

The Possibility and Mode of Registering Adat Title on Land

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Key words: Adat title, *beschikkingsrecht*, registering adat title, ‘unending close and expand’, property market.

SUMMARY

Land policy and management and registration in Indonesia, should be developed based on the theory and system of adat (customary) land law. It should also translate the basic norm of article 33 (3) of the 1945 Constitution and article 5, 9 and 19 of BAL (Basic Agrarian Law) of 1960 into reality. In practice, however, many implementing laws and regulations are formulated based on the basic principles of the previous Dutch civil law on agrarian policy, property market and land administration system. Consequently, most of the implementing law and regulations regarding land policy and management as well as registration and property market are formulated contradictory with the basic concern and goal of the 1945 Constitution and BAL of 1960.

This paper, trying to discuss the mode of how adat principles and philosophy should be translated into implementing rules for land policy management and administration in Indonesia. To achieve that, it is necessary to correctly understand first the meaning of *beschikkingsrecht* meant by Van Vollenhoven namely as the theory of adat land law, rather than as a unique title of land in adat. It is suggested, that adat titles on land can safely be registered despite its ‘communal’ character. Registration is important, because adat law stipulates that only the owner can make a land contract that transfer the title and deliver the land as real estate. Land registration can also bring people to safely participate in the property market, and help solving most of the perennial land conflicts among people and between people and the government.

BAHASA INDONESIA

Politik pertanahan dan penataan serta pendaftaran tanah di Indonesia seharusnya dikembangkan berdasarkan teori dan sistem hukum pertanahan adat. Ia pun seharusnya menterjemahkan norma dasar pasal 33 ayat 3 UUD 1945, pasal 5, 9 dan 19 UUPA 1960 menjadi kenyataan. Tetapi prakteknya, banyak peraturan pelaksana hukum dan perundang-undangan yang dirumuskan berdasarkan azas-azas hukum sivil Belanda tentang politik keagrariaan, pasar tanah dan sistem administrasi pertanahannya. Akibatnya, banyak peraturan perundang-undangan, yang dilaksanakan bertentangan dengan kepentingan serta tujuan dasar UUD 1945 dan UUPA 1960.

Makalah ini, membahas cara azas dan filosofi adat diterjemahkan menjadi peraturan pelaksana politik dan administrasi pertanahan Indonesia. Untuk mewujudkannya, pertama – tama penting untuk memahami dengan benar arti istilah *beschikkingsrecht* menurut Van

Vollenhoven yaitu sebagai teori hukum pertanahan adat, daripada sebagai hak tanah yang khas dalam adat. Disarankan, meski ada sifat 'komunal'-nya, namun hak adat atas tanah dapat dengan aman didaftar. Pendaftaran itu penting, karena hukum pertanahan adat menetapkan hanya pemilik tanah yang berhak membuat perjanjian tanah dimana haknya dialihkan dan tanahnya diserahkan. Pendaftaran pun dapat membuat penduduk aman ikutserta dalam pasaran tanah, maupun penyelesaian sengketa menahun diantara warga masyarakat dan antara masyarakat dengan pemerintah.

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1. INTRODUCTION:

Two issues are discussed in this paper, namely the possibility and mode of registering adat title on adat land. These issues are crucial in Indonesia during the implementation of systematic registration, particularly outside Java. The reason is that outside Java is still dominated by communal character of adat land law known as '*hak ulayat*' or '*ulayat right*'. The underlying cause for the reluctance is because land registration will change the principles of '*ulayat right*' from communal property to individual.

Questions raised are therefore, is it possible to register adat title on adat land that is bounded by communal principles? If possible, what is the best mode of registering it? Then, after the adat communal land is registered; can it be put on collateral? If the registered communal land is mortgaged, and the creditor fails to perform his duties, can the bank put it on auction? In short, so many legal questions need to be seriously considered before registering adat title on adat land. Two main questions to such a hesitation, however, are all those questions valid and fair with regard to adat principles and theory; and what is the legal foundation for considering adat law in developing land policy, administration and property market?

The answer to the theoretical question on adat principles and theory is invalid. It is invalid because those questions that raised hesitations are based on the miscomprehension of adat land law philosophy and theory. The answer to the legal question for adat law legality is based on article 5 of BAL 1960 that correctly translates the main political concern and goal of article 33 (3) of the 1945 Constitution. The constitution stipulates that land should be used to enhance people's prosperity, based on traditional economic pattern of cooperative business. BAL of 1960 in article 5, which overtly stipulates that the law on land and agrarian affair in Indonesia is adat law, then translates the goal. The land policy, management and registration are stipulated in article 9 and 19, namely the Indonesian citizens are the landowners and land should be registered to issue the strong legal evidence for the titleholder.

