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Doctrinal Review on The Legality of Ulayat Rights Release Agreements in Papua Province

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Abstract: In Papua Province, land conflicts between MHA and entrepreneurs often occur and lead to social conflicts. One of the common practices used in the transfer of ulayat land is the Ulayat Rights Release Agreement. In this article, the author will discuss the legal aspects of the Ulayat Rights Release Agreement that need to be considered to protect the seller and the buyer. This study is a normative or doctrinal research that uses primary data in the form of observations and the author's experience as a legal analyst involved in the Papua Province licensing review process, as well as secondary data derived from statutory regulations and other literature. The results showed that Ulayat Rights Release Agreement requires three important conditions, namely: 1) Subjects that need to be legally identified and ratified (Ulayat Rights Holder); 2) Objects that need to be mapped (Ulayat Rights Limits); and 3) Relationship between Subjects and Objects about how Ulayat Rights are used, regulated, and managed by Ulayat Rights Holder (Ulayat Rights Control). These three points need to be legally ratified based on applicable regulations, which is through a Regional Head Decree or Regency Regulations.
Keywords: MHA, Ulayat Rights, Papua

INTRODUCTION

Ulayats rights are recognized through Article 3 of Law Number 5 of 1960 on the Basic Regulations on Agrarian Principles ("UUPA") which states that "...the implementation of ulayat rights and similar rights of customary law communities, as long as in reality they still exist, must be in such a way that it is in accordance with the national interest and State, which is based on national unity and must not conflict with higher laws and regulations." The recognition of this ulayat right is inseparable from the spirit of customary law as the applicable agrarian law in Indonesia based on the provisions of article 5 of the UUPA. Prior to the UUPA, there was a dualism of land law in Indonesia, which are western law and customary law.

Although it has been acknowledged, the UUPA does not explain further about the definition of ulayat rights. Boedi Harsono defines ulayat rights as "the rights of an indigenous legal community over its territorial land environment that authorizes certain indigenous rulers to regulate and lead the use of the territorial land of the legal community" (B. Harsono, 2008). In addition, ulayat rights are also defined as jointly owned land which

is believed to be a gift of supernatural power or inheritance from an ancestor to a group or customary law community (B. Harsono, 2008). Article 1 paragraph (2) Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 18 of 2019 concerning Procedures for the Administration of the Ulayat Land of the Unity of Customary Law Communities ("Ministerial Regulation of ATR Number 18 of 2019) ", as a positive law governing the administration of ulayat land, defines ulayat rights as "the right of communal Unity of Customary Law Communities to control, manage and/ or utilize, and preserve its customary territory in accordance with the values and applicable customary law."

The existence of ulayat rights in a certain Customary Law Communities can be seen from the daily activities of community leaders and community elders, which in reality are still recognized as the task of regulating mastery and leading the use of ulayat land (Harsono, 2008). One of the areas that is still bound with the dynamics of indigenous peoples and ulayat land is Papua Province(Muzizat et al., 2021). The customary law community in Papua is divided into seven customary areas, namely the Tabi/Mamta (Mamberamo river plain to Tami river), Saireri (Saireri bay), Doberay (bird head area), Bomberai (Bintuni-Mimika Bay), Ha-Anim (Asmat-Merauke), La Pago (east Central mountain) and Me Pago (west Central mountain)(Deda & Mofu, 2014). Papua Province became the land for five indigenous territories, namely Tabi/Mamta, Saireri, Ha-Anim, La Pago and Me Pago, while West Papua Province included the Doberay and Bomberai indigenous territories(Deda & Mofu, 2014). Papua Province has special autonomy stipulated through Law Number 2 of 2021 concerning the Second Amendment to Law Number 21 of 2021 concerning Special Autonomy for Papua Province ("Otsus Law") which provides flexibility for the Papua Province government to regulate and manage the interests of the local community according to its own initiative based on the aspirations and fundamental rights of the Papuan(Auriga Nusantara et al., 2018). In Article 1 number 21 of the Otsus Law, Ulayat Rights is defined as "the alliance rights owned by certain customary law communities over a certain area which is the environment of their citizens, which includes the right to utilize land, forests, and water and their contents in accordance with laws and regulations".

