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ADAT COMMUNITIES IN INDONESIAN LEGISLATION

As yet, there is no generic law in Indonesia that specifically and comprehensively deals with *adat* communities. Provisions related to the recognition of *adat* communities and their rights are dispersed in various parts of the Constitution, sectoral Acts, and implementing regulations.

A thorough examination of these provisions shows that (i) they are general in nature and open to multiple interpretations; (ii) they are still directive-normative, and consequently not instrumental; (iii) they have the spirit of centralism and integration; (iv) they are still limited to the recognition of the existence of *adat* communities and certain rights, and do not guarantee the protection, much less the promotion, of these communities; and (v) they are only sectorally and partially regulated.

The spirit and characteristics of these provisions have directly or indirectly led to the marginalization of *adat* communities as groups having their own system of values and institutions, and to dispossession from their *adat* land and natural resources.

EXISTING LEGISLATION ON ADAT COMMUNITIES AND THEIR RIGHTS

1945 Constitution

The existence of *adat* communities is recognized in the Constitution, namely in Article 18 and its Explanatory Memorandum, which underline that in regulating a self-governing region (*zelfbestuurende landschappen*) and *adat* communities (*volksgemeenschappen*), government needs to respect the ancestral rights of those territories. After amendments, recognition of the existence of *adat* communities was provided in Article 18 B Para. 2 (concerning regional government)

and Article 28 I Para. 3 (in the Chapter on Human Rights). These two articles, however, use two different terms, namely “*adat* law community” (Article 18 B) and “traditional community” (Article 28 I). Since they do not refer to the same entity, there is inconsistency in terminology.³⁷ Further, use of phrase “in line with *cultural* evolvement and *civilization*” (emphasis added) in Article 28 I Para. 3 leads to the question: whose culture and civilization? Without further explanation, this implies an approach based on integration and assimilation, and can be used as a legal base to apply such an approach to *adat* communities.³⁸ In addition, these articles mention “traditional rights,” a term that is new in the Indonesian legal vocabulary, especially when associated with the *adat* law community. The use of this term can lead to a range of interpretations.

Act No. 39 of 1999 on Human Rights

Article 6 of Act 39 provides an explicit formulation of the recognition and protection of *adat* communities and their cultural identity, and considers this recognition and protection as part of the implementation of human rights. Rights over *ulayat* (communal right) land are considered by this Act to be part of the cultural identity (rights to cultural integrity) of these communities and must be protected.³⁹ Seen from the perspective of international human rights instruments, namely, the International Covenant on Civil and Political Rights, this notion—that *ulayat* rights constitute a manifestation of or a part of the rights to cultural integrity—is in line with the meaning and scope of the rights to cultural integrity of ethnic minorities that also include their collective rights over natural resources.⁴⁰

According to another human rights instrument, the Universal Declaration of Human Rights, *ulayat* land is considered a property right that must be respected

and protected.⁴¹ Seen from this perspective, articles 36 and 37 of Act 39 of 1999 concerning property rights and acquisition of property rights, respectively, become relevant in the framework of protection of *adat* communities' *ulayat* right. Thus, acquisition of *ulayat* land by government must be done through due process of law following the free and prior informed consent of *adat* communities. Unilaterally determining that compensation for *ulayat* land taken for public use is to be in the form of social facilities, as regulated in Presidential Decree, No. 53 of 1993, is not in agreement with the principle of protection of and respect for human rights as guaranteed in Act No. 39 of 1999.

Act No. 10 of 1992 on Population and Prosperous Family

This Act does not explicitly mention *adat* communities, but Article 6 implies recognition of the right to cultural integrity as groups and rights to use ancestral lands (territories). This article provides that the right to use ancestral territory guarantees that a population that has developed a territory based on its *adat* land, is not to be subjugated in its interests by newcomers. If the ancestral territory is used for development activities, then such population is given priority to benefit from the added value of such development activities.

Regarding the right to cultural integrity of populations as groups, Article 6 guarantees the right to preserve and develop a cultural system in both its physical aspects (relationship to land) and nonphysical aspects, such as special aspects of lifestyle. This agrees with a principle that has been long voiced by indigenous peoples—that tribes or groups with distinct lifestyles cannot be forced to change them in order to conform to the lifestyles of others. Change can only take place if it is desired by such a population.