The author, based on his field research in East, West and South Sumatra (Soesangobeng, 1998, 1999, 2000), came to two general conclusions on the answer to the hesitation of registering adat land. First, it is possible to register adat title on adat land, provided that adat land principles is considered; and second, the issue of communal land is not a hindrance. The issue of communal land outside Java becomes a hindrance, because of the miscomprehension of adat land law theory called *beschikkingsrecht* that is wrongly translated into '*ulayat right*' or '*hak ulayat*'; and that it is considered as common property that communally owned by all members of the community.

This paper, therefore, will start with an explanation to clarify the adat land law theory; followed by an interpretation of the mode of developing land administration system through

land registration, that can accelerate the mode of entering property market. Finally, some conclusions are presented.

2. THE INDONESIAN ADAT LAND LAW THEORY

Van Vollenhoven, the founder of Adat Law study, developed the adat land law theory in 1919. He coined a special Dutch terminology namely *beschikkingsrecht*, to explain the uniqueness and yet complicated idea, logic, system and philosophy of adat land law that are incomparable to the Dutch Civil Code principles, theory and system of sovereignty. Van Vollenhoven, explained that the term *beschikkingsrecht* is to describe the supreme law of land throughout Indonesia. Van Vollenhoven (1919: 9) himself, wrote to explain the meaning of his '*beschikkingsrecht*' terminology as follows:

"Dit ,beschikkingsrecht' – het word in technischen zijn genomen, als eigen rechtsbenaming- waarvoor, ook in zijn invloed op bouwvelden, het materiaal volop is aangedragen, is weer met niets in ons burgerlijk wetboek noch met ons recht van herschappij vergelijkbaar, maar is voor den ganschen archipel het hoogste recht ten aanzien van grond"

(This '*beschikkingsrecht*' – the word taken in its technical sense, with its unique law term – in which, its substance also valid to agriculture field, is again not comparable with anything in (the Dutch) Civil Code nor with our (Dutch) notion of sovereignty, but it is, for the whole archipelago (Indonesia) the supreme law with regard to land-free translation by the author).

Hence, it is wrong to translate *beschikkingsrecht* into 'ulayat right' or '*hak ulayat*', let alone to conceive it as a special kind of adat land title. It should rather be conceived as a special kind of law with unique logic, system and philosophy of adat land in Indonesia compared to that of the Dutch Civil Law and theory of sovereignty on land. The appropriate translation and perception of *beschikkingsrecht* is "Indonesian Adat Land Law". The term '*hak ulayat*' is used only by the Minangkabau people in West Sumatra, and was used by the previous Dutch officials as an example in their polemics against the Adat Land Law defenders. Therefore, it is inappropriate to use the term '*hak ulayat*', as if it is the only legal and correct terminology to describe the essence of the term *beschikkingsrecht*.

The application of *beschikkingsrecht* theory during the Dutch colonial regime resulted in miscomprehension and unending polemics. The polemics were among adat scholars and the former Dutch colonial officials. The adat scholars, particularly Van Vollenhoven and Ter Haar, stood up to defend adat land law principles to be appreciated in the Dutch law and regulations in the Netherlands-Indies (currently: Indonesia). Ter Haar (1927), in using Van Vollenhoven's *beschikkingsrecht* theory, insisted that all lands are directly fallen under the control of adat autonomous community. Hence, there is no no-man's land in-between, because the end boundary of an adat community is directly the beginning of the adjacent communities' boundaries. In other words, even the dense forest that is far away from people's compound and cultivated areas belongs to the adat community's controls and management.