Conflicts that occur in Papua related to land are still frequent, especially conflicts between oil palm plantation companies and indigenous peoples. Based on data from the Consortium for Agrarian Reform (kPa), the highest agrarian conflict occurred in the plantation sector(Fadli, 2021). The Corruption Eradication Commission (KPK) is coordinating the evaluation of oil palm plantation licensing in Papua and found violations of oil palm plantation permits that caused environmental damage and agrarian conflicts with local indigenous peoples(Zuhad, 2021). Agrarian conflicts themselves often take lives, such as the death of Marius Betera, a farmer in Boven Digoel Regency, Papua Province who visited the location of a palm oil company permit(Sucahyo, 2020).

One of the company's efforts to control indigenous peoples' lands (ulayat lands) in Papua is buy their lands. The transfer of ulayat land is legally possible because based on the General Explanation of section II of the UUPA which stated that**,** "it is not justifiable, if in today's state conditions the legal community still maintains the content and exercise of its recurring rights absolutely, as if it is detached from its relationship with the legal communities and other areas within the State as a unit". In addition, ulayat rights are not only encompassing public dimension but also a private dimension (civil) so that the transfer of ulayat rights is possible based on the principle of freedom to contract or make agreements with other parties/subjects.

In practice, the purchase of ulayat land is carried out through an agreement that is set forth in a written agreement that forms the basis of the release of ulayat rights over ulayat land by indigenous peoples. In the form of an agreement, the term "Ulayat Rights Release Agreement" is born, which is made by the representatives of indigenous peoples and the company. In addition, there are similar practices, such as the sale and purchase of customary land of the Moi tribe in the city of Sorong using a land release certificate(Gafilem, 2013). The release of land rights is carried out through deliberation based on an agreement between the land owner and the party who needs the land(Rubaie, 2007). Based on the characteristics of ulayat rights over land as joint ownership rights of indigenous peoples as described above, the author would like to further examine the main causes of the agrarian conflict by discussing two issues related to the legal aspects of the Customary Rights Release Agreement which is the basis for the transfer of customary land from the community to other parties (companies). *First*, how to ensure that the subject who agreed the agreement is a party who has the right to represent indigenous peoples considering that the main characteristics of ulayat land are as communal property. *Second*, how to ensure the legality of the ulayat land objects that are sold to provide legal certainty for the seller and the buyer.

Many researchers have discussed the legal aspects of customary land rights release in Papua. For example, (Cindy Fatika Sari et al., 2021) have discussed the release of land by the Papuan Customary Law Communities through a court decision approach. In addition, the research by (Eka Yunita, 2018) also discussed the process of land registration for the release of customary rights of the Moi tribe in Sorong, West Papua. This article uses a different approach, which is a doctrinal approach, so that the discussion will be more emphasized on normative rules, such as agreement law, UU Otsus, and several Special Regional Regulation (Perdasus) that apply in Papua Province. The results of both studies have not shown the use of Special Regional Regulation as a legal basis for court decision-making and the process of land registration for customary releases, thus indicating the need for doctrinal analysis to enrich the knowledge of legal academics. The contents of this article will be divided into four sections. After the introduction, the Second chapter will describe

the research methods used in this article. The third chapter will discuss the legality of ulayat rights agreements based on the subjective and objective terms of agreements regulated in article 1320 of the Civil Code, as well as the relationship between the practice of ulayat land release agreements and the overlap of land claims in Papua Province. Finally, the Fourth Chapter will contain the conclusions of this article.