Emphasizing respect for cultural integrity, this provision underlines the principle of nonassimilation or nonintegration, a principle that rejects the imposition of change to one group's culture by another (dominant) group or community; a principle that underlines the idea that changes to a group's culture can only happen from inside the community, not because change is imposed by an external power.⁴² However, this principle seems to be an exception in the policies and practices of government regarding *adat* communities as can be seen

from the policy on resettlement of shifting cultivators, the policy on alienated communities, and from legislation such as Act No. 5 of 1979 on village government.

Act No. 22 of 1999 concerning Local Government

This Act, especially its provisions in Chapter XI (articles 93–111) on villages, replaces Act No. 5 of 1979 on village government. The latter, which was based on the spirit of uniformity and centralism, was very much predicated on the existence of *adat* communities. Act No. 5 made village institutions, including *adat* institutions, uniform. Some *adat* communities were divided into formal *desa* (villages) while others were merged into a single *desa*. *Desa* were included in the centralistic government bureaucracy, and were made the lowest level of government, directly under the subdistrict (*kecamatan*) level. The structures of traditional village governments, which formerly were diverse, were made uniform by this Act, and consisted of a head of village and village council (*Lembaga Musyawarah Desa; LMD*), assisted by a village secretary and heads of subvillages (*Kepala-Kepala Dusun*).

The old Act had the following consequences. First, there was limitation on, and even elimination of, the autonomy of traditional *adat* institutions as a main pillar of sociopolitical, economic, and cultural aspects of life in *adat* communities in Indonesia. Second, the forced division or merger of traditional communities to form one or several new formal *desa* weakened social and political solidarity in the community. Third, there was a leadership crisis in the communities. Village government as formed through this Act was not fully accepted by them. The village institution and leadership were not deeply rooted in the community. As a consequence, many roles that should have been played by village government did not function well. At the same time, traditional *adat* leaders were marginalized from political and economic processes and natural resource management; their function was relegated to *adat* ceremonies. Leadership dualism or lack of strong leadership in the villages led to low participation of the communities in governance activities and the development process. A further consequence was that communities became more dependent on the central Government.⁴³ Fourth, village leaders, both formal and

traditional, did not have enough authority to resolve or settle conflicts. Many conflicts were left unsettled and became seed for more serious conflict.

Act No. 22 of 1999 provides scope for the restoration of *adat* communities and institutions. It is possible now, for instance, to recover and revitalize such community entities as *nagari*, *huta*, *kampung*, *bori*, and *marga* if the local communities wish to do so. *Adat* communities may restore their *adat* norms and values, including those related to the tenure and use of land and natural resources. There is now a Village Representative Council (*Badan Perwakilan Desa*) which can be named by using the equivalent local term for the word *desa*, the members of which are chosen from and by the community and who have authorities or powers, inter alia, to formulate village regulations together with the village head. This will make possible an increase in the community's role and participation in determining or regulating important matters, whether as individuals or as a group.

Act No. 5 of 1960 concerning Basic Regulations on Agrarian Principles (or Basic Agrarian Law)

The Basic Agrarian Law (BAL) provided general principles that accommodate recognition of *adat* communities, *ulayat* land rights, and *adat* laws, as can be found in Article 2 Para. 4, Article 3, and Article 5. As basic law, this Act needs implementing legislation to make it effective. To date, only a few implementing regulations have been promulgated. As a consequence, there have been many deviations in the implementation of the Act. These deviations have been partly due to the concept of "eminent domain" or right of control by the State, which is provided as a basic principle in Article 33 of the Constitution, and which has been interpreted and understood in such a way as to lead to the denial of the *ulayat* right of *adat* communities (see below).

Regarding the recognition of *ulayat* rights in this Act, there are some points needing comment. First, Article 3 is limited to "recognition" of *ulayat* rights. To guarantee that this right is respected and protected, this general provision in Article 3 needs to be spelled out in implementing regulations covering key issues on the existence of *adat* communities as holders of this right (for example, criteria of the existence of *adat* communities and mechanisms for determining their

existence), on the existence of *ulayat* rights, and on guarantees for protection and respect of this right by the State.