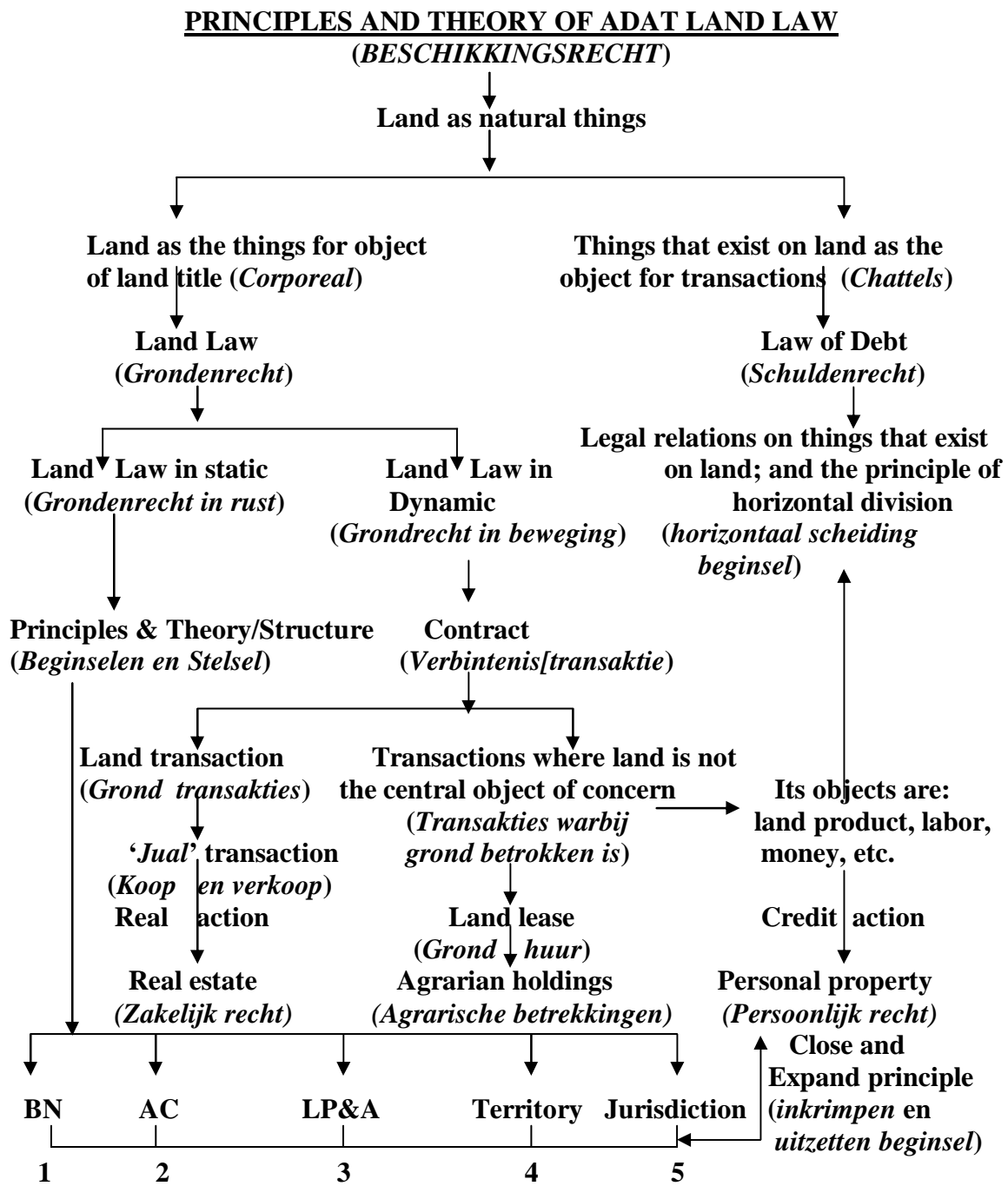
The Dutch officials, on the other side, led by Nols Trenite (1920), strongly insisted to enforce the Dutch agrarian politics and land law in Indonesia based on the Agrarian Law of 1870 and the Dutch Civil Code. For outside Java, Nols Trenite (cf. Ter Haar, 1927) created his theory, by contorted Van Vollenhoven's (1919) theory of 'dense forest', and named it after Van Vollenhoven's term '*woeste grond*'. Nols Trenite, argued Ter Haar and Van Vollenhoven by saying that between two autonomous adat communities, lied land unoccupied by the Natives and hence, no Adat Law rules exist on it. Those unoccupied lands are the dense forest that can be counted as the land of free state's ownership called '*vrijlandsdomein*'; as opposed to the state's land occupied by the natives, which is called '*onvrijlandsdomein*'. The Dutch authority had their full control and free determination of its uses over the land of the free state's ownership. Those lands were the areas where the Dutch authority could freely provide for foreign investors to develop their big plantation companies, without any consideration of relinquishing the Natives and Adat Law controls.

To anticipate the polemics, Ter Haar (1941/1994) wrote a book that was published in 1939. Schiller and Hoebel (1962) translated the book with the title "Adat Law in Indonesia". The book has a dual mission. First, it explained the detail principles and structure of adat law in which Van Vollenhoven's theory of *beschikkingsrecht* plays a central concept with regard land. Second, it was also meant to argue Nols Trenite's theory of 'dense forest', in which adat community's power and authority on land were limited to cover only in the actual people's compound and cultivated areas. The struggle of defending the *beschikkingsrecht* theory gained only little and shallow success as noted by Ter Haar (1934) in his paper explaining how *beschikkingsrecht* was considered in the judge's decisions.

