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## The Essence of Indigenous Land Release for Investment Interests

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**Abstract:** *The aims of the study were to investigate to what extent the essence of waiver of customary land in Merauke Regency and to investigate to what extent the release of customary land can provide legal certainty for investors. The research was conducted in Merauke, West Papua Prvince. The techniques of obtaining the data were interview and field observations. The data consisted of primary and secondary data. They were analyzed using qualitative analysis. The results of the research indicate that the waiver of customary land is the claim of the existence of indigenous people as a condition of the transfer of land rights in Papua Province especially in Merauke Regency. The release of customary land for investors benefit in Merauke Regency does not provide legal certainty for investors, so it causes the conflict of land affair. The conflict occurs due to the overlapping of tenure or claim by some tribes over the land rights and land boundaries which are not clear because they are natural boundaries.*

**Keywords:** *Customary Land; Investment.*

### INTRODUCTION

Land for human life, contains a multidimensional meaning. First, from the economic side, land is a means of production that can bring prosperity. Second, politically, the land can determine a person's position in community decision-making. Third, as a cultural capital, can determine the high level of social status of the owner.

Fourth, the land is sacred, because at the end of life everyone will return to the land. Because of the multidimensional meaning there is a tendency, that people who own the land will defend the land in any way if their rights are violated<sup>1</sup>.

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<sup>1</sup> Heru Nugroho. 2001. *Menggugat Kekuasaan Negara*. Surakarta. Muhammadiyah University Press. p.237

The importance of land for the individual and the state as the highest society organization is constitutionally stipulated in Article 33 Paragraph (3) of the 1945 Constitution which stipulates that "Earth, water and natural resources contained therein, are controlled by the State and used for the greatest prosperity of the people ". As a follow up of Article 33 Paragraph (3) of the 1945 Constitution relating to the earth or land, Law No. 5 of 1960 on Basic Agrarian Laws is further referred to as the Basic Agrarian Law (UUPA).

In the Basic Agrarian Law we see a difference of understanding "earth" and "land". To know this we can see from the two articles below: Article 1 Paragraph (4) of the BAL regulates: "In the sense of the earth, other than the surface of the earth, including the underlying earth body and under water". The article provides an explanation of what is meant by "On the basis of the right of expropriation from the state, the existence of various kinds of rights on the surface of the earth, which are called land which may be granted and owned by persons either individually or jointly with other persons or legal entities".

The indigenous peoples of Merauke Regency have very close kinship ties and are hand in hand in every way. The relationship of closeness in this kinship can be seen from the style of life of the community that prioritizes social interests rather than individuals. This can be seen for example if it gets the result of hunting, or gardening then they will divide it for all members of their family. The indigenous peoples of Merauke Regency are divided into 7 major clans, namely Gebze, Mahuze, Ndiken, Kaize, Samkakai, Balagaize and Basik. The clans consisted of several family heads known as the Marind tribe.

Merauke district rich in natural resources much ogled by investors to invest there but nevertheless, in its implementation experienced obstacles because of the provision to release customary land even though officially has been released by those who need the land.

Furthermore, when talking about the reality in the community, it can't be separated from the land disputes that often occur where the year is increasing and occurs almost in all regions in Indonesia both in urban and rural areas. The land issue is so relevant to be

studied together and considered in depth and thoroughly in relation to the policy in the land sector so far. This is because the level of policy implementation shown so far has ignored the structural aspects of land tenure which ultimately led to various disputes.<sup>2</sup>

Land cases that often occur when viewed from conflicts of interest of the parties in land disputes include:

1. People are faced with state bureaucracy;
2. People are dealing with state enterprises;
3. People are faced with private companies;
4. Conflict between the people.<sup>3</sup>

#### **METHOD OF THE RESEARCH**

The research sites selected in the preparation of this research were conducted at the highest adat institutions in Merauke Regency; National Land Agency in Merauke District; and the Regional Investment Board in Merauke Regency. Data analysis techniques that will use the author is a qualitative descriptive technique based on material and data related to the topic of discussion. The author describes and explains the

problems in accordance with the facts that occur through a number of factors relevant to this research, then drawn a conclusion.

#### **ANALYSIS AND DISCUSSION**

Communities in Merauke District feel more secure to have adat release than certificates, this is because there are many indemnification demands by indigenous peoples to private lands, legal entities and the government, many occur after special autonomy for Papua Province with the issuance of Law Special Autonomy No. 21 of 2001 for the province of Papua are:

"The regulation of authority between the Government and the Provincial Government of Papua and the application of such authority in the Province of PPN Japua is done in a special way."