METHODS

This research used normative or doctrinal legal research methods. Doctrinal research deals with a legal doctrine, its development and application, and is directed at finding a specific statement of law, and an in-depth analysis of legal reasoning(Ahmad Zuhdi, 2012). The data was primary data, which was collected by observation techniques based on the experience of the Second author as a legal analyst involved in the land-based licensing review process in Papua Province. At the time when the second author was actively involved as a legal analyst, a review of the licensing of oil palm companies had been conducted on 54 companies in Papua Province, where these companies obtained land from indigenous peoples through declaration and agreement of ulayat rights release, made between community leaders and companies. The author argues that the statement letter and agreement on ulayat rights release have not taken into account the provisions of the Law and Special Regional Regulations in force in Papua Province, so that it has the potential to cause land conflicts. Secondary data collected in the form of laws and regulations, books, articles, journals, and online research. The results of the study was elaborated using qualitative analysis.

RESULTS AND DISCUSSION

Legality of Ulayat Land Release Agreement based on Article 1320 of the Civil Code

The release of land rights leads to the termination of the legal relationship between the holder of the land and their land, which is accompanied by the provision of compensation whose form and agreement are determined by deliberation(Santoso, 2010). The release usually occurs in the case of the purchase of freehold land by a private company or other legal entity. This is because a legal entity cannot become a holder of property rights under the UUPA, so the legal entity must apply for new rights other than property rights, such as Right to Build (HGB) and Right to Cultivate (HGU) on land whose rights have been released. In the release of rights, initially, the released land object will become state land, which is then submitted a new application for rights by the party who provides compensation on the basis of an agreement on the release of land rights or a statement letter on the release of land rights(Santoso, 2010).

The process of releasing land rights as regulated in the UUPA is also applied in the process of releasing ulayat rights as set forth in the Ulayat Rights Release Agreement. This agreement becomes an administrative requirement that must be fulfilled in Papua Province before the Provincial National Land Agency and/or the Regency Land Office carries out the further process of issuing land rights to individuals and companies. If the release of ulayat land is stipulated in a written agreement, then the legality of the agreement is subject to Article 1320 of the Civil Code regarding the terms of the agreement, namely: 1) The agreement of those who bind themselves; 2) The ability to make an agreement; 3) a certain subject matter; and 4) an unforbidden cause.

The first condition stated that the agreement is the manifestation of the will of two or more parties in the agreement regarding what they want to do, which usually begins with an offer by one party which is then accepted by the other party(Muljadi & Widjaja, 2014). The second requirement stated that the ability to act independently, is related to the issue of authority to act in law (K. Muljadi & G. Widjaja, 2014). The third condition stated that all types of agreements inevitably involve the existence of a certain object, whether it is an agreement to give something, to do something or not to do something(Muljadi & Widjaja, 2014). The fourth condition stated that an agreement does not have the power if it is contrary to the Law, decency, or public order(Muljadi & Widjaja, 2014). In addition, it is also known that the four conditions for the validity of the agreement are divided into two groups, namely subjective conditions (agreement and skills) and objective conditions (a certain thing and a cause that is not forbidden). The non-fulfillment of a subjective condition in an agreement has the consequence that the agreement can be canceled while the non-fulfillment of an objective condition causes the agreement to be null and void. This provision means that in the event that the subjective conditions are not met, one of the parties who have not yet given an agreement or a capable party can still change their mind to continue the agreement that has been made. On the one hand, the agreement is automatically considered null and void if the objective conditions are not met, which raises serious consequences. As an agreement, the legality of the agreement to release ulayat rights can be examined from the subjective and objective requirements. To assess the legality of the ulayat land release agreement, the author also examines specific rules related to MHA in Papua Province.

