

## THE NATURE OF RECOGNITION OF LAND RIGHTS IN PAPUA: AN INVESTMENT PERSPECTIVE

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### Abstract:

Special autonomy to Papua Province has been enacted on 21<sup>st</sup> November 2001 through the Law Number 21 Year 2001 concerning Autonomy toward Papua Province. The Law basically has given a great effect to open an investment opportunity in Papua Province and it also accommodates economic development concept in line with go green concept...It is important to know that the efforts of local development conducted by the local government through investment issue must acknowledge, look up, protect, empower, and consider to the rights of the Adat community holistically... Some regulation to recognize the rights are UUPA, the Governmental Decree (PP) No. 24 of 1997 on Land Registration System, The Special Autonomy for Papua Province based on the Law No. 21 of 2001, and Special Local Regulation Papua Province Number 23 Year 2008 on land rights of indigenous people and rights of indigenous people individually above the land.

**Keywords:** Nature, Recognition of land Rights

### 1. Introduction

Special autonomy to Papua Province has been enacted on 21<sup>st</sup> November 2001 through the Law Number 21 Year 2001 concerning Autonomy toward Papua Province.<sup>371</sup> The Law basically has given a great effect to open an investment opportunity in Papua Province. The Law furthermore accommodates economic development concept in line with go green concept. Those concepts stipulate that economic development must be synergized and united to the efforts of environmental preservation. It means that the policy of development of local economy must be in line with the policy of maintenance and space spatial either in the context of private or public space. In other word, the policy of economic development must accommodate the concepts of protection of natural resources, biological, non-biological, or artificial. Those protections include the conservation effort of cultural heritage and its entire ecosystem surrounding them. It can be said that it is a structuring and an environmental conservation efforts that is comprehensive and do not ignore the rights of adat community.

In term of the Law of Special Autonomy, it is important to know that the efforts of local development conducted by the local government through investment issue must acknowledge, look up, protect, empower, and consider to the rights of the Adat community holistically. Those rights are: *firstly*, the communal rights of the community that consist of communal rights of adat law community and individual rights of every citizen in the adat law community; *secondly*, communal rights possessed by the adat law community in the context of its territory that consists of right to live and right to use land, forest, water and entire its substances pursuant to the regulation. The explanation as mentioned above simplistically states that the rights of communal land to an individual land of the adat law community for many reasons must conduct discussion with the adat law community and its citizens, including the lands as an objects of investment.

An economic activity in Papua Province that uses natural resources basically has been applied to accordance with the concepts of economic development based on society concept, as stipulated in the Law on Special Autonomy. The principle of developmental policy is conducted in order to empower the community by giving the community chance broadly. The purpose of it is to give a role to the community in the local economy. Therefore, investors who invest in the territory of Papua Province must recognize and respect to the communal rights attached to the community. Logically the provision of business opportunities made between the provincial, district/city, the investor must involve the local (indigenous) communities. However, all efforts of Papua provincial government to respect the rights of indigenous peoples, still should not override the interests of investors, primarily related to legal certainty.

The efforts to spur economic growth in many parts of Indonesia including the province of Papua indeed are caused by legal uncertainty. This is taking place because several government regulations (local government)

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<sup>371</sup> Special Autonomy to Papua Province is commonly known as the Law Number 21 Year 2001. (Gazette 2001 Number 135 and Additional Gazette number 4151), as amended by the Government Regulation in Lieu of Law Number 1 Year 2008 (Gazette 2008 Number 57 and Additional Gazette Number 4843). The Law consists of 79 articles and governs the Authority of Papua Province to hold the Special Autonomy. Beside the Law, Papua Province also applies the Law Number 23 year 2014 Concerning Local Government, as enacted generally in whole Indonesia's territory.

such as licensing of land acquisition and so on inhibit capital inflows. Overlapping some regulation furthermore causes another legal uncertainty, which become the reason for employers (investors) not dare to invest in agriculture or natural resources in the area of Papua. The issue of legal certainty is crucial in supporting the issue of the speed of growth and the investment climate in the area of Papua.

The diversity of primordial ties involving indigenous peoples in relation to the communal rights is also another issue that must be faced by the investors who entered the province of Papua. Generally, the implementation of development as a form of growth and development of an area always has implications for the increasing need of land including in Papua's Province, while availability of land is limited. This brings consequences for investors to make a compromise with the indigenous peoples over their communal rights. While the meaning of social functions on the land begin to shift to economic function, which contributes to the high exchange rate for the availability of land for investment activities.