In practice, sometimes the law has not yet given legal certainty to indigenous land disposal cases in Merauke district so there are some indicators that must be understood in this research, among others:

#### **The Essence of Release of Customary Land Rights in Merauke Regency**

The essence of the release of land rights is a requirement established under customary law in Merauke Regency over the transition of land

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<sup>2</sup> Abdurachman. 2010. *Kedudukan Hukum Adat Dalam Rangka Pembangunan Nasional*. Bandung. Alumni, p. 71

<sup>3</sup> *Ibid.* p.73

rights implicating the issuance of such lands from control over indigenous and tribal peoples. Removal of adat land is done by compensating land or land compensation to the ulayat rights holders through consensus and mutual agreement.

According to indigenous peoples of Merauke district, customary land release is done through customary rituals. This customary ritual has an adat ordinance with several stages: there must be an agreement, performing a Gatzi ceremony, slaughtering a pig, distributing pigs to indigenous peoples. The function of land for indigenous peoples in Merauke Regency is also as clothing, food and board. Most indigenous peoples are heavily dependent on land and are still dependent and have a close cultural, religious affinity to their local (land) environment. They have a close, close bond with the land from generation to generation.

The role and function of customary law community according to ulayat law is as a ruling body that controls and regulates the provision, allocation, use of land for the welfare of members of the community. The legal community through customary officials acts as

carers and guards who ensure the safety and comfort of land use and enjoy the results. So the function of the legal community is as a place of land providers and the enforcement of ulayat norms to be fulfilled by every citizen, including foreigners who dwell in the juridical community of adat<sup>4</sup>.

According to Mas'ud Samin<sup>5</sup>, that there are 3 levels of adat rights are:

1. Individual adat rights apply to individuals
2. adat rights family applies at the level of one clan, for example gebze clan only gebze clan alone who can take, use, and seek life in the land.

All the land in Merauke Regency is customary land. The transfer of land rights is also done through buying and selling.

According to the author in the transition of rights through the sale and purchase may eliminate the ownership of customary rights of indigenous peoples because of the indigenous peoples rights through the sale and purchase and no ownership for generations so that the land can't be used by their offspring songs. It should

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<sup>4</sup> Maria S.W. Sumardjono. 2005. *Kebijakan Pertanahan. Antara Regulasi dan Implementasi*, Jakarta. Kompas, p 72

<sup>5</sup> Mas'ud Samin, sekretaris Lembaga Masyarakat Adat Marind Imbuti. Interviewed on 13 May 2013

be applied in providing protection to ulayat land that is only levy money (Recognitie). Recognitie is the provision of compensation or payment of land that is not always in the form of material or money so that the land can be re-utilized after the expiration of the period rather than the sale and purchase.

At this time, written release has been conducted by both community and legal entity as a condition to have a certificate at BPN. This is also reinforced by Maurid's statement that in Merauke district the customary rights of indigenous peoples communities are still acknowledged as follows:

1. There are still groups of citizens who feel bound by certain customary law arrangements and if any customary law community wishes to relinquish its land to other parties (individuals, legal entities, and government agencies) must go through the approval of the clan chairman first and if in case release/sale and purchase of customary land is not known by Chairman Marga then the sale/purchase/declared is not valid.
2. There is still a certain area which is an environment that is used as the fulfillment of daily needs for the indigenous people
3. There is still a customary ruler (head of clan) that implements

the legal provisions on adat rights (ulayat).

Therefore, the release of adat land is very important to be the basis of the transfer of rights by indigenous peoples to other parties. Land discharges are recognized by BPN after approval from the district head or by a notary as a government representative. In the absence of customary release, BPN will not issue certificates.

The economic development of Merauke Regency is a process, which is a process that includes the establishment of new institutions, the development of alternative industries, the improvement of existing manpower capacity to produce better products and services, identify new markets, a new company to invest in the region of Merauke regency. Each of these economic development efforts has the main objective of increasing the number and type of employment opportunities through employment opened by companies that make profitable investments for local communities in Merauke regency.

To achieve these objectives, local governments and communities must jointly take regional development initiatives. Therefore, the local

government along with the region and its community participation and by using existing resources should estimate the potential resources needed to design and build the regional economy<sup>6</sup>.

The Government of Merauke Regency has different programs every change of Head of Region. This is because every Bupati has different programs that are campaigned on every ELECTION, this is causing sometimes the previous programs that have not been implemented or temporarily implemented hampered and even stopped due to the Head of Region.