Subjective Conditions of Ulayat Rights Release Agreement

Regarding ulayat land rights, the criteria for determining whether ulayat rights are still present must be seen from three points, namely: 1) the existence of customary law communities that meet certain characteristics of the subject of ulayat rights, 2) the existence of land/areas with certain boundaries as *Lebensraum* which is an object of ulayat rights and 3) the existence of the authority of the customary law community to take certain actions(Sri

Wulan Sumardjono, 2007). These criterias are closely related to the subjective and objective conditions of the ulayat rights release agreement. Subjective terms emphasize legality on the subject aspect of the agreement maker, which is the existence of an agreement and the capacity to make an agreement from the parties who are obligated. Indigenous Law Society (MHA) is the subject of the holder of ulayat rights and the existence of MHA has been regulated in a number of laws and regulations. In Indonesian law, the existence of MHA requires formal proof, for example based on Regional Regulations (Perda) or Decree (SK) of Regents or Mayors(Firmansyah, 2016). Recognition of MHA is regulated in several statutory instruments, such as Regulation of the Minister of Home Affairs Number 52 of 2014 concerning Guidelines for the Recognition and Protection of Customary Law Communities, Regulation of the Minister of Marine Affairs and Fisheries Number 8 of 2018 concerning Procedures for Stipulating Customary Law Community Management Areas in Utilization of Area in Coastal Areas and Small Islands, The Regulation of Minister of Environment and Forestry Number 9 of 2021 concerning Social Forestry Management and several other sectoral regulations.

However, the problems is regarding regulatory and policies instruments on the recognition of MHA (Regency Regulations and Regent Decree) are not expressly regulated in the applicable regulations. Some regulations only require a Regent's Decree, but for sectoral (Forestry) it requires a Regency Regulation as a valid instrument to use and does not require a Regent's Decree. This makes a difference in the recognition process to meet the requirements based on the applicable regulations. This certainly affect the process of releasing ulayat rights, whether the conditions for recognition of subjects are based on the Regent Decree and/or the Regency Regulation. Conflicts can occur if in the future the Forestry sector does not recognize the release of rights that are recognized based on the Regent Decree.

Papua Province as a special autonomous region based on the Otsus Law has a Special Regional Regulation (Perdasus) that regulates the recognition of the existence of MHA, such as Special Regional Regulations Number 22 of 2008 concerning the Protection and Preservation of the Natural Resources of Papuan Customary Law Communities (Special Regional Regulations Number 22/2008) and Special Regional Regulation number 23 of 2008 concerning the Ulayat Rights of Customary Law Communities and Individual Rights of Customary Law Communities to Land (Special Regional Regulations Number 23/ 2008). Special Regional Regulations Number 22/ 2008 mandates that MHA subjects are recognized through the instrument of Regency/ Provincial Regulation while Special Regional Regulations Number 23/ 2008 regulates that the object of ulayat land is determined through a Decree of the Regent/ Governor. In Papua, several regional regulations and decrees from the Regent/Mayor have been issued which acknowledge the existence of MHA, such as the Decree of the Sarmi Regent Number 188.4/135/ YEAR 2021 concerning the Recognition and

Protection of the Customary Law Community of Isirawa (Sawere) in Martewar Village, Wari Village, Aruswar Village, Niwerawar Village, and Arbais Village, West Coast District and Sarmi Regency in 2021 (Sarmi Regent Decree 188.4/2021) and Sorong Regency Regulation Number 10 of 2017 concerning Recognition and Protection of the Moi Indigenous People in Sorong Regency (Sorong Regional Regulation Number 10/2017).

Formal recognition through a Regional Regulation or Decree of the Regional Head of the existence of MHA provides better legal certainty for the parties in the release of ulayat land. This is because the subjective and objective conditions in the ulayat land release agreement become clear. First, the Regulation or the decree of recognition of MHA contains rules regarding customary structures so that the buyer of ulayat land can understand the authority of a party representing MHA in signing the agreement. The characteristics of jointly owned rights raise the question of whether the release can be carried out by certain parties such as traditional elders or certain organs in the traditional structure, such as the role of the Board of Directors, Commissioners or parties appointed based on the General Meeting of Shareholders (GMS) in representing a Limited Liability Company. In Article 9 of the Sorong Regional Regulation Number 10/ 2017, it is stated that the institution of customary law communities consists of: a) SABALO or the Grand Conference of Indigenous Peoples of Moi, b) Malamoi Indigenous Peoples Institution as indigenous executor, c) the Indigenous Council and d) the Chairman of the Indigenous Council. Furthermore, in Article 13 paragraph (6) of the Sorong Regional Regulation Number 10/ 2017, it is regulated that the release of indigenous land is signed by the land owner and witnessed by the Local Indigenous Council of the Malamoi Indigenous Community. Thus, the agreement on the release of indigenous land through the Moi tribe requires the presence of the Indigenous Council and representatives of the Malamoi Indigenous Community as witnesses of the transition of ulayat rights.