The communal land actually is a land that does not belong to the government and not to personal, but the land owned by indigenous peoples. Hence, the land may be used to improve the welfare of the entire community. The basic regulation of state recognition for the communal rights and a lawful guarantee can be found in in the Law No. 5 of 1960 concerning the Basic Regulation of Agrarian, known as UUPA. The existence of legal recognition of communal land by the State is a strong foundation for indigenous peoples to control, manage, and utilize the communal land, or in other words the existence of indigenous people are recognized legally.<sup>372</sup>

The implementation of state recognition to the existing of communal land may be delegated to the regions and adat law communities, but in its implementation certainly require a legal certainty. The setting and management of the communal land typically handed over to indigenous groups. It is because customs between one tribe to another in Papua is different, then the arrangement of the communal land are also diverse to follow the rules made by the tribe that controls the communal land. It certainly is becoming a problem for investors who invest in Papua province like what happen in (1) Dani tribe, (2) Lani tribe, and (3) Moni tribe. Those indigenous Papuans have similarities in perspective and legal basis of the existence of communal land and the absolute right to defend their land, but there is also a difference especially in terms of disposal system of the communal land each tribe as mentioned above. The assumption of it is if there are interested parties to take advantage of the communal land for investment, all of them have to go through customs release in accordance with tribal customs, which controls the communal land. This condition creates dilemma that requires in-depth study in order to produce the essence of the rule of law, the right to land for investment needs in all regions of the province of Papua.

The nature of the law in question contains aspects of legal protection for investors to carry out investment activities. The law of nature is expected to accommodate interests of local communities (indigenous) and does not conflict with national interests. Investment law can be constructed in the legal norms that include: (1) system of investments, (2) the terms of the investment, (3) protection of investments (investor), and (4) the protection of communal rights, and (5) a good relationship amongst rights of indigenous people, rights of investor and the government rights.<sup>373</sup>

Even though UUPA in one side recognize the communal rights of the adat community, there is also contradiction in the UUPA itself. Article 5 of UUPA indicates to do not give place to the customary (adat) law and even also indicates to abolish the property rights of indigenous people.<sup>374</sup> The reason of it is all the land use should remain subject to the demands of national interests and goals of unity national. Even if some administrative policies in accordance with local customary law still permitted.

As outlined by UUPA, it cannot be justified if the adat communities based on their own customary (adat) rights reject the government and the local government projects. Moreover, the projects will conduct for the welfare purpose of the indigenous people. According to Article 3 of UUPA implicitly states that the interests of the indigenous people should at least be subject to the national interest and the country more broadly.<sup>375</sup> According

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<sup>372</sup> Maria S.W. Soemarjono, *Guidelines of Making Research Proposal*, PT. Gramedia Pustaka Utama, Jakarta, 2001, p.55.

<sup>373</sup> H. Salim HS. and Budi Sutrisno, *Investment Law in Indonesia*, PT. RajaGrafindo Persada, Jakarta, 2012, p.9.

<sup>374</sup> Maria S.W. Soemardjono, *Land in Perspective of Economic, Social, and Cultural Rights*, Kompas, Jakarta, 2009, p. 156.

<sup>375</sup> Ibid. p. 157.

to UUPA, it is not justified if public (society) still maintains the content and implementation of customary (communal) rights absolutely as if it was detached from the law in the unitary Republic of Indonesia. It is also a special case, which is an obstacle to investment in the province of Papua.

## 2. Recognition of Land Rights in Papua

The existence of the State is aimed for the welfare of the people who live in there. UUPA has laid the foundation for the prosperity of the people as an option interests into the goal. UUPA has put traditional values that apply for generations by indigenous peoples and modern values. In terms of it, Notonagoro<sup>376</sup> states that agrarian development in Indonesia need to be held with some consideration such as: a) the formal factor; b) material factor; c) ideal factor; d) modern agrarian factor;<sup>377</sup> e) political ideology factor.

Before the Law on Special Autonomy for Papua Province existed, customary (adat) land, communal land rights, and land controlled by the government based on the submission by the Dutch government all were obtained very easily, even in the process of formally or directly with the owner of the adat land rights and communal rights are sometimes obtained free of charge. However, after the enactment of the Law as a result of reform, it was bringing implications for society, which is increasingly daring to express the voice of conscience such as demanding land rights of indigenous people and communal land rights that has to be returned to the people of Papua. For example, the case of land that has been certificated but there is no release of the customary (adat) land, it can be recaptured by the people who feel as owners of the land.