With the outbreak of the Second World War and the establishment of the Republic of Indonesia as an independent state, the understanding of the adat land theory ceased to be discussed. The short and shallow achievement of Ter Haar and other adat land law defenders was also forgotten and neglected. The only remaining issue was the political will to abolish all the agrarian law and regulations based on the Dutch Agrarian Law of 1870, and change it with a new national agrarian law. The understanding of adat land law theory, however, is still unclear and incorrect. Therefore, although article 5 of BAL 1960 overtly stipulates that the law for land and agrarian regulations in Indonesia is adat law, the theory of adat land law namely *beschikkingsrecht*, is still interpreted to follow Nols Trenite's mode of interpretation.

For better understanding of the adat land law theory, the following diagram No. 1 can, best illustrate Ter Haar's mode of translating *beschikkingsrecht* as a theory of adat land law.

Diagram 1: Ter Haar’s explanation of *beshikkingsrecht* theory.



Source: Soesangobeng’s abstraction of Ter Haar’s book (1941/1994).

Notes :

↔ : Symbol for the “unending close and expand” relation of influences between the power and authority of the autonomous community and personal property of an individual person and corporation.

- 1 – 5 : The five postulates coined by Van Vollenhoven, using each Dutch special terminologies namely:
- BN : Basic norms, the first postulate, identified by the term *Beschikkingsrecht*
- AC : Autonomous community, the second postulate, identified by the term *Rechtsgemeenschappen*
- LP&A.: Legal power and authority, the third postulate, identified by the term *Beschkkingsrecht*
- Territory: Territorial division of the autonomous community, the fourth postulate, identified by the term *Beschikkingsgebied*
- Jurisdiction: Area of implementing and enforcing the autonomous community's power and authority, the fifth postulate, identified by the term *Beschikkingskring*.

Diagram No. 1 explains that adat law considers land natural things that are distinguished between things corporeal and chattels. Each is covered by two distinct laws namely land law for corporeal and law of debt for chattels. Land law, is divided into static and dynamic senses. The static contains principles and structure or theory and system, while the dynamic covers the contractual transactions on land. The contractual transactions are then divided into land transactions and transactions where land is not the central object of concern. The principle of land transaction is to transfer land right through contract of sale that creates real property. The transaction where land is not the central object of concern, on the contrary, is characterized by leasehold that creates agrarian holdings, namely to till the land and obtain its product, labor, or money. The Law of debt creates personal property through credit transaction that covers agrarian relationship. The principle of the agrarian relations is based on the principle of horizontal division that distinguished corporeal and chattels. The inter-relation between personal rights and the power and authority of the autonomous community is determined by the principle of 'unending close and expand' influences.

Another issue that clearly exists in Ter Haar's theory, though not overtly stated, is the distinction between land and agrarian relations to land. Land is interpreted to cover not merely the surface of the earth but also water, air, minerals, including ancestors' spirits. Thus, it is similar to English definition of land (cf. Simpson, 1976: 5) and the Roman maxim of "*Cujus est solum ejus est usque ad coelum et ad inferos*". A slight difference is that in adat law, man as human being including ancestors' spirits is put in the central object of concern of all actions regarding land. Consequently, any relationship with land is considered as legal relationship between man and the ancestors' spirits who control the land. Agrarian on the other side is interpreted as the form and pattern of relationship to till land, own trees and other things on it and the enjoyment of its products as well as its uses for economic purposes.

Most of the adat scholars and officials in Indonesia cannot clearly understand Ter Haar's principles and structure or theory of adat land law. As a result, misunderstanding and misperception of the adat land law theory persist until the present time. They even adhere to Nols Trenite's theory and use it in their mode of enforcing Basic Agrarian Law's (BAL). Hence, the Indonesian officials themselves create even more confusing legal logics by translating *beschikkingsrecht* into '*hak ulayat*' and considering it as a unique land title dominated by 'communal' character. Therefore, it is necessary to understand the complexity

