

LAND ADMINISTRATION SYSTEM IN INDONESIA

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HIERARCHY OF LAND LAW

- The law relating to land in Indonesia is extraordinarily complex with an estimated 572 plus laws, regulations, and other documents relating to land and formal government processes.
- An order of key documents follows:
 - Under the national philosophy of Pancasila
 - UUD 1945, the Constitution – Article 33
 - UUPA 4/1960 with Articles 1-15 being basic land policy fundamentals for land management, and following articles for technical land management – **Basic Agrarian Law**
 - TAP MPR (People’s Advisory Assembly) 9/2001 -
 - MPR (People’s Advisory Assembly) Decree 5/2003 - Presidential Decree 34/2003
 - Presidential Regulation 10/2006 which provides the functions of BPN operate at 3 levels: national, regional and sectoral, principally in national land policies, land affairs technical policies, administration, surveying registration mapping and so on.
 - Presidential Speech 2007 Jan 31.

LAND TENURE SYSTEM

- The Constitution Article 33.3 and UUPA Article 2.1 give the state “control over earth water and airspace”. “Earth” includes everything below the surface of land and water: Article 1.4 and 5. The jurisprudential theory of land law however delegates land control though hak or rights to individuals and entities. The formal structure is through registration of land under the UUPA. The other structure is by recognition of the land rights through the UUPA. Sectoral arrangements for forests, mineral, coal and petroleum resources, and other specific land exist. What remains is conceptually tanah negara or state land.
- The area of contention is the relationship between land claimed through hak ulayat (adat land) and state land, given hak ulayat is not a right formally recognized in the UUPA and not registerable. In practice the state does not hesitate to create forest rights, HPH and so on, or mining rights, over adat land. In forest land, no formal land rights can be created, so the two thirds of land administered under the Law on Forests is tanah negara.
- The result is that the Government of Indonesia owns by default (though it is called control)
 - over two-thirds of land administered by MoF for forest resources
 - all reversions after private time-limited rights
 - all opportunities to resume land held in hak milik by private individuals
 - “above and below the surface of all private land other than what is necessary for the exercise of the right”.

LAND TENURE SYSTEM

- In general land status can be divided into two groups - state land and private land. Private land is land with a certain right on it, either registered or not (yet). There are two subcategories of state land;
 - state land the right on which has been designated to person or a legal entity and
 - free state land or state land without any right attached to it.
- Buildings are not legally part of the land and because land ownership is individual, not commercial, there must be a separate title for commercial buildings. Civil law permits a separate tenure whereby one person's building can exist on another's land.
- There are presently five types of basic tenure with Hak Milik the highest and nearest to freehold tenure. These are:
 - Hak Milik – ownership (freehold)
 - Hak Guna Usaha – cultivation only
 - Hak Guna Bangunan (HGB) – building only
 - Hak Pakai – use only
 - Hak Pengelolaan – land management only.

LAND TENURE SYSTEM

- This hierarchy of rights, uniquely linked to the use of land, has blurred the boundary between land administration and land management. Under such a structure the land registration system is a de facto planning control mechanism, but it is a less than effective one.
- With the exception of Hak Milik, existing rights are specific and temporary. The inherent need for periodic renewal is viewed by many as an automatic process for extracting fees rather than a bonafide tool for effective land use management. The assurance that land use conforms to accepted norms and standards is appropriately a technical planning function.
- While restrictions may be endorsed (as an encumbrance) on registration documents, the imposition of these restrictions should properly be done by qualified personnel within the framework of prudent land and natural resource management.
- Rights in land are recorded in two systems: (i) private conveyancing and (ii) registration of deeds
 - Private conveyancing is not regulated; however it is accepted by the courts as an informal, but not illegal, transfer. This is based on the legal principle that the title is transferred at the time of payment in cash, registered or not. The passing of the documents agreeing to the transfer is done in private, usually witnessed by two persons.
 - The system that is formally adopted is the Registration of Deeds. A copy of all agreements that affect the ownership and possession of the land must be registered at the Land Office.