As for the term of indigenous land, according to the National Land Agency in Biak, Edy Pakpahan, that "the term of indigenous lands is basically non-existent". The indigenous land means that used to belong to the ex-indigenous land because all of the rights to land have been set in Article 16 paragraph (1) UUPA. The article stipulates that "The rights to land as referred to in Article 4 paragraph 1 is: (a) property rights, (b) leasehold rights, (c) building rights, (d) rights to use, (e) lease rights, (f) open land rights, (g) rights picked forest products, and (h) other rights which are not included in the above rights will be set by law and the rights temporary as mentioned in Article 53."<sup>378</sup>

At the beginning of the implementation of the Special Autonomy Law on Papua, the ownership of land rights overlaps because some people think that the land either customary (adat) land or registered/certificated land is property of the adat rights, although the customary (adat) land rights has been released to others. It is becoming a source of conflict triggers inexhaustibly against legal certainty of land rights in Papua.

According to Yosef David Korwa, the acquisition of land before the special autonomy, which people under pressure at the New Order Government, is sometimes compensated below standard or not in accordance with the value of the land. The government under the reasons of development compensates the land with very low price and even in some former indigenous lands that are used as temporary rights to use by the Dutch government are annexed (seized). However, the special autonomy and the reform era have given space and legitimacy to the indigenous peoples to retain a portion of their rights despite not all.<sup>379</sup> The Special Autonomy for Papua Province based on the Law No. 21 of 2001 practically has carried a significant impact on society both from the aspect of politics, economics, and the legal system, particularly in the practice of registration and ownership rights to land.

According to the Head of Community Empowerment at the National Land Agency Biak, Joachim Ayowembun, after the enactment of the Special Autonomy for Papua Province, it began to occur the demands of the rights of the indigenous peoples both groups and individuals to do not longer recognize state land. Pursuant to them, all the rights of land formerly and controlled by the Dutch government as well as was handed over to the Government of Indonesia should be returned to the head of indigenous people or at least demanding the government to pay compensation to the indigenous peoples.<sup>380</sup> Not only that, for other people who have gone through the process of the release of the customary land owners to the buyer are also targeted by community groups, either clan or personal nature.

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<sup>376</sup> Notonagoro, *Legal Politic and Agrarian Development in Indonesia*, CV. Patjuran Tudjuh, Jakarta, pp.3-7.

<sup>377</sup> Ibid. p. 2.

<sup>378</sup> Muslim Lobubun, the Existence of Indigenous Land after Enacting Special Autonomy of Papua in Biak Numfor District, *Legal Research Journal*, Vol. 1 No. 3, Mei 2012, p. 551.

<sup>379</sup> *ibid.*

<sup>380</sup> *ibid.* p. 552.

The release of the customary land rights disputes are triggered occurrence of claims for compensation widespread by the present generation. It is because they have channeled to express their aspirations and get their rights back only through the Tribal Council. The Tribal Council itself until nowadays has no a legal framework to regulate the issue of the indigenous land rights in Papua. This condition therefore is contrary to the rules of the UUPA which essentially leads to all the land, both indigenous lands or lands controlled by the government, must be registered through the National Land Agency to obtain recognition and certification by the state.

In addition, to obtain the registration of customary land rights of indigenous peoples to the National Land Agency actually is obstructed and experienced problems because of the assumption of community that the enactment of the Special Autonomy Law for the Province of Papua has already given full rights to the community to have the land without registration to get the legality/certificate as proof of ownership of the customary land. One example after the enactment of the Special Autonomy (Autonomy) for Papua is International Airport Biak Frans Kaisiepo. This Airport already have a land certificate, but it is claimed by the community that the land belongs to the ancestors so that the land should get recognition of the indigenous peoples and should gets release by the Adat.

After the implementation of the Special Autonomy for Papua Province, it has provided ample room for the public to have a certificate that has been issued by the National Land Agency (BPN) in accordance with the mechanism and the conditions specified in the Governmental Decree (PP) No. 24 of 1997 on Land Registration System that always have constraints or denied or not admitted as evidence of ownership rights to the land. So that, most of the arguing parties defend their rights to the District Court, neither the owner of the certificate nor the parties who feel as landowners, especially the indigenous people of Papua.