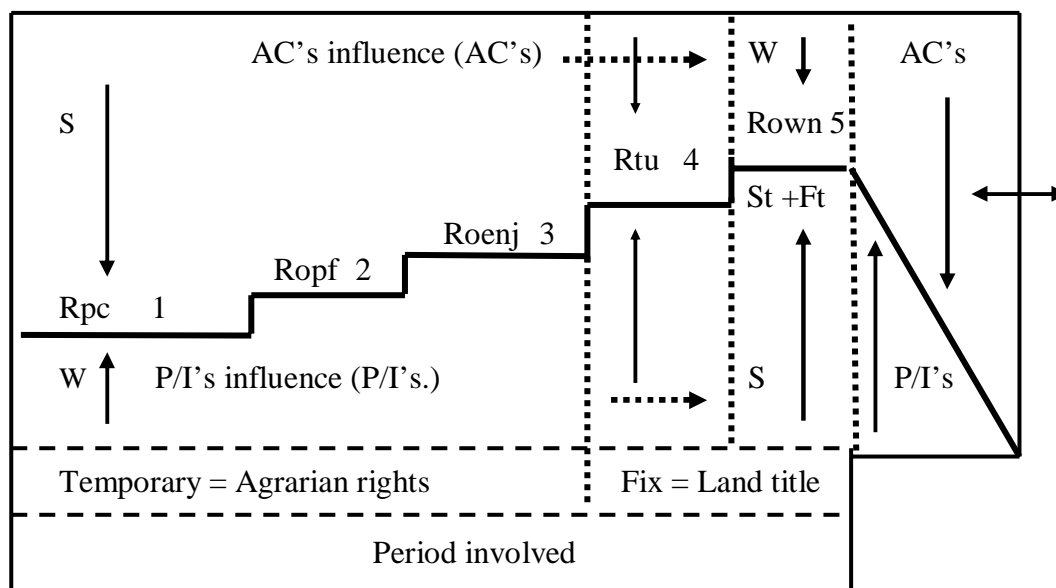
of *beschikkingsrecht* as the theory of adat land law, before trying to translate its essentials into legal norms for implementing BAL of 1960.

3. REGISTRATION OF ADAT TITLE

In line to the intention of this paper, the element of the establishment of adat land title deserves special explanation. That is to clarify and specify the object of registering land title on adat land. This is necessary, because land title is established not by a decision of the adat chiefs, but through a process of long period of intensive and continuous dwelling and tilling the land. The title is established when a person or group of persons choose to occupy an area within the autonomous community's jurisdiction, after obtaining the permission from the official adat chief. The person or the group is then obliged to put a sign on the land; by what, he/she or the group obtain an initial right that excludes other members of the community to claim the area.

The following diagram no. 2 describes the processes of adat land title acquisition in adat according to Ter Haar's theory.

Diagram 2: Stages of adat land title acquisition and its 'unending close and expand' influences.



Source: Soesangobeng's abstraction of Ter Haar's (1941/1994) book.

Notes:

Abbreviations: S: strong; W: weak; St + Ft: strongest and fullest; AC's: Autonomous community's; P/I's: Personal/Individual's; Rpc: right of preference to choose; Ropf: right of preference; Roenj: right of enjoyment; Rtu: right to use; Rown: right of ownership

↓ : sign for the strong influence of autonomous community against personal/individual right

- ↑ : sign for the weak influence of personal /individual right against autonomous community's influence
- ↔ : intra and extra-community's relations
- 1 – 5 : stages for the growth of rights to become land title namely right to use and ownership.

Diagram no. 2 describes how adat right grows from the temporary right of possession to become the fixed rights as land title namely the right to use and ownership. When individual or group start to establish his/her or their relationship on land, the autonomous community's power and authority are still strong and full, while the individual or group's power and authority are weak and still in its seminal state. If the person or group continuously occupy, till, and enjoy its products, he/she or the group acquire a stronger and fuller right namely the right to use. Then, as the time passes, when the titleholder manages to bequeath the land to the descendants, he/she or the group acquires the strongest and fullest right namely ownership.

Although the titleholder has acquired the strongest and fullest right viz. ownership, the community's influence never ends. Once the owner leaves the community or abandons the land, the community regains her strongest and fullest power and authority to control the land. This manner of inter-influence power and authority of the community and the personal or individual right is what Ter Haar (1941/1994) called the principle of 'unending close and expand' process or 'grows and shrinks' by Schiller and Hoebel (1962: 90). The power and authority of the community on land that already holds by a titleholder is called 'right of eminent possession'. Consequently, there is no absolute land title either owned by the community or a person as individual or corporation as well as a group. In its Dutch formulation, Ter Haar (1941: 55) wrote that:

"...het beschikkingsrecht staat met de individuele rechten in en nooit eindigende wisselwerking van inkrimpen en uitzetten..." (...the power and authority (*beschkkingsrecht*) of the community and the individual right are in the state of unending inter-relationship of close and expand influence- free translation by the author).