LAND TENURE SYSTEM

- The Indonesian system of registration is not guaranteed by the state (a negative system). The principle is to protect the real owner from the risk of registration of the wrong one. The real owner can claim his/her ownership through court proceedings and if it is confirmed by the court, the new ownership is registered according to the court decision. In this system the registers are treated as primary evidence rather than definitive proof. The integrity of the system is sufficient for land owners to have full confidence in their rights if the land data is accurate. However, the presence of inaccurate data will weaken the system.

BASIC AGRARIAN LAW (UNDANG-UNDANG POKOK AGRARIA)

- The land laws under colonial governments were a dualism between western systems and the traditional (adat) laws based on the customs of various regions.
- The Basic Agrarian Law was introduced in 1960 to end this situation by creating a National Land Law based on the utilization of traditional concepts, principles, systems and institutions.
- However a growing number of commentators consider the BAL has been used to dilute customary rights and the law has outlived any usefulness it may have had. Review of the BAL has been difficult until recently because of a strong band of formalists who believe land law, like that of marriage, is non-neutral or unable to be changed.
- Recognition of 'adat' or customary land rights and customary systems of tenure, which are explicitly acknowledged in Article 5 of the BAL, has become a critical element of contention in Indonesia. The root of the problem is that most of the existing implementing regulations of the BAL failed to elaborate, and are even contradictory to, the adat principles.
- In the past the government has attempted to recognize the existence of customary land provided that the following criteria exist:
 - the land is under the ownership of a recognized adat community
 - the boundaries are defined and understood and
 - the community is recognized and functioning as such under adat law principles.
- In the face of growing pressure, the Gol has recently directed a review of the BAL.

PRIVATE RIGHTS IN INDONESIAN LAND LAW

Registrable under the UUPA (Ch 2)	
Hak milik	Ownership. An hereditary right available to Indonesian individuals through conversion regulations, grant from government, or in accordance with adat law. An owner can convey the right of building, right of use, right of rent, land pledge (hak gadai), share cropping or right of lodgings.
Hak guna usaha (HGU)	Plantation right, strictly a right of exploitation
Hak guna bangunan (HGB)	Right to build
Hak pakai	Right of use
Other private rights	
Hak sewa	Lease
Hak membuka tanah	Right of opening-up land
Hak memungut hasil hutan	Right of collecting forest product
Other rights	Temporary rights mentioned in Art 53: mortgage, sharecrop, temporary occupation and lease of agricultural land.

DISTRIBUTION OF LAND RIGHTS IN INDONESIAN LAW

1957 Before the UUPA and nationalisation of estates in 1958				
Land identified in the fiscal cadastre		State land 'controlled' under Constitution (note history)		
Western titles 250,000 parcels registered under 1834 Conveyancing Ordinance	Traditional adat land including traditional common land and individual plots – together called hak ulayat	Administered state land. Land in state ownership after excision of the large estates, private land and hak milik adat (indigenous individual titles recognised by Dutch)	Unused land Designated state land Forest land	Kingdoms and Sultanates Feudal land which became state land in 1945, except for individual plots
After 1958 nationalisation of estates and introduction of the Agrarian Law 24 September 1960				
Indonesian people 'have fullest relationship with land' (not 'ownership'). State has 'control' not 'ownership'. Individuals can have 'ownership' through adat principles recognised in Agrarian Law as hak milik. Traditional forms of ownership are 'subject to national interest' and not recognised as land rights.				
Private land		State land		
Converted registered titles	Unregistered titles comprising 'existing rights' converted to statutory rights recognised by Agrarian Law, principally hak milik or similar rights, and western titles pending registration	Hak ulayat, 'protected' by the relationship between land and Indonesian people's 'fullest relationship', mentioned in the Agrarian Law, and requiring 'consultation' of traditional people before interference by non-traditional use*	Unused land Designated state land Forest land	