Samson Moses Silubun, details the current Merauke District programs are:

1. Strategic Program
  - a. Improving the quality of human resources;
  - b. Improve and organize education and teaching management;
  - c. Increasing the availability of education facilities and infrastructure;
  - d. Improve the degree and service of public health;
  - e. Improve the quality of health resources;
  - f. Improving the quality of farmers' resources;
  - g. Improving village agricultural infrastructure;
  - h. Organizing distribution and market networks;
  - i. Improve and organize agricultural space;
  - j. Increase the independence of food village
  - k. Arranging institutional government of village, district and district as needed (continued pemekaran pps and municipality merauke, government institutional adjustment, supra arrangement and infrasstruktur) Improving and managing transparent and effective transparent and efficient public services (controlling, speeding up, control of bureaucratic service.
2. Priority Program
  - a. development of education
  - b. health development
  - c. development of agriculture
  - d. infrastructure development
  - e. development of public housing
  - f. Economic Development of Village, District And Town.
3. Development Progress Village Program (Gerbangku)
 

Based on the result of the research, there are 46 companies investing in Merauke Regency, both Foreign Investment Company (PMA) and Domestic Investment (PMDN) engaged in Agriculture and Plantation, ie sugarcane plantation, oil palm, Timber palawija and IUPHHK-HTI.

<sup>6</sup> Iman Sudiyat. 2010. *Hukum Adat Sketsa Asas*. Yogyakarta. Liberty, p. 23

### **Release of Customary Land Can Provide Legal Certainty to Investors**

Release of customary land for the benefit of the investor did not provide legal certainty, this is seen from the indigenous people's lawsuit against investors causing land conflict. The lawsuit that occurred due to overlapping of control or recognition by some tribes over customary land/ulayat right and boundaries of land is not clear because it is still a natural boundary.

This study shows that, the unwrapping of adat land originated from ancient times through customary rituals with agreement between ulayat land owners and those who will buy the land. In addition to the unwritten release, there is also known written release since 1972, represented by the government in this case the heads of villages, districts, village institutions and sub-districts.

One of the provisions of the Laws governing the authority of indigenous peoples in the relinquishment of customary land for development purposes, particularly in Merauke Regency is Article 43 of Law No.21 of 2001 on Special Autonomy for Papua Province, expressly recognizes the

right of indigenous peoples which should be protected and respected by the region. There is recognition and respect for indigenous and tribal peoples for collective property rights.

The Government of Merauke Regency in carrying out the development necessarily requires the procurement of land through the release/release of customary land rights to the Regional Government based on Law No.2 Year 2012 on Land Procurement. for the implementation of development for public, private and individual interests.

According to Mas'ud Samin the release of customary land in Kota Merauke also occurs in the land purchase agreement which generally follows the rules and regulations applicable in indigenous peoples Merauke, malalui approach to local customary authorities is also needed. Adat authorities/traditional leaders as customary institutions are like small governments in their customary territories, which exercise common authority and hence the act of customary lands in customary territories shall be the knowledge and permission of their adat chief.



Legal products that are also the basis of customary land release namely Governor Regulation No. Papua Province. 23 of 2008 on the Ulayat Right of Indigenous People and Indigenous People Community Customary Law on Land, Regulation of the Minister of Agrarian Affairs No. 5 of 1999 concerning the Guidance on the Settlement of Problems of Customary Communities Community Customary Rights.

Then in case of land disposal for the benefit of Investor then the applicable Law Products Namely Governor Regulation Papua No. 64 Year 2012 on Standards of Compensation for Timber Forest Products and Non-Timber Forest Products levied on Indigenous Peoples' Rights and Merauke District Regent Regulation no. 17 Year 2012 About Tasks, Functions, and Duties of Regional Investment Board of Merauke regency. These regulations are expected to become a reference for local governments, communities and investors who invest in Merauke District.

Speaking of customary institutions, we are also talking about culture. Cultural autonomy can't be separated

from regional autonomy meaning that cultural autonomy is part of regional autonomy as well. Community participation in the region in relation to regional autonomy, not only to carry out development in the economic field but also in the field of culture.

Indigenous Peoples Institutions in Merauke Regency have 2 ie LMA District and LMA districts. Regency LMA concerning the problems of all Merauke indigenous communities, and if there are problems that can't be resolved by LMA district then submitted to LMA Regency.

In the case of disposal of land rights to individuals who have passed the agreement then the LMA performs the ratification of the signature of the seven genera which is then followed by the manufacture of certificates. Implication of the act of release is a guarantee in the future so that no one is demanding so there is no ambiguity in the future. Without it the people still claim the land. The ownership of customary land disposal is a certainty of future security for the breakup of the relationship by the owner of ulayat rights.

In the case of the release of land rights to investors, the provisions are



slightly different from individuals. On the investment of land disposal referred to as Tali Asih. The rope is a compensation for the utilization of land used by investors.