Thus, the acquirement of land title in adat, is an unending process of establishing real contact to land that gradually grows from right of temporary possession to become the fix rights. Only the fix rights namely the right to use and ownership that can be counted as land title. The land title is a private property controlled by adat civil law and includes the use for commercial business or what is known in the Latin maxim as *res extra commercium*. Based on this theory of adat land title acquirement, it is appropriate to conclude that only right to use and ownership can become the object of land registration.

The other rights that belong to the temporary rights cannot be treated as the object of land registration. It is because the community's power and authority are still strong and full, that cannot be transferred to individual control through land transaction, although the transfer of its agrarian right and relationship is allowed. Hence, it is apparent that Ter Haar makes a clear distinction between land title and agrarian right. The agrarian right is the temporary right of possession, where the legal relation to obtain it is determined by leasehold, and therefore it is

not the object of land registration. On the contrary, the land title is the fix right of possessions where through land transaction, the right to land as corporeal is created to become real property, therefore it is the object for land registration and conveyance.

Another crucial issue to be considered is registration of adat land rights bounded by communal characters such as the *ulayat* land, *gogol*, *druwe desa* and others of the like. Three main features have to always be kept in mind when considering registration of adat land that is still bound by community's power and authority of control and influences. They are the principle of 'unending close and expand'; the distinction of agrarian right and land title; and the principle of horizontal division. The combination of the three principles should be clearly considered before determining what right can and what is not necessary to be registered. For land title, despite its communal character of influence, its registration is always possible. This is because land title namely right to use and ownership, has been privatized as individual title, in which community's influence has shrank to the extend that only its 'right of eminent possession' that is left. The agrarian right is not the object for registration. It can, however, be recorded in the land administration document, as a kind of encumbrances but surely there is no certificate of title needs to be issued.

The communal character is not a hindrance for registering adat title on land, due to its essential. The essence of being communal in adat land is in the 'unending close and expand' influences of community's power and authority over individual's rights; rather than to the function of land as property that is owned and equally shared by all members of the community. This sort of communal shared property never exists in Indonesia. The government overtly argued this when a question on communal property was raised in the Parliament in 1951 (Ardiwilaga, 1962: 54, 59). The government's respond to the question was strict that: the meaning of communal land as it is owned and shared collectively has never been existed in Indonesia. Therefore, if we understand better the principle of 'unending close and expand' inter-influence between community's power and individual right, then it is useless to hold the idea that registration will change the communal character of adat land into private individual property.

The mode of preventing adat principles in this regard is to record the elements of community's control and influence in the certificate of title. Those elements are different in terminology from one area to the other, but their essential features that needs to be described are the status of the land whether it is purely personal property or still bound by family and group's property. In adat law, the terminology that is used as the name of a kind of right to land, directly describes the content and function of land whether it is personal belonging or it is still attached to the family or community's control. The term '*ganggam bauntuak*' in Minangkabau for example, directly describes the content, function and status of the land and the owner and her descendants. The term describes that the land is a family group's legacy bequeathed from the ancestor, held by female descendant as the owner; but controlled by male who holding the status of administrator of the legacy, and that it is provided for everlasting use by all members as the descendants of the family group.

On the contrary, the term '*yasan*' in Java describes the fullest and strongest power and authority of a person to own the land as his/her personal property called *milik*. The

community's power to control and influences over 'yasan' has shrunk to the extreme limits of weakness but never end and totally loss. The term 'druwe desa' in Bali describes the full and strong influences, power, and authority of the village as adat community to control the land. The term 'druwe nengah' on the other hand, describes the household's property that is provided to be enjoyed by all blood brothers and sisters of a head of the household; while, the 'druwe', means a full personal and individual property.

The mode of registering the land owned by a person with 'yasan', 'milik' or 'druwe', is clear with no hesitation whatsoever to use only the name of the titleholder. To register the land that still bound by the family or community's power to control such as 'ganggam bauntuak' or 'druwe desa', is rather complicated. Because the registration should also mention other name(s) who, according to adat rules, is/are involved in managing the land. The registration of a parcel owned by a person on 'ganggam bauntuak' land, need to mention the name of three adat status. They are the original owner, the administrator of the legacy, and the person using the parcel. The person using the parcel will be mentioned in the certificate as the holder of the right to use. The original owner and the administrator of the legacy are also mentioned in the column for the origin of the parcel.

To register the 'druwe desa' in Bali, it is the name of the village that needs to be mentioned and the chosen type of right in the BAL that suits is the right to use. With all the information in the certificate, then the adat status of the registered parcel, as well as the right and obligation of the person using it, are determined and protected.