DISTRIBUTION OF LAND RIGHTS IN INDONESIAN LAW

1967 After Basic Forests Law No 5 of 1967				
Registered Private Land			Unregistered land with disputed claims	State land in which no individual or community land rights exist
Con-ver-ted titles	Titles brought in through alienation of state land in new statutory titles or through release of private land to the state and alienation of new titles	Titles brought in through conversion of hak milik adat (individuals only) by systematic, sporadic and individual application	Land to which both state and individuals can lay claim. Land with some proof of individual use, arguably capable of being registered, and of unknown quantity	Land incapable of being registered – hak ulayat or traditional communal land, indigenous land, vacant land and land with poorly evidenced rights
After 2000*				
Private Land*		State land		
Registered private land 22.5 million registered titles of hak milik, HGB, HGU, HP, HPL and HMASRS, estimated to be about 5 percent of land mass		Unregistered land with disputed claims.	Land incapable of being registered	
*At 2000, approximately 75 million parcels were identified in the fiscal cadastre as owned by individuals or communities on a tenure sufficient to attract tax liabilities and willingness of 'owners' to meet their collection.				

REAL ESTATE TRADING ANOMALIES

Anomaly	Probable cause	Information source
Land exchange is uncertain.	Adat or oral transactions cannot be registered. Derivative transactions are not always registered	
Limitations on foreigners, but they buy through black market.	Foreigners cannot own, mortgage, and are constrained in many other ways. 1996 Government regulation allows them hak pakai for 20 years, then 20, then 25.	President Susilo Bambang Yudhoyono will ask BPN, the home minister and state minister for people's housing affairs to conduct an in-depth study into granting expats home ownership rights. "The government has no objection to this . .Jakarta Post Wed 18 Feb 2009 page 4.
Uncertainty about state land	The reversion of hak hak atas tanah to the state following transactions, upgrading from a use based hak to hak millik, expiration of time for time delimited haks	These must be clarified by legal definition of tanah negara.
Strata title problems	Buildings on land in a HGB can only be purchased by a person or entity entitled to HGB	This excludes foreign owners who are restricted to hak pakai

REAL ESTATE TRADING ANOMALIES

Anomaly	Probable cause	Information source
Inadequate land security law	Hak tanggungan law needs revising	
Land outside the market system	Two thirds of land mass is managed by MoF and is outside formal titling	The country cannot exclude most of its land from a titling and tenure system. The economic impact of not layering tenures is extreme. This land is outside mortgage and credit systems.
Investment problems	Hak pakai is unpopular.	Banks are hesitant about accepting hak pakai as security. Changes to the right by the Investments Law are designed to assist.

SUBSTANTIAL PROBLEMS IN LAND ADMINISTRATION

a. Maladjustment of land use

Vast areas of land are not used. This vacant land (*tanah-tanah terlantar*) needs to be brought into production and use. (Inception report 4, Joyo Winoto, head of BPN)

b. Two-thirds of land in forest administration is without titles

- This problem is recognized in all analyses of land issues in Indonesia. Various areas of land in land titles are managed through BPN under the President, while forest resources are managed by the Ministry of Forestry. The separate administration of forests is not the problem. Indeed forestry requires specialist administration. The problem is the lack of **a system for layering rights** existing under land laws with rights existing under resource laws (forestry, mining, water resources and plantations or estates).
- Layering is the method by which the countries in the developed world allow simultaneous titles to land and resources to exist in the same land. This prevents land being legally managed according to a blueprint designed for exploitation of a single resource. It facilitates multiple markets in opportunities to use and develop land, buildings, resources, planning opportunities and many others.
- The land titles under the BAL need to be made available throughout the country, not just when forest rights expire, but existing simultaneously in land the forest rights.

SUBSTANTIAL PROBLEMS IN LAND ADMINISTRATION

c. The relationship between titling and planning

Most developing nations face issues in integrating planning and land use management processes. Typically, enforcement of planning schemes runs far behind their design. Most countries, developed or not, develop elaborate plans for management of their land use. The operations of the planning system contributes particularly to private land banking.

d. Accuracy of the register record

Secondary registrations of transactions affecting land already registered is uncertain in extent. Moreover, there are acknowledged inaccuracies in the existing record base.

e. Definition of tanah negara

- The nature of state land raises issues that add unnecessary uncertainties to the operation of land rights. When does land in a *hak millik* revert to the state? Does land held through HGB from the state revert to the state or district government? Likewise for HGU land.
- Can a private owner of a *hak millik* issue a HGB for his land or must he rely on Hak Sewa?

f. Consolidation of land for development

Even now, many of the major commercial developments are formed on multiple parcels because thematic consolidation remains a distant goal.