Second, the recognition given by Article 3 is conditional. One condition is "as far as this right still exists." Tied to this condition, such recognition becomes meaningless, because there was the intention by the drafter of this Act to let the right weaken and be extinguished over time. In other words, "national agrarian law policy has given the signal not to perpetuate or to preserve the existence of *ulayat* right."⁴⁴ Thus, Boedi Harsono, who was involved in the drafting of BAL, wrote: "Regulating *ulayat* right, according to the drafter of BAL, will hamper natural development of *ulayat* right, which actually tends to weaken. This trend is accelerated by making stronger individual rights, via regulating this individual right in written law and by arranging its registration resulting in the granting of land certificate. The weakening or even the extinguishments of *ulayat* rights will be accommodated in the framework of the implementation of the eminent domain or right of control by State..."⁴⁵

Third, recognition of *ulayat* rights in Article 3 of BAL is ignored through the concept of "eminent domain" or right of control by the State, as originally understood by some of the drafters of the BAL. Iman Soetikinjo, another of the BAL drafters, wrote: "...since national tribes and *adat* communities are no longer autonomous because they have been part of one nation, Indonesia, then, power related to land rights which is derived from *ulayat* rights and which formerly was in the hands of head of tribes/*adat* communities/villages as highest authority holder in their respective territories,...now automatically shifts to central government as the highest authority, who function as holder of right of control by state or state *ulayat* right over all territory of state. However, authority derived from this state *ulayat* right can be delegated in its implementation to self-governing regions and *adat* communities if deemed necessary (Article 2 Para. 4 BAL)."⁴⁶

This way of understanding of the eminent domain or right of control by the State has led to the process that Noer Fauzi calls "statization of adat lands" (*negaraisasi tanah-tanah adat*).⁴⁷ There has also been a perception that *ulayat* land should be categorized as "state free land," meaning that this land is basically not covered by any claims.⁴⁸ This way of understanding the right of control by the State, which is also used in order

to ignore *ulayat* land, also occurred at the regional level. For example, in Central Sulawesi, the Head of the Provincial Land Board promulgated an Instruction in 1992 that all lands in Central Sulawesi are state lands, except land having been granted certificate of rights. This is based on the argument that because Central Sulawesi was formerly a self-governing region, then, since BAL has been in force, all lands in Central Sulawesi—which were formerly lands of that self-governing region—became state lands. This argument clearly ignores the fact that the existence of a self-governing region before Indonesian independence did not extinguish the existence of *adat* communities. *Adat* communities still existed—and continue to exist until now—together with their *ulayat* right. And when BAL came into effect in 1960, the existence of this *ulayat* land was, and still is, recognized, and not extinguished as lands of a former self-governing region.⁴⁹

Fourth, the meaning of the concept “national and State interest” is not defined. Lack of a clear definition of this concept has caused the Government to deliberately interpret it so as to include almost all development activities. In national agrarian legislation, Presidential Decree (*Keppres*) No. 55 of 1993 uses a narrow approach in defining “public interest.”⁵⁰ However, this decree does not provide alternative forms of compensation for *adat* communities, because Article 14 unilaterally determines the form of the compensation, namely development of public facilities or other forms thought to be useful for *adat* communities.

Fifth, the centralistic nature of BAL is apparent in the context of eminent domain or the right of control by State. The holder of the eminent domain (state *ulayat* right) is the central Government. Authority to implement this right can be delegated by the central Government to *adat* communities or self-governing regions if the central Government deems it necessary, not contrary to national interest, and based on the provisions of government regulations. No such government regulation has been promulgated; the delegation of authority has never taken place.

However, there has been an interesting development in the area of agrarian law through promulgation of Regulation No. 5 of 1999 of the Minister of Agrarian Affairs/Head of National Land Board, concerning Guidance for Resolution of Problems of

Ulayat Right of *Adat* Law Communities. Promulgation of this regulation is a positive development, because it can be seen as a starting point toward respect and protection of *ulayat* rights. It provides some general criteria for the existence of *ulayat* rights and underlines the need for study and identification of the existence of this right. The regulation also provides that, following identification, *ulayat* land that still exists will be recorded on base maps used for land registration by placing a cartographical sign on the maps. If possible, the boundaries should also be drawn on the maps and recorded in the land register.