The question of how will the registered parcels of adat land be used for economic reasons will be answered in the following section 4.

4. THE USE OF REGISTERED ADAT LAND FOR ECONOMIC PURPOSE

The use of adat land for economic purposes is not new. It has its origin since the establishment of adat land law. Van Royen (1927) in his dissertation proved that even *beschikkingsrecht* theory was developed based on economic reason. The mode of using land in economic dealings, however, was determined by the mode of transactions. In the earlier closed economic system of a family group, land transaction, was characterized by exchanging land and its products as economic commodities. As time passes, however, the system changes due to the adoption of new mode of meeting the need of economic dealings with outsiders (cf. Ter Haar 1929). In short, adat land law is open and flexible for adopting new mode that amenable to the existing adat principles.

The same character is still applicable to the present economic situation. Ter Haar, has proved it through his mode of interpreting and developing *beschikkingsrecht* to meet the need in modern economic system as depicted in diagram no. 1. In the diagram, it is clear that land and its product is inevitably are the objects for property market, land management, and administration. However, they need to be distinguished between their object of concern, namely whether land is the main concern or not. If land is the main concern, than land transaction, namely to sell (*jual*) it for good, is the only form of transaction. Its legal consequences are threefold. First, the vendor must be the owner of the land; second, the

transaction is real where the involvement of adat chief is a must; and third, the title of the land is simultaneously transferred to the purchaser upon the conclusion of the agreement, but the delivering of the parcel as real estate have to be conducted by the seller in his/her capacity as the original owner. If land is not the main object of concern, the form of transaction is lease or land pledge. In this regard, the three legal consequences for land transaction are not applicable.

Anticipation for the use of registered adat land for economic purposes needs to consider three main elements, namely the amendment of cadastral registration system, decentralization, and property market in informal situation. The combination of these elements, will determines the mode developing property market and accelerate the mode of solving perennial conflicts among people and between people and the government. The descriptions of each of these three elements are as follows:

4.1 Amendment of Cadastral Registration System

The system of cadastral registration in Indonesia is adopted from the Dutch. Under the Dutch system, cadastral registration was specified only to land title that is controlled by the Dutch Civil Code, which provide only for the European and Foreign Oriental. The Indonesian natives are by law, excluded from cadastral registration due to the Dutch land and agrarian policy and management; hence, the natives are also having no access to participate in the property market. However, the natives' rights on land were recognized but not legally protected, because according to the Dutch agrarian policy, the natives were the labors to tile the state land with an obligation to pay tax for the government.

Taking into account of these historical effects of the Dutch policy to the natives and adat rights, the amendment of cadastral registration system should involves the following principles:

- The Dutch principle of publicity called '*nemo plus juris ad alium transferre potest quam ipse habet*' has to be changed to comply with adat principle that in Latin is called '*nemo dat qui non habet*' means 'he who hath cannot give'. Consequently, all adat lands have to be in the first place registered so that all titleholders have a strong legal evidence of their land title.
- The process of boundary marks agreement amongst owners of the adjoining parcels. This is called '*contradictioire delimitatie*' in the Dutch system, where its validity lies on the agreement between the owners of the adjoining parcels themselves, while the surveyor only recorded it as legal data. To comply with adat principle, then the agreement should be made directly by the official surveyor with the presence of the adjoining parcels' owners. This is because in adat law, the agreement is achieved by the adjoining parcels' owner with the involvement of the adat chief and other members of the community through a special adat ritual called *selametan*.
- The principle of survivorship in the Dutch civil code needs to be amended. The principle is only the title of the survival is eligible to be registered. The amendment has to comply

with adat law where the original owner of the land has died decades ago but still acknowledged by the descendants as the true owner of the land. His/her name needs to be mentioned also in the registration. The real needs for this is in the registration of *ulayat* land in Minangkabau.

- The principle of survivorship in the Dutch civil code needs to be amended. The principle is only the title of the survival is eligible to be registered. The amendment has to comply with adat law where the original owner of the land, had died decades ago but still acknowledged by the descendants as the true owner of the land. His/her name needs to be mentioned also in the registration. The real need for this is in the registering of *ulayat* land in Minangkabau.
- The clear distinction between the transfer of land title and the delivery of land has to be defined. This also complies with adat law system of land contract as overtly described by Soepomo (1982), in his research in West Java that concludes that adat law also acknowledges the principles of delivering land as real estate.