The indigenous people demanded is a further difficulty faced by BPN especially in the development process of land building that has been certified. It sometimes becomes a reason for the certificate owner to pay compensation to the indigenous people. As we know, the certificate is a proof of property rights. It therefore sometimes leads to legal process through a lawsuit to District Court. In terms of this context, the ownership of the customary (adat) land becomes unclear between claimed ownership one clan to one another particular the release of its own land. The result of this condition is creating a dispute between the seller and the buyer. For this position, the buyer always harmed even though BPN tries to facilitate and bring the disputing parties both sellers and buyers with the aim of resolving their problems. In some cases, it can be resolved by consensus, but in other cases sometimes there is no common ground (consensus) that led to the dispute to the District Court.

The polemics as mentioned above, it becomes clear how important the legal certainty over ownership of land rights in Papua, which by the BPN has been executed according to the procedure of registration of land as stipulated by Article 19 of UUPA and PP 24 of 1997. The polemic becomes a problem for local governments to ensure legal certainty over land rights for investment activities in Papua.

The law basically can be enforced if it is always in accordance with the legal culture. The National Agrarian Law can only be implemented in Papua, at least with some conditions, namely: 1) the openness of local customary law system against external influences; 2) the recognition of State to the existence of indigenous people and its customary (adat) laws; 3) the existence of political will of the government to accommodate the contained values in the customary (adat) law; 4) any payment in the form of direct benefits perceived by the indigenous peoples for use of resources over the communal rights.

Cultural identity, dignity of the people of Papua, and the socioeconomic chasm have not sided fully to the people in the middle of natural resources exploitation where virtually every corner of the land is surrounded by plantings investment. The plantings investments are the bird's head of British Petroleum in the Bintuni Bay. In the mountainous region of Papua, the mountain that is the ancestor of the Comoro is dredged by PT. Freeport Indonesia. In the area of Merauke, on the border with Papua New Guinea (PNG), there is a development project of national food security and energy called MIFEE (Merauke Integrated Food and Energy Estate). Papuans now are in a crossroads; whether they open in the relationship between cultural identity, which is increasingly open to the reality of Papua, or not. Man is not the substance but the subject continues to move and to open up for all the changes occurring around him. The fact shows that the customary law is a reflection of the customs of indigenous peoples that will continue to change in line with the change itself, as illustrated in the nature of customary law that open.

Legal substance of the customary law should be a space for dialogue between the government and the community. It means that understanding indigenous culture will bring knowledge to the identity of indigenous peoples that is inclusive, dynamic, and transformative. The Papuan cultural identity is sometimes identified with the primitive culture has involved the government in defining and stigmatize Papuan culture conditions through policies are made. The presence of special autonomy should be accepted as giving a special status to Papua Province to run the regional government in managing its own natural resource potential but still do not forget the cultural issues that constitute the identity of the community.

Three different geographical regions determine how different life (pluralism) on indigenous people of Papua. They are actually social capital that enriches the culture of Indonesia. The spirit of special autonomy is supposed to bring togetherness amongst the people of Papua to build the area. It cannot be translated upside down to the process of development in Papua as a whole. There is no emergence situation to show regionalism ego or to give the impression of a conflict between fellow members of the indigenous people of Papua, or conflict between indigenous Papuans and migrant communities, or between community and government, or between communities and investors. Therefore, Special Autonomy in Papua is not only concentrated to the local government authority in harnessing the potential of natural resources alone, but also focuses on the potential of cultural diversity and customs as well as the Papuan's customary law.

The process of development in Papua Province should be done through a regional approach to developing communication or dialogue with the involvement of the people of Papua in the form of participation. In terms of the agrarian law enforcement, the preferred approach is a model of cultural structures by utilizing the values of local wisdom that belongs to the tribes in the province of Papua. Democracy is grown through models of leadership, decision-making, and control differences in which is framed in togetherness as a recognition of the rights of Papuans indigenous land that is the patrimony.

The communal rights are not object of land registration. Therefore, in terms of burden proof, they need some criteria as mentioned in Article 2 paragraph (2) of the Regulation of the Minister of Agrarian / Head of BPN No. 5 of 1999 on Land Rights Settlement Land. It is noted:

The communal rights of the customary (adat) law is still considered to exist when:

- a. There is a group of people who still feel linked by their traditional legal order.
- b. There is a communal land especially the living environment of the citizens of the legal partnership.
- c. There is the customary (adat) legal order regarding the acquisition and use prevailing Land Rights and inhabited by the citizens of the customary (adat) law union.

