

CUSTOMARY RIGHT TO LAND

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In Aceh, most land parcels affected by the tsunami are held under customary ownership rights to land (*hak milik adat*) or customary right to land (*hak atas tanah adat*). The customary right to land is known in Indonesian as *hak ulayat*, which under Article 1 paragraph (2) of the State Minister of Land Affairs/Head of National Land Agency's Regulation No.5 year 1999 is defined as the land parcels over which a community has the right in accordance with respective specific customary law. It refers to the right of the village or community to control over local land. While it varies in strength from region to region, it generally covers community rights to allocate land, approve land transfers, control land use and settle land disputes within certain areas.

Indonesian law governs the formal recognition and recording of *hak ulayat* where specific *adat* laws and practices continue to apply to ancestral customary land. Under the procedures for settlement of disputes concerning *hak ulayat* within the above regulation, however *hak ulayat* will not be recognised or recorded where land is already subject to statutory ownership right (including forest concessions).

Customary (*Adat*) Ownership Right to Land in Aceh

Acehnese tend not to use the commonly used Indonesian term *hak ulayat*. In practice, however, community rights over land in Aceh are similar to *hak ulayat*. The determination of the right to land is determined by the *geuchik* (village chief) or sometimes the *Imeum mukim* (*mukim* chief). The community has the right to allocate community land to village members or outsiders, approve land transfers in the community area to outsiders and determine (or influence) the nature of land use. In theory, the community may also take over land from village members for community purposes.¹

¹ El Hakimy, T.I, *Kepemilikan Tanah di daerah pedesaan di Aceh, di Desa Leupung di Distrik Aceh Besar*, 1980, p.18-20, 39,44

Under the Article 1 (7) of the *Qanun* (Regional Regulation) No.4 year 2003 on Governance of *Mukim* within NAD province, *hak ulayat* is defined as the right to land within the *Mukim* areas of governance which is regulated by *adat* law. In practice, however, there is no such thing as *tanah adat* (customary land) except in areas where *adat* community structures are still prevailing, says Kamaruddin, S.H., the Vice Director of the Internal Division of the Legal Aid Institute (*Lembaga Bantuan Hukum/LBH*) of Banda Aceh. On the other hand, some land parcels can fall under the *tanah adat/hak ulayat* category because they are managed by the community and from which benefits can be derived for the purposes of the community within a *gampong* (village).

According to T.I.El-Hakimy, such right over land is known as *Tanoh Hak Kullah* in Aceh. The boundaries of such *adat* land can be no longer than it takes for one person to travel to the upstream area in one day by foot or to the downstream area or to the sea in one day by a sea trawl. The boundaries of such land can also be natural landmarks such as a mountain top, a cliff, a river, and agreement regarding *mukim* borders.

According to the *adat* in Aceh, there are a number of types of *hak ulayat*:

1. *Tanoh rimba*, uncultivated forest land.
2. *Tanoh uteuen*, forest land with specific types of vegetation.
3. *Tanoh tamah*, forest land cultivated for dry land agriculture on which wood coppices (*tarok*) grow and can be used for fuel wood. Another type of *tanoh tamah* is the shrubs (*beuluka*).
4. *Tanoh padang*, land with timber types of plant life, but mostly is partially cultivated grassland in the low land area grown with weeds and other types of grasses. Such land is commonly found around paddy fields in *gampong* and often used for animals grazing.
5. *Tanoh paya (tanoh bueng)*, lowland covered by a permanent source of water and shrubs. Where located close to a beach, such land is referred to as *tanoh suwak* (swamp)
6. *Sarah*, fertile lowland located at the shallow river stream.
7. *Sawang*, land located at the mouth of a river.
8. *Tanoh jeued*, land created by mud carried by the river flow (including an island in the middle of a river or land mounds at the side of a river).

Customary ownership rights are common not only in relation to residential land, but also for rice fields and gardens. The right is similar to statutory ownership rights but the local community has a greater influence over the way in which land may be used and transferred.

In general, customary ownership rights in rural areas:

- can only be sold if offered first to neighbours (and then to other community members);
- cannot be sold to community outsiders (although it may be leased with community approval);
- is subject to the right of access of the neighbours and other community members
- can (in theory) be taken over by the community for community purposes

A field study by El Hakimy also found that such restrictions often take the form of negotiation interactions between community members and the *geuchik* rather than rigid rules which are applied in all circumstances.