INSTITUTIONAL REFORM AND DECENTRALIZATION

- The National Land Agency (Badan Pertanahan Nasional – BPN) is responsible for administration of all non forest land in Indonesia. It was established in 1988 as a separate agency in response to land issues impacting on development, with specific responsibility for recognition, registration and administration of property rights and dealings.
- Until recently the technical components of BPN have remained essentially unchanged since its establishment and these are grouped under the four areas stipulated in the BAL – land reform, land use, land titling, and land survey/registration.
- The agency was specifically charged with:
 - formulating policies and planning for land reform and land use;
 - formulating policies and planning for the ownership of land with the principle that land has a social function as defined in the Basic Agrarian Law;
 - administrating survey, mapping and registration of land to provide security for land ownership;
 - granting land rights to maintain order in land administration;
 - research and development in land matters and the training of personnel to support BPN operations and;
 - other duties as decided by the President.

LAND ADMINISTRATION REFORM IN INDONESIA

- By the early 1990s only 22% of the estimated land parcels were registered and the growth in property transactions outstripped BPN's capacity to deliver timely, transparent and community responsive services. With existing resources and procedures, it was estimated that it would take BPN about 100 years to register all the existing eligible land parcels, let alone process the annual growth in new parcels. Noting the inordinate procedural delays, disputes over land rights, compensation for land acquisition, and conflicts with traditional land holders, the GoI identified land administration as a major issue impacting on national economic and social development.
- In 1991 the World Bank prepared a report on Land Resources and Management which recommended a long term program aimed at facilitating the emergence of efficient land markets and alleviating social conflict over land rights. This was envisioned at the time as a 25 year program of reform which commenced with the first 5 year Land Administration Project (LAP I) in 1994.
- In 2004 Land Management and Policy Development Project – LMPDP was envisioned to follow on from LAP I as the next stage of the long term program of land administration reform

LAND ADMINISTRATION IN TRANSITION

- The system of land administration in Indonesia has remained fluid, shaped by a range of political and economic forces. Principal among these is the thrust toward decentralisation and the need to negotiate policy changes to achieve the institutional environment to enable the implementation of this thrust.
- **Decentralisation** - under a broad regional autonomy program, the GoI legislated in 1999 that primary responsibility for land administration would be decentralized to the local governments. This followed closely on legislation which redefined the overall revenue generation and distribution roles and functions of central and local government agencies.
- There have been several recent actions at political level which reflect government commitment to reform :
 - The Decree from the People's Advisory Assembly (MPR/2001), concerns The Agrarian Renewal and The Management of Natural Resources
 - Presidential Decree Number 34 of 2003, stipulates the role of Regency/Municipal government in land affairs and specifically defines this role as including the functions below:
 - Location permit issue
 - Provision of land for public interest
 - Cultivated land dispute
 - Resolution of compensation for land allocated for development
 - Determination of subject and object of land redistribution and compensation for maximum excess land and absentee land;
 - Determination and resolution of ulayat/communal land problems
 - Utilisation and resolution of neglected land problems
 - Land opening permit provision
 - Planning of land use within Regency/Municipal areas.

NATIONAL LAND AGENCY (BPN) ROLE

- A range of models for delivery of land administration services conforming to the above political directions have been given some consideration. All required some degree of adjustment to the two principle laws governing decentralisation.
- All options also identify a continuing role for provincial government and this is contrary to the present policy which devolves all responsibility to the district level as they presently stand. The preferred model can be described as one which incorporates:
 - All land policy and standards to be set by central government (BPN Pusat);
 - All monitoring and supervision activities to be carried out by central government;
 - Provincial spatial planning and the issue of major land grants to be delegated to Provincial Land Services Offices;
 - Regional spatial planning, land use management, permits, expropriation, minor land grants and systematic adjudication to be delegated to Regional Land Services offices;
 - Land registration to be carried out within BPN Land Offices at regional level;
 - Technical services associated with land registration (base mapping, coordinate networks, licensing of surveyors etc) to be supplied by BPN Technical Services Units based in Provinces.

THANK YOU