The existence of the communal land rights of indigenous people and/or the individual rights of citizens of indigenous people on their land have also guaranteed by Article 2 and 3 Special Local Regulation Papua Province Number 23 Year 2008 on land rights of indigenous people and rights of indigenous people individually above the land, which specifies that:

Article 2:

- (1) Local Government recognizes the existence of communal land rights of indigenous people and individual rights indigenous people on the land.
- (2) The recognition of the communal rights of indigenous communities and individual rights of citizens or indigenous people on the land referred to in paragraph (1), based on the research's study.

Article 3:

- (1) The existence of communal land rights of indigenous people and individual rights indigenous people on the land must be based on the results of the study in regencies/cities in the area.
- (2) The study to determine the presence or absence of the communal land rights of indigenous people and individual rights indigenous people on the land in the district/city carried out by a committee of researchers consisting of:
  - a. Experts customary (adat) law;
  - b. Traditional institutions/elders or the competent adat authorities on indigenous rights and individual rights of citizens;
  - c. Non-governmental organization;
  - d. Officials from the National Land Agency of the Republic of Indonesia;
  - e. Officials from the Office of Legal Department Regent/Mayor;
  - f. Officials from forestry and mining agencies; and
  - g. Officials from other relevant agencies.

- (3) The Committee researcher referred to in paragraph (2) conduct research on certain customary (adat) community as determined by the District/City Government.
- (4) Membership of the committee researcher referred to in paragraph (2) and the areas to be examined as referred to in paragraph (3) shall be determined by the Decree of the Regent/Mayor.
- (5) Membership of the committee researcher referred to in paragraph (2) and the areas to be examined include inter-district/city stipulated by the Decree of the Governor.

Bushar Muhammad, in his book *Principles of Customary Law: an Introduction*, explains the structure of indigenous communities that are territorial. He states that the indigenous people's territorial structure is community, which is based on local environment. The members unite and tie with each of their ancestral lands.<sup>381</sup> An example of Bushar Muhammad point of view is Papuan customary (adat) law community who has family ties and their attachment to the land of residence since birth. Then, its members are based on consanguinity and area/region.

In the development of customary (adat) law union, it still maintains legal union according to the basic of affinity or consanguinity territorially. However, genealogies community has not been able to follow an increasingly broad and complex, so the need for change. Indeed, it is still based on the principle of the family, living alongside each other, and helping each other with the spirit of nationalism. Relating to the territorial customary law community and the genealogies customary law community, J.S. Serpara, in his research's report about indigenous land issues and its development in Irian Jaya, explains the legal community in Irian Jaya in general is the alliance of indigenous communities that are a mix between the genealogy group level with the clan who live in a specific territory with a clan or another clan.<sup>382</sup>

Alliances of the customary (adat) law traditionally are highly dependent on the land. It is because the public livelihood from agriculture/patterned agrarian and fishing. In this context, land is deemed as the capital of life. So that the relationship between man and the land where it is located or dwell humans for food and establish a life to grow until the creation of a wider community. This dependence is usually considered as a "linkage law" (rechts betrekking) between man and land. People, who have affinities with the law of the land, have the right to land and the right to land either out or into touch with the collection of the results of the land. For the purpose of community interest, individual rights are restricted. The community interest is called the seigniorial of communal rights/beschikkingrecht.

### 3. Conclusion

Recognition of land rights in Papua plays an important role to guarantee investors to invest their money (capital) in Papua Province. The recognition of it is governed by UUPA, the Governmental Decree (PP) No. 24 of 1997 on Land Registration System, The Special Autonomy for Papua Province based on the Law No. 21 of 2001, and Special Local Regulation Papua Province Number 23 Year 2008 on land rights of indigenous people and rights of indigenous people individually above the land.

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<sup>381</sup> Bushar Muhammad, *Principles of Customary Law: an Introduction*, Bina Cipta, Bandung, 1988, p.33.

<sup>382</sup> J. S. Serpara, *Indigenous Land Issues and its Development in Irian Jaya*, Directorate Agrarian Republic of Indonesia, Jakarta, 1997, p.3.

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