Determination of boundaries of *ulayat* land, followed by registering it in the land register (without certification of the right) will provide legal certainty of the existence of *ulayat* right, and is in line with one main character of *ulayat* right: that it is permanently inalienable. Certification of *ulayat* rights will make it easy to be alienated (by way of transferring or selling it to another party).

However, this regulation has some weaknesses. First, it reduces the content or scope of *ulayat* right by defining it merely as a right to “reap the benefits of the natural resources, including land, in the said area, for survival and livelihood.”⁵¹ In other words, it defines *ulayat* rights as merely a right of usufruct rather than a right to land. The contents of *ulayat* rights, which constitute the highest tenurial right in *adat* law and which have both public and private aspects, are far broader than merely usufruct rights. *Ulayat* rights give authority to (i) regulate and manage the use of land (for residence, for agriculture, etc.), determine the availability of land for future use, and land/soil conservation; (ii) regulate and determine the legal relationship between persons and land (e.g., issuing specific land rights for community members); and (iii) regulate and determine the legal relationship between persons and legal acts concerning land (transfer, inheritance, etc.).⁵²

Second, the regulation does not retroactively correct past infringements on *ulayat* lands. *Ulayat* rights identified under this regulation cannot be enforced against land already acquired by government agencies, companies, or persons “in accordance with applicable provisions and procedures.” Previous location permits and other inequitable methods of land acquisition will probably be seen as having been in accordance with these provisions and procedures.⁵³

Forestry Acts

Promulgation of various sectoral Acts following BAL, such as the Forestry Acts (Act No. 5 of 1967 and Act No. 41 of 1999), Mining Act (Act No. 11 of 1967) and the Protection of Biological Natural Resources and the Ecosystem (Act No. 5 of 1990), has led to further marginalization of *adat* communities.

If BAL provides recognition of *adat* communities and their *ulayat* right (right of disposal), these various sectoral Acts promulgated since 1967 (since the New Order period began) tend to ignore the existence of those communities and their *ulayat* right.

Act No. 5 of 1967 concerning Basic Forestry Law, promulgated in the first year of the New Order period, was based on the goal of accelerating development to improve economic growth through extraction of natural resources, including forest resources. This Act and its implementing regulation⁵⁴ facilitated the issuance of forest concessions to big companies.⁵⁵

The Act divides the forest area into two categories, namely, state forest and proprietary forest. State forest is defined as forest growing on land not covered by any proprietary rights. Included in the category of state forest is *ulayat* or *adat* forest. Proprietary forest is forest growing on land covered by proprietary rights. By including *ulayat* forest as state forest, this Act ignores *ulayat* rights of *adat* communities over their forest area. Based on this policy, the Government, without prior consultation with *adat* communities, granted forest concessions to logging companies.

Priority on the interests of the State (i.e., Government) and companies over the interests of the community can be seen in Article 7 of this Act, which provides that in the area where forest concessions have been granted, "implementation of *ulayat* right should not hinder the fulfillment of the aims of this Act." The implementing regulation of this Act, namely Government Regulation No. 21 of 1971 concerning Right of Forest Exploitation and the Right to Harvest Forest Products, further stipulates that "rights of *adat* law communities and their members to extract nontimber forest products...shall be arranged in a proper order so as not to interfere with implementation of forest utilization." (Article 6 Para. 1). Even implementation of this right of *adat* communities can be suspended in an area where logging operations are being conducted (Article 6 Para. 3).

The approach in this Act has, obviously, seriously marginalized *adat* communities because they now have much less area of exploitable *adat* forest for their subsistence.⁵⁶ This also triggered agrarian conflict between the communities on the one hand and government and companies on the other.⁵⁷

This Act was revoked and replaced by Act No. 41 of 1999 on Forestry, which takes the same position as the former Act regarding recognition of *ulayat* rights over forests. As with the former Act, the new Act divides forest into two categories: state and proprietary.⁵⁸ *Adat* forest falls into the category of state forest, using the concept of eminent domain or right of control by State as its legal base.⁵⁹

This Act seems to deviate from the main trend emerging in the reform era, which strongly voices out, *inter alia*, respect and protection of human rights. *Adat* communities and their *ulayat* rights are recognized and protected in People's Assembly Decision No. XVII/MPR of 1998 (concerning Human Rights) and Act No. 39 of 1999 on Human Rights. Yet, recognition and protection of *ulayat* rights of such *adat* communities are ignored in Forestry Act No. 41.