Objective Conditions of Ulayat Rights Release Agreement

Second, regarding the objective requirements of the agreement on the release of ulayat land, the legality aspect studied emphasizes the legality of the ulayat land object. Regional regulations or decrees from the regional head should also contain a system for regulating and using ulayat land, usually contained in a decree or regional regulation on the recognition of MHA. For example, in Appendix II of Sarmi Regent's Decree 188.4/2021, there are four statuses of land and natural resources, namely:

1) General Communal Land Rights (Village Reserve): customary rights area controlled and regulated by the tribal chief as a village reserve if there is a traditional party.
2) Keret-Individual Communal Land Rights: customary territory that has been divided by the eldest/first came clan to other clans. Then the land is divided into families to be utilized.

3) Privately Owned Land: land that is privately owned and passed down from generations.
4) Borrowed Land: land that is only used as a borrow-to-use power for a certain period of time can have status from clan land or village reserves from tribal chiefs.

In its development, once known as the certification of communal rights for MHA ulayat land based on the Regulation of the Minister of Agrarian Affairs and Spatial Planning/ Head of the National Land Agency Number 9 of 2015 concerning Procedures for Determining Communal Rights to Land of Custromary Law Communities and Communities Located in Certain Areas (Regulation of the Minister of ATR Number9 of 2015). Article of Ministerial Regulation of ATR Number 9 of 2015 regulates that Communal Rights granted to MHA that have been registered can be cooperated with third parties, in accordance with the provisions in the laws and regulations and the agreement of the parties. This rule provides legal certainty to the ulayat land buyer because the object of ulayat land that can be transferred becomes clearer, which is ulayat land that has been registered and obtained a communal rights certificate. However, Regulation of the Minister of ATR Number 9 of 2015 received a lot of criticism for negotiating the public dimension of ulayat land and only emphasizing the civil dimension of ulayat rights. In the public dimension, the Customary Law Communities (MHA) has the authority to regulate (1) land/ territory as their living space related to its use and preservation, 2) the legal relationship between MHA and their land, 3) legal acts related to MHA land(Sri Wulan Sumardjono, 2016). The civil dimension of ulayat rights appears in the manifestation of ulayat rights as shared property(Sri Wulan Sumardjono, 2016).

Customary law has unique characteristics so that the release of ulayat land must follow the procedures for the transfer of land rights regulated in customary law. Sometimes customary land cannot be transferred to parties outside the MHA directly. For example, it is known that the concept of "priority right" in customary law is the right to cultivate land from an indigenous community member to take precedence over other community members(Sembiring, 2016). In the case of the transfer of ownership rights to land, the right to purchase authority is sequentially owned by the immediate family of the land owner, individual rights holders to the land with ownership rights (eg liens and profit sharing rights), land owners bordering the transferred land, village residents, and outsiders (Sembiring, 2016). In addition, customary law practice in Aceh shows that if the transfer of rights is not carried out according to the order of bidding based on the prior rights, the aggrieved party can sue the cancellation of the validity of the sale and purchase to the Gampong Judiciary and the Mukim or the District Court(Sembiring, 2016). Given the diverse character of customary law in Indonesia, the making of agreements for the release of ulayat rights needs to pay attention to the substance of customary law land that applies in the area. Therefore, the agreement on the transfer of rights to customary land cannot be

carried out by only following the formal provisions of a written agreement and proof of communal rights certificates because the elements of the legality of the agreement regulated by the Civil Code must pay attention to the material provisions regarding customary land regulated in local customary law.

