer space. Indirectly, the implementation of such a power, therefore, is instrumental for the government to control over the mechanisms and procedures of managing its rights and authority lawfully. This very basic principle suggests that in administering the State's and people's interests, including the national development, the government's act should be based on the law. The tenure of land rights of indigenous peoples obliges the State to respect the traditional (communal) communities, as long as the traditional rights still exist. The respect for communal rights based on the condition of "as long as the reality still exists" induces various, different interpretations. Eventually, this creates conflicts with regard to the status of the communal rights. Commonly, communal rights do not have formal juridical evidence. This eventually creates difficulties for the State to adjust such rights when the national agrarian law is applied. In principle, Article 2 of the Basic Agrarian Law Act states that all rights to land are occupied by the state, whereas Article 18 of the Act mentions that principally the rights to land "can be revoked for the interests of the public." The recognition of communal rights in the Basic Agrarian Law Act stresses that as long as those rights are not in contrary to the national interests.

The concepts of the rights of land occupation by the State proposed by the government often contradict with the values that exist in the community and do not provide justice for indigenous peoples who hold the communal rights.

¹⁰ Mochtar Kusumaatmadja, *Konsep-konsep Hukum Dalam Pembangunan (Concepts of Law in Development)*, Bandung: Lembaga Penelitian Hukum dan Kriminologi Fakultas Hukum-Universitas Padjadjaran, Binacipta, Second Edition, 1986, p. 19

¹¹ Roscoe Pound states, "*For present purposes I am content to see in legal history record of a continually wider recognizing and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and precluding of friction in human enjoyment of the goods of existence-in short, a continually more efficacious social engineering*" Roscoe Pound, *An Introduction to the Philosophy of Law*, Yale University Press, New Haven and London, 1982, p. 47

In exercising its rights, the government often completely ignores the rights of these indigenous peoples for the sake of national development. This means that the government's course of action is only based on the formal statutory provisions. In practice, the government takes an action only based on legal norms contained in the legislation without looking at the social reality, i.e. the living law and legal culture existing in the society. Due to such understanding, the implementation of laws does not protect the existing communal rights of indigenous peoples.

1.2. Recommendation

Through the framework of harmonizing values embraced by indigenous peoples and those of economic development through investment activities, the State should be able to bridge the issues concerning the utilization of land through a partnership. Thus, disputes and conflicts over the land do not perpetuate and ultimately the land can be used to support the investment activities. As a growth-oriented strategy, the pattern of partnership can be introduced through social welfare programs in the field of plantation, such as revitalization of agriculture, trade and manufacturing industries. This program should be used as a breakthrough for improving the people's welfare and avoiding the clash of interests between investors and indigenous peoples, the holders of communal rights, in the utilization of land. In addition, deregulation is required as a derivative for the establishment of regional/local regulation.