Act No. 11 concerning Basic Provisions on Mining

As with Act No. 5 of 1967, Act No. 11 is based on the goal of economic development through the extraction of mining resources. Giving priority to large companies (including foreign investment) in the exploitation of mining resources, this Act ignores the people's traditional mining rights. The rights of local people (including *adat* communities) are not sufficiently accommodated in this Act, which does not give local communities (including *adat* communities) the right to be consulted before a mining concession is granted. There is, however, compensation for land taken for a mining concession. Strict safeguards regarding protection of the environment are not included. When there is negative impact on local people as a result of mining activities, compensation will be paid by concessionaries. However, the Act does not say anything about the need for consultation in order to determine the form and amount of compensation to be paid (Article 25).

Act No. 5 of 1990 concerning the Conservation of Biological Resources and the Ecosystem

Marginalization of *adat* communities and denial of their rights over natural resources also occur as a result of Act No. 5 of 1990. This Act, also using the eminent domain or right of control by the State as a legal base, places the State (Government) in the central position to manage protected areas (articles 16 and 34). In this capacity, the Government is to direct and motivate people to participate in the conservation of biological resources (Article 37 Para.1)

This Act does not say how protected areas will be established or determined, except that this will be covered by government regulations. Considering that the establishment of protected areas has great impact on people, for example by taking land for reserves, such regulations are not appropriate in the context of protecting rights. However, no such government regulations have been promulgated yet, and in practice the establishment of protected areas, including buffer zones, is carried out unilaterally by the government without prior consultation and consent of the people, including *adat* communities. An example is the designation and establishment of Lore Lindu National Park in Central Sulawesi.

Comparing this Act with the same legal product from the colonial period, namely *Natuurbeschermingsordonantie* 1941, it can be said that the colonial Act was more tolerant and respectful of the rights of people. It provided that the establishment of protected areas in land controlled by third parties can only be carried out with consent of those parties (articles 2 and 13 of the Ordinance).

LATEST DEVELOPMENTS

Since the Act on Regional Autonomy came into force, rehabilitation of *adat* institutions and norms has become possible. In this context, the role of local government is important, because Act No. 22 of 1999 can be used in either a positive or negative way with respect to *adat* communities' rights. In some districts, such as in Luwuk Banggai district in Central Sulawesi, the district government formed an *adat* council at the

district level without participation of *adat* communities and with no real representation of local *adat* communities.

Future development in the area of policy and law will likely be influenced by principles of democratization, community participation, and respect for human rights. Act No. 25 of 2000 concerning the National Development Program (*Program Pembangunan Nasional; PROPENAS*), for example, stresses that the legal system for management of natural resources must have the perspectives of sustainability, respect for human rights, democracy, gender equality, and good governance. Also, this Act asserts the importance of active participation of communities in making use of, access to, and controlling the use of, natural resources in the framework of protecting public rights and rights of *adat* communities.⁶⁰

These principles seem to be influencing current national initiatives to develop laws that directly or indirectly relate to *adat* communities and their *adat* rights. It is difficult to predict the outcome of these initiatives. However, the process and mechanism for preparing and discussing such initiatives have begun to use a participatory approach, in the sense that various stakeholders are participating in the process.

One of these initiatives is the Draft Decision of the People's Assembly on Implementation of Agrarian Reform, which contains some articles based on respect for human rights and existing *adat* law, and recognition of the right of *adat* communities to agrarian resources.

Regarding natural resources management, there are two initiatives, namely the Draft Decision of the People's Assembly on Sustainable and Environmentally Sound Management of Natural Resources and the Draft Act on Management of Natural Resources. Both contain the same principles as elaborated in the above Draft Decision of the People's Assembly on Implementation of Agrarian Reform.

In the area of forestry, the Government (i.e., the Forestry Department) reached an agreement in 2001 with the Consultative Group on Indonesia (CGI) to make some commitments related to the rights of *adat* communities to forest resources. The Government recognizes the importance of community participation (including participation of *adat* communities) in developing a policy on forest tenure and has made a commitment to recognize the rights of *adat* communities in forest management. In this regard, some action plans

have been established, including law reform (preparation of draft government regulations on *adat* forests), mapping *adat* territory in forest areas, and making inventories of other ownership rights of *adat* communities to forest resources. All these are directed to guarantee the long-term relationship between people or community groups (including *adat* communities) and forest resources.⁶¹

However, there remain legal reform initiatives that do not provide such recognition and protection on *adat* communities and that do not involve intensive consultation and participation of communities, including *adat* communities, for example in the Draft National Act on Land and the Draft Act on General Mining.