In customary law, it is also possible to have individual ownership of ulayat land. There are four main bases for the birth of civil rights to land: 1) because of the legal position of people as citizens of the legal community, 2) because they have received approval in the form of permission and with the knowledge of the head of the indigenous community, 3) because the purpose of its use is to be managed directly so that it can be utilized; and 4) there is no purpose of land administration to be used as an object of trade for own benefit (Sembiring, 2016). However, individual owners, who are usually part of the MHA, still need to follow customary provisions and procedures when transferring the rights to the ulayat land.

Furthermore, in the latest customary land administration regime, Ministerial Regulation of ATR Number9 of 2015 has been revoked based on Ministerial Regulation of ATR Number 18 of 2019 so that the issuance of a certificate of communal rights to ulayat land no longer exists. Based on Article 6 of Ministerial Regulation of ATR Number 18 of 2019, recognition of the legality of ulayat land is not done through communal rights certificates but it is stated through the land registration basemap and recorded in the land register. Thus, the buyer of the customary land should check with the land office to ensure the legality of the customary land that is the object of the agreement. Specifically in Papua Province, the provisions of Ministerial Regulation of ATR18 of 2019 must be harmonized with Special Regional Regulation number 23 of 2008 concerning the Ulayat Rights of Customary Law Communities and the Individual Rights of Customary Law Communities on Land (Special Regional Regulations Number 23 of 2008).

Based on Article 2 paragraph (2) of Special Regional Regulations Number 23 of 2008, recognition of MHA ulayat rights and/or individual MHA citizens' rights to land must be based on the results of research. Article 3 paragraph (2) of Special Regional Regulations Number 23 of 2008 states that this research was conducted by a multi-party team consisting of indigenous institutions, academics, non-governmental organizations, and the government. The results of the study will be a reference for the Regional Head (Regent/Mayor/ Governor) to issue a Decision on the Determination of MHA Ulayat Rights and/ or MHA individual rights to land that still exists based on Article 6 of Special Regional Regulations Number 23 of 2008). In addition, Article 7 paragraph (4) of Special Regional Regulations Number 23 of 2008 states that the results of the research map will be carried out by cadastral measurements by BPN to be recorded in land registers and become a reference in granting land rights in the customary rights area of MHA. Thus, based on Special Regional Regulation mandate Number 23 of 2008, the Regional Head must take the initiative of recognition

of MHA ulayat land in Papua Province and the results of the recognition of ulayat land will be registered with the local Land Office/BPN into land registers.

Regarding the agreement to release ulayat rights, article 8 paragraph (1) of Special Regional Regulation Number 23 of 2008 states that after the issuance of the Decree of the Regent/ Mayor/Governor, MHA and/or individual MHA residents have the right to deliberate with third parties outside MHA residents who require land for various interests. Article 8 paragraph (3) of Special Regional Regulation Number 23 of 2008 states that the results of the deliberations with third parties can be in the form of: a) transferring part or all of the customary rights of MHA and or individual rights of MHA citizens to land, with mutually agreed compensation and b) lending part or all of the customary rights of customary law communities and or individual MHA residents on land for a certain period of time to be managed by other parties in the form of rent or profit sharing or other mutually agreed forms.

Furthermore, Article 8 paragraph (5) of Special Regional Regulation Number 23 of 2008 regulates that all results of deliberation agreements with third parties, whether in the form of releases, leases, profit sharing and so on, must be done with an authentic deed. Article 1868 of the Civil Code defines an authentic deed as a deed made in a form determined by law by or before public officials who have the power to do so, at the place where the deed was made. One of the employees or public officials referred to in article 1868 of the Civil Code is a notary, who provides legal services in the field of civil law, including making agreements. Authentic deeds made by a notary must follow the formal provisions stipulated in the Notary Position Law so that it has perfect proof power compared to other types of written evidence (Arman, 2011). As a service provider in the field of law, a Notary must understand the concept of customary law for MHA who will release ulayat land to ensure that the subjective and objective requirements have been properly fulfilled. Without a regional regulation or decree recognizing MHA, the provisions in Article 8 paragraph (5) of Special Regional Regulations Number 23 of 2008 is not ideal to be implemented because the Notary does not have a legal basis or reference to understand the customary structure or land regulation system of MHA as a party to the agreement.