According to Gatot Dwiyanto, the problem of rope is a problem at PT. Medco that has occurred three times compensation demands from 2008 to 2013, so this is very detrimental to the company. Whereas there has been an agreement between indigenous peoples and investors that have been approved by a notary.

The same thing happened to PT. Korindo, according to Agus Malissa, that the land belonging to PT. Certified Korindo is also required to be compensated again because the owner of the customary rights who received the disposal money is not the actual owner but the other clan.

From land conflicts between investors and indigenous peoples is always resolved with mediation accommodated by the government and Indigenous Peoples Institutions has never been passed on in court.

Removal of customary land as the first land registration requirement, where the process of land registration of the Merauke district land office on

the sale and purchase of customary rights based on customs release letter as the land title proof. Release of adat as a condition to get affirmation of rights/recognition of rights in the issuance of land titles certificate. The legal act of buying and selling land based on customary law system is very different from western law in general the implementation of Sale and Purchase with customary release which often happened in indigenous people of Merauke done by adat, which has fulfilled some principle that is:

1. Conducted on the basis of the agreement of both parties so as to comply with the consensual Principles of the buyer's agreement/agreement on the amount of money to be paid, the timing of payment, and the seller of the land area, the location of the location, the limits, safe from the dispute. If the agreement has been fulfilled, it is usually followed by customary and down payment as a final sign. Such customary trading practices are rarely found in the western legal system.
2. Reel Contract is a real agreement that is a cash deed that can be seen, but not infrequently the payments

made with down payment, usually the down payment is not binding, in connection with the time down payment has been an agreement, then if there is wanprestasi made down payment buyer will disappear, while the wanprestasi done prospective seller, then he must return the money down payment referred, usually two times more.

3. The light is not dark, that is the buying and selling actions done must have a witness either old people / community leaders, neighboring boundaries and village heads, District Head who strengthened customary chief Ondoafi with customs release letter. It is intended to provide legal certainty, so that buying and selling acts become bright, because it is known to the traditional leaders and from the government.

Based on the rules made by indigenous peoples that should be carried out, in practice sometimes deviated from the rules agreed upon by customary figures that exist, regarding the limits of ownership of land rights to be processed release sometimes do not

get clarity so that the legal certainty given to potential buyers are very weak, and make the dispute in the future.

The first Land registration requirement of the new land rights applicant from Ulayat Rights land as follows:

1. Certificate of customary release.
2. Letter of application signed by the applicant.
3. Deed of sale from PPAT.
4. Photocopy of applicant's ID card that has been legalized by the authorized official.
5. Certificate from village head/district about the control and subject always juridical land not yet certified.
6. Research from the Office of the National Land Agency on Batasb on land and land boundaries.
7. News of the announcement endorsement event.
8. Physical data and juridical data.
9. Plot map.
10. Sale Receipt and purchase of land adat rights.
11. Quantity of land registration fee according to the deposit order (SPS) to the state treasury.

Besides that, another thing that disputes between Merauke local government, investors or prospective buyers of land and indigenous peoples is the investors in cooperation with the

local Government formed a committee of land acquisition in order to gain land below market price. Government policy does not favor the interests of the people, so that the people are disadvantaged. Implementation of land acquisition is often determined unilaterally, the result of which is the increasingly suffering of the landowner community as the land has been displaced, so that various layers of society urge the government to stop the intervention. In addition, the weak local government's role is related to the giving of legal force to buyers who have released indigenous land rights, the interests of the buyer as if not getting certainty because the government is not able to overcome the problem of conflict with indigenous peoples who also have its own rules.

Should the customary land release can provide a sense of security for investors who invest but because there are no local regulations that regulate the ulayat rights maps and standards of compensation, the legal certainty for investors is not guaranteed.

## **CONCLUSION**

The essence of the release of customary land rights is in the customary law of the land and the

rights of the indigenous people benefit of all the people in Merauke Regency. The release of customary land for the benefit of investors in Merauke Regency did not provide legal certainty, this is seen from the indigenous people's lawsuit against investors causing land conflicts. The land conflicts that occur with respect to customary land boundaries are evidence of social vulnerability faced by Marind people, whose customary lands are targetted by investments and built by the private sector without proper processes and sufficient consultations with communities (clans) and clans of landowners custom.

Any disposal of customary land rights for the benefit of individuals, government and investors should be undertaken by the ownership of customary rights so that the welfare of the communities in Merauke Regency can be realized. In addition, Merauke District Government as the holder of power in the region must be quick and decisive as a mediator in terms of indemnification by indigenous peoples so as to provide assurance of legal certainty for investors who invest

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