In the Draft National Act on Land, as in BAL, recognition of *adat* law is again tied to “national interest” (by stating that its implementation must be in line with national interest), a concept that is not specified or defined in the Draft.

Marginalization of *adat* communities is continued in Article 11 of this Draft. *Ulayat* land, as long as it still exists, is recognized and protected by law. Identification and determination of its existence are to be carried out by the district/city government according to district regulations, with the participation of *adat* elite and *adat* law observers/academics. It is implied in this article that determination of the existence of *ulayat* land is the business of the elite, whether the political or cultural elite, and academics. There is no room for *adat* communities themselves to be involved, although they have the most at stake in this issue.

Furthermore, such recognition on *ulayat* land is almost meaningless. Although recognized, *ulayat* rights cannot retroactively be implemented over (former) *ulayat* land that has been acquired by government, local government, legal bodies, or individuals. Where then does “free” land exist? Forestlands now under the control of the Forestry Department and for which it is granted public-use rights, cover around 70% of the total land area of Indonesia. Much of the rest is under the control of plantation authorities. It is, therefore, difficult to find “free” land over which *ulayat* right may still exist according to this draft Act.

Moreover, control of such lands by government institutions, legal bodies, and individuals is presumed

in the draft Act to be valid. It does not matter how those lands were acquired. The draft does not question whether such lands were acquired from *adat* communities in an equitable process.

Further, the draft reduces the scope of *ulayat* rights by defining them as only “right of control of *adat* law community over certain area, which is a living space for its members to reap the benefits of the natural resources, including land, in the said area.” Interpreting *ulayat* rights in this way does not follow the original concept of *ulayat* rights that include the public aspect of control and allocation of the land, and makes it impossible to adopt self-governance by such communities.

The draft Act on General Mining states that the legal extent of mining covers all Indonesian territory—land, water, and continental shelf. Article 14 stipulates that “Unless permitted by an authority or rights holder, mining activities cannot be carried out in cemeteries, sacred sites, historical buildings, or prohibited or protected areas, based on relevant legislation.” Thus, there is inadequate protection of these areas without formal laws to determine whether such protection must be granted or not. With the phrase “based on relevant legislation” in this article, it is possible that protection over sacred forests, cemeteries, and *adat* houses can be ignored in relevant legislation.

Although not expressly addressing *adat* land and rights of *adat* communities, this draft Act provides that acquisition of land for mining activities will be carried out through, inter alia, transaction, granting of compensation, lease, conversion of stock, or product sharing (Article 35 Para. 2). It can be interpreted from this stipulation that this mechanism also applies if the land acquired is *ulayat* land. However, that depends on whether the land is recognized as *ulayat* land or not. Experience so far shows that *ulayat* land is also categorized as “free state land.”

Neither does the draft Act mention what principles are to be fulfilled when the area for a mining concession is determined. Further, there is no mention of the need to inform and obtain the consent of people, including *adat* communities, who live in or around the proposed mining concession area.

CONCLUSIONS

Existing legislation does not provide a strong legal base for the protection of *adat* communities and their rights. Law reform is, therefore, very important. A reform agenda for the protection of *adat* communities should be set up by the Government. Such an agenda could include preparation and promulgation of a special Act concerning *adat* communities and their protection in the process of sectoral development. Law reform is needed not only in substantial issues, but also in the process and mechanism of participatory lawmaking.

Preparation of the legislation should be carried out through public participation involving *adat* communities. Ideally, the consultation should be carried out gradually from the lowest (village) level to the national level, where representatives of *adat* communities should be assisted to express their needs and desires. Consultation would provide inputs about and discussion of the real problems faced by *adat* communities. It is realized, however, that this process is costly and will take time. For now, at least, the consultation process could be initiated from the district level. Considering the importance of this agenda, support and participation should come from various stakeholders, such as government, representative bodies, NGOs, and the communities themselves.