Problems in the Use of the Ulayat Rights Release Agreement as a basis for rights

The practice of Ulayat Rights Release Agreement or Indigenous Land Release Letter accompanied by compensation has been recognized as a legal mechanism to transfer land rights based on court decisions. Consideration of Judges in the Jayapura District Court Decision No/115/Pdt.G/2016/ PN Jap., for example, states that ″The law that lives and develops in the community regarding ulayat land with ulayat rights there is a customary law order regarding the management, control, and use of ulayat land that are valid and

obeyed by the members of the alliance, namely by the release of customary land rights with compensation such as a Declaration Letter of Customary Land Release which is known by the village head and the Head of the District or the Head of the Sub-district to be registered with the Office of the National Land Agency which in the end If there are no problems or objections from parties who object or have rights that are addressed to the Head of the Land Agency Office or through a lawsuit to the Court, a certificate of proof of rights will be issued in the form of a certificate". The decision shows that the Release of Rights to Customary Land or ulayat accompanied by compensation and witnesses is sufficient evidence of the transfer of land rights. In accordance with the principle of land registration publicity, the Land Office will subsequently announce the land registration so that the interested party can submit an objection before the issuance of the certificate. Declaration of release of customary land rights varies in legitimacy and validation, where sometimes the judge requires that the letter must be known by the head of the village and the head of the district, authorized by the head of the sub-district and legitimized by the customary authority (Cindy Fatika Sari et al., 2021).

However, the author argues that the acceleration of the process of acknowledging ulayat land through regional regulations mandated by laws and regulations, both at the national level and the Special Regional Regulation in Papua Province, must still be implemented. This is because the practice of the Agreement or the Ulayat Land Release Statement is quite vulnerable to overlapping land claims and disputes. In the decision of the Jayapura District Court Number 121/Pdt.G/2010/PN-JPR and Merauke District Court Number 37/ Pdt.G/2017/PN Mrk, for example, there are several Customary Land Release Declarations issued by the same person to different buyers. The letter was subsequently registered with the Land Office and a certificate of land rights was issued. Therefore, the Regional Regulation on the Recognition of MHA and ulayat land serves to document the customary structure and system of ulayat land ownership in an MHA. The recognition of MHA through the Regulation is also related to the creation of ulayat land maps so that it can later be registered on the basemap of land registration and land register BPN in accordance with the provisions of Ministerial Regulation of ATR Number 18 of 2019 and the overlap of claims on ulayat land can be minimized. Based on information from the Regional Office of the National Land Agency in Papua Province, there is no land registered in the Land Offices in Papua Province (Discussion with the Papua Licensing Review team, September 12, 2021).

The recognition of MHA and indigenous territories emphasizes the aspect of territorial unity with the communities that live on it. Basically, the physical control of an area by a certain community becomes an initial indication of the land owned by a certain subject. However, this is still in an assumptive level, so stages and mechanisms are needed, which have a legal basis to determine a indigenous territories owned by MHA. Customary

territories and customary rights in Papua Province are the same, almost all areas in Papua province are controlled by customary communities, but there is no legal proof for these claims. So far, the release of ulayat rights has been carried out sporadically and does not consider anthropological and cultural aspects, and ignores procedural aspects in the process of customary acknowledgment. The release of ulayat rights in indigenous territories is carried out on land objects that do not meet the legality aspects of ulayat rights in accordance with applicable regulations. In addition, there are still many MHA subjects who have not been legally recognized through the Regional Regulation or Regional Head Decree. This creates legal uncertainty of the release of ulayat rights, especially from the subjective and objective conditions stipulated in Article 1320 of the Civil Code.