Customary ownership rights to land can be acquired through:

1. Inheritance, gift or purchase, or
2. Clearing and cultivating land in a customary area.

In some areas, the clearing and cultivation of land will lead to the right of use of land, which will turn into ownership right by way of inheritance. In *Guardianship, Inheritance and Land Law in Post-Tsunami Aceh* page 82, Erica Harper from IDLO quotes legal scholar El Hakimy that agricultural usage rights (*useuha*) arise from continuous cultivation of land for a period of at least six months. In certain circumstances, members of the community may need the *geuchik*'s approval to begin land cultivation. El Hakimy also notes that this right of use tends to merge into ownership (or perceived as ownership).

In most cases in Aceh, community members will not need the approval of the *geuchik* to clear and cultivate customary land. The community will recognise their ownership right after a certain period and for as long as the land is in continuous use. In certain circumstances however outsiders may receive the *geuchik*'s approval to clear and cultivate customary land.

While this type of customary mechanism for requiring land ownership is recognized under the Basic Agrarian Law No. 5/1960, it is important to note that *adat* rights through clearing and cultivation may not necessary be legitimate if the respective land is defined as state land. Article 6 of the State Minister Agrarian Law No.5/1999 states that:

- a. is owned by individuals or legal body whose land rights are recognized by the Basic Agrarian Law.
- b. Are parcels of lands acquired or "freed" by government agencies, legal body or individuals in accordance with the prevailing procedures.

LBH Banda Aceh has recorded a number of cases of land which can necessarily be categorized as under customary right. Instances include the claim of community land in Lambaro Skep village, Banda Aceh. Community members in the village have continuously used the land for a long period of time and therefore they can be perceived as having *hak ulayat* (customary right) over the land. The parcels of land were appropriated from the local community and registered under number 305 by the Dutch administration in 1906. The total size of the land parcels were 41.3 hectares and were named "Skep" after the shooting field that the Dutch Marsose troops used. After the Dutch left Aceh, the parcels of land were occupied by the Japanese army. Following Indonesian independence, the land was taken over by the Indonesian Military (TNI) and a couple of years later were documented as the ownership of TNI Zeni troops. A TNI military barrack was afterwards built on the land in 1976.

Over the years, the land parcels were transferred into residential areas. Some even sold some parcels to civilians, after which disputes began. In the Legal Opinion published by LBH Banda Aceh, Lambaro Skep community members urged the National Land Agency (BPN) to issue certificate of land titles for them because they feel that they have the evidence to prove their ownership of the land parcels. During 2001-2002, a consultation was held between community members and the TNI. The result of the consultation said that the TNI has the right to 41.3 hectares of land only, before which they claimed to be reaching as far as the border of the sea. The remaining parcels of land were determined as

belonging to the community and it was agreed that certificates of land titles would be issued accordingly.

The matter was not solved completely when the tsunami struck Aceh.

Post tsunami, the *Kodam* (Military Territorial Command) of Iskandar Muda re-installed land boundary stakes. In 2005, The Adjudication Team from Jakarta reinstalled the boundary stakes. Following the installment, BPN has issued new certificates of land titles for community members residing outside the TNI claimed areas, which was confirmed by a letter stating community members physical tenurial of the land parcels and installments of boundary stakes. However, BPN does not issue land titles for community members within the area of TNI as the land parcels are still in dispute.

Kamaruddin S.H. adds that in October 2006 community members sent a letter to the Head of Aceh House of People Representatives (DPR), the Military Commander of *Kodam* Iskandar Muda, as well the President concerning the dispute. The government has not responded to the matter. Kamaruddin further confirms that in principle the Lambaro Skep villagers have legitimate ownership over the land parcels in Lambaro Skep, as proven by the fact that the local community have been residing in the village for three to four generations. This is strengthened by Article 20 of Chapter III of the Basic Agrarian Law on Ownership Right which stipulates that ownership (*hak milik*) is a right that can be passed from generation to generation and is the strongest right that an individual can have over land.

Article 2 of the Ministry of Land Affairs/Head of BPN No. 5 year 1999 on the Guidelines for Settlement of Customary or Communal Rights to Land provides that:

(1) Customary rights will only be recognised when such rights are existing and binding upon members of the respective *adat* community in line with the prevailing *adat* law.

(2) Customary or communal rights are considered valid only if:

- a. A group of people feel bonded to such land through customary law; and such customary law is recognised and applied in the daily lives of such people.
- b. There is a specific *adat* land which a community inhabits and from which their daily needs are derived;
- c. There is a specific customary law regulating the management, control and use of the *adat* land and which is respected by the community.

The customary rights of indigenous people should not be appropriated or owned by individuals or agencies. Tenure over customary rights to land is considered legitimate when there is a valid transfer by the customary law and communities. Members of communities who are involved in disputes concerning customary rights to land in Aceh can seek the help of LBH Banda Aceh at the following contact details:

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