4.2 Decentralization

Decentralization of land management also exists in adat land theory, as clearly depicted in diagram no. 1 re. adat land theory, system and philosophy. Land is administered in accordance to the principle of social organization and structure of the autonomous adat community. The principle of dividing territory and governmental authority in adat, between division and central authority of the community as a unity, also exists. With regard to land, land is considered as the prime identity and symbol of unifying the community as a holistic group. The power and authority to control and administer land are hierarchically divided according to the issue and territorial divisions between central and regional authorities. The central authority, has the power to control the issue of land title namely land as real estate, whereas the regional authority has the power to control and administer all agrarian rights and relations as well as to determine the uses of land within its territory.

In translating the adat theory and philosophy into the state system of land administration, land should be controlled and administered by the central government authority. The agrarian relations, on the contrary, can be delegated or decentralized to the local government. In the central authority, the government power is manifested in the form of a Ministry or Department for national land authority. In the regional authority, the local government holds the power and authority to control and administer the agrarian relations.

Kinds of power and authority in the Central government held by the Ministry of National Land are among others:

- The power to determine land acquisition, the establishment of land title, expropriation, encumbrances, abandonment, land accretion,
- Cadastral registration,
- The authority to define the general land policy and management,
- To determine public official who has the authority of drawing deed for land dealings,
- To determine the public official for land conveyance, surveyor, and valuation,
- To determine the general policy for national spatial planning, etc.

The kinds of agrarian relations that can be delegated to the regional government are:

- To determine the regional spatial planning of land in the area,
- Collecting land taxes and revenues,
- To determine the uses of land,
- To invite investors for developing plantations, industries, mining in the area, etc.

4.3 Property Market in Informal Situation

Property market in this regard is interpreting as the mode of using land for economic purposes particularly in selling and buying land as real estate. The specification to focus on selling and buying transactions should be compliant and consistent with adat theory of land dealings covered by adat land law in dynamic. The informal situation here is meant to refer to the law and atmosphere when the agreement is achieved. The informal situation occurs when the law that covers the transaction is not state law and its procedure, and the atmosphere is based more to the oral personal trust rather than to the written official document. This kind of agreement is widely known as the informal land transaction.

The informal land transactions mostly happen among people who were categorized in the Dutch law as the Indonesian Natives. They were exclusively excluded from property market and hence their economic lives are fully dominated by the informal transaction. They were not familiar with certificate as legal evidence to prove their ownership of land and use it for collateral in the bank. As a result, they develop their own mode of loan, saving and credit for raising capital through personal relation by quick and simple procedure although with very high interest.

The weak access of the Natives to gain business capital through bank persists until the present time even after they become the Indonesian citizens. This is because they are not treated as the owner of land as stipulated in article 9 of BAL, but are still considered as the menial labor on land. Such mode of treating people has created a lot of perennial conflicts between people and the government, because people enhance their claims to be recognized as the landowners. Therefore, the registration of adat land will not only help people participating in the property market, but also help solving a lot of perennial conflicts among people themselves and also between people and the government.

5. CONCLUSION AND SUGGESTION

The above descriptions illustrate how people and their adat land have been misinterpreted and neglected by the authorities that created obstacles for people to participate in economic business. The misinterpretation also created a land policy and management, which focusing not on the interest in enhancing people's welfare as stipulated in article 33 (3) of the 1945 Constitution and BAL 1960, but more in increasing business and investors' interest. To change the paradigm, it is necessary that we adopt two strategic paths, namely first, to drop all previous Dutch civil code principles on land and agrarian policy and adopt the correct adat philosophy and principles; and second, to register all adat lands by enforcing article 9 of BAL 1960. The first path is to be consistent to the

legal policy in which Dutch civil code principles regarding land and agrarian issues are revoked.

The second path is to provide strong legal evidence of ownership that allows all people to safely participate in the modern property market. This is possible, because article 9 of BAL stipulate that all Indonesian citizens are the landowners. That means, by law, all Indonesian citizens are the landowners because of their status of being Indonesian citizens. The right they acquire, however, is the right of eminent possession that will emerge as real ownership after occupying the land, and they must register it to obtain the certificate of title. Therefore, registration of all land parcels should become the first priority to develop land policy management and administration that are good, transparent and accountable.

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Career

Lecture:

- 1964 – 1986: in Law School of the Brawijaya University in Malang, Indonesia, teaching land law and adat law
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Research:

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- 1967 – 1975: Head of Law Research Bureau of the Brawijaya Law School, in Malang.
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- 1993 – 1994: Swiss Contact, in VEDC Malang, for developing method of training teachers of the Senior School of Technological in Eastern Indonesia.
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