In some indigenous territories releases in papua, such as in Boven Digoel Regency and Merauke Regency, none of the regional regulations or regional head decrees have been issued regarding the recognition of MHA subjects to date (Discussion with Papua Licensing Review team, September 12, 2021). This led to a conflict between MHA and the company when carrying out plantation operations in the province of Papua based on the Papua Province licensing review verification process (Discussion with the Papua Licensing Review team, September 12, 2021). The release of Ulayat Rights without the recognition of MHA and indigenous territories creates legal uncertainty for the community. This is the main of the problem of the conflict between MHA and the company because the land released has not been clean & clear. In this case, the authority of the subject who release ulayat land is still questionable and the mechanism for providing compensation as outlined in the ulayat rights release agreement has not been accepted by the parties who feel they have the right to relinquish the ulayat rights. Many ulayat land disputes occur because the buyer ignores customary law arrangements, in this case to obtain HGU so that the determination of subjects and objects is carried out incidentally without looking at the aspects and requirements of the recognition of MHA and indigenous territories.

Overall, the problems regarding the legality of the Ulayat Rights Release Agreement are: 1) Subjects that need to be legally identified and ratified (Ulayat Rights Holder); 2) Objects that need to be mapped (Ulayat Rights Limits); and 3) Relationship between Subjects and Objects about how Ulayat Rights are used, regulated, and managed by Ulayat Rights Holder (Ulayat Rights Control). These three points need to be legally ratified based on applicable regulations, which is through a Regional Head Decree or Regency Regulations. Then the agreement can be held by the legitimate parties because the subject and object of the ulayat land have been clear.

CONCLUSIONS

The legality of the ulayat land release agreement consists of two conditions based on Article 1320 of the Civil Code, which are subjective and objective. Clarity regarding the fulfillment

of these two conditions is highly dependent on the issuance of a Regional Regulation or Decree of the Regional Head regarding the existence of MHA and Indigenous Territories. Ideally, the Regional Regulation or Decree of the Regional Head will explain the customary structure of MHA, so that the subject representing MHA in the release agreement will be clearer. Ulayat land as the object being released also needs to be mapped on the area of the land and the pattern of regulation of land tenure based on the customary law system to be further recorded in the land register of the local land office. In addition, based on Special Regional Regulation Number 23 of 2008, the agreement on the release of ulayat land should be made in the form of an authentic deed, which can be made by a notary. However, the making of an authentic deed is not ideal to be carried out without a Regional Regulation or Regional Head Decree concerning the existence of MHA. Without regional regulations or decrees, notaries do not have a strong legal basis to understand the customary structure and system of using MHA's ulayat land as a condition for the legality of the agreement.

This article does not intend to state that the Agreement on the Release of Ulayat Rights as a mechanism for transferring land rights is not valid because it does not fulfill the subjective and objective elements of Article 1320 of the Civil Code. Based on the court decision, the Ulayat Rights Release Agreement has been recognized as a legal mechanism for the transfer of land rights but this practice needs to be supported by the establishment of ulayat land recognition regulations to avoid overlapping land rights claims in Papua Province. Currently, consideration in determining the existence of subjects of ulayat rights holders is only carried out based on the physical control of land by respecting the rights of indigenous peoples which are not outlined in the form of government decisions. This is due to the lack of recognition of the government for the existence of MHA and ulayat land in Papua which is in accordance with the provisions of the laws and regulations. To ensure there is protection for customary law communities and certainty in investment, the subjective and objective requirements of the agreement on the release of rights ulayat need to be fulfilled. Local governments, assisted by NGOs and indigenous experts, need to act actively to map indigenous peoples in accordance with the mandate of Article 2 and Article 3 of Special Regional Regulation Number 23/ 2008 which requires the recognition of ulayat rights based on the results of multiparty research.

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