

# Privatization Of Communal Land Registration For The Tengger Customary Law Community In Probolinggo Regency

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# PRIVATIZATION OF COMMUNAL LAND REGISTRATION FOR THE TENGGER CUSTOMARY LAW COMMUNITY IN PROBOLINGGO REGENCY

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## ABSTRACT

From the regulations of the Regulation of the Minister of Agrarian and Spatial Planning concerning Procedures for Establishing Communal Rights to Land of Indigenous Peoples and Communities in Certain Areas in 2015 and 2016 which regulates that customary law communities or communities residing in certain areas can apply for the determination of communal rights over land to the Regent/Mayor or Governor then there can be privatization of the registration of communal rights. The research was conducted using a qualitative Socio Legal method. Based on the results of research at the location of the Tengger Customary Law Community in Probolinggo District, customary rights are no longer known because they have become Village Treasury Land. However, there are certain communal lands that have been privately certified since 2015 to date through the Government's Complete Systematic Land Registration National Program. As a result of the law, the customary community's communal land registration provides legal certainty and legal protection to land rights holders from conflicts between customary community members regarding land tenure boundaries, however de facto the role of formal leaders and customary stakeholders remains dominant and limits them.

**Keywords:** privatization, communal land registration, customary law communities

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## INTRODUCTION

In Indonesia, land registration includes measuring land titles and bookkeeping, registering land rights and transferring these rights and providing certificates of proof of rights, which act as strong evidence. Land registration is an obligation for both the government and those entitled to the land. So that with land registration, right holders can easily prove their rights to the land they control.

Land Registration is a series of activities carried out by the Government continuously, continuously and regularly, including the collection, processing, bookkeeping and presentation and maintenance of physical and juridical data, in maps and lists, regarding land parcels and apartment units, including the issuance of certificates of proof of rights for land parcels for which there are already rights and ownership rights to apartment units as well as certain rights that burden them. The ultimate goal of land registration is the issuance of a certificate as proof of strong rights.

Minister of Agrarian and Spatial Planning Regulation No. 10 of 2016 (hereinafter referred to as Permen ATR 10/2016), which is an update to the previous 2011 regulation concerning procedures for establishing communal rights over land of customary law communities (MHA) and communities residing in certain areas, Article 5 paragraph (1) regulates that communities who are in certain areas can apply for the determination of communal rights over MHA and communal land to the Regent/Mayor or Governor. The application is submitted by the customary head or community representatives in a certain area. The research was conducted using a qualitative Socio Legal method. Based on the results of research at the location of the Tengger Customary Law Community in Probolinggo District, customary rights are no longer known because they have become Village Treasury Land. However, there are certain communal lands that

have been privately certified since 2015 to date through the Government's Complete Systematic Land Registration (PTSL) National Program

## RESEARCH METHODS

This research uses the constructivism paradigm with the Socio Legal method. According to Satjipto Rahardjo, that "with the methods and theories of social science about law to help researchers carry out analysis". This study uses a qualitative research method which is expected to find hidden meanings behind the object and subject to be studied. According to Zamroni, a qualitative research method approach is carried out to understand law in the context of society<sup>2</sup>.

Techniques for finding primary data, carried out through free/open or unstructured interviews directly with respondents met, are considered important for providing data in this study. Although there are statistical data obtained through secondary data or integrated interviews, this research is more in the nature of field research using the verstehen or hermeneutic approach. Based on interviews and observation findings, it is then discussed in depth both with informants/respondents and with key informants.

## TRADITIONAL AND LEGAL VALUES OF LAND OWNERSHIP AND REGISTRATION

Customary Law Community existed before the Republic of Indonesia was formed. The recognition of the existence of MHA in Indonesia is regulated in Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, as a result of the first amendment to the 1945 Constitution of the Republic of Indonesia, which states that "The State recognizes and respects indigenous peoples and their traditional rights as long as they are alive and in accordance with community development and the principles of the Unitary State of the Republic of Indonesia, which are

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regulated in a Law".<sup>10</sup> provisions of Article 18 B of the 1945 Constitution of the Republic of Indonesia are strengthened by the provisions of Article 28 I paragraph (3) of the 1945 Constitution that "The identity of traditional culture and society is respected in accordance with the times and civilizations". Furthermore, the provisions of Article 3 of the UUPA state that the implementation of customary law communities and similar rights, as long as they still exist, must be in such a way that is in accordance with the national and state interests, which are based on national unity and must not contrary to laws and other higher regulations. Thus, based on the 1945 Constitution of the Republic of Indonesia and UUPA as the basis for national land law, the existence of MHA land rights is recognized. Thus, based on Article 3 of the UUPA, MHA can have land rights. The public aspect of customary law appears in the authority of customary law communities to regulate land/territory as their living space related to its use, including its maintenance, legal relations between customary law communities and their land, and legal actions related to customary law community lands. The private aspect of customary law is the authority of the customary law community to use the land jointly<sup>3,4</sup>.

<sup>6</sup> According to Soekanto in Nurtjahjo & Fuad, customary law is the entire custom (unwritten) and lives in society<sup>5</sup>. In the form of morals, habits, and customs which have legal consequences. Soepomo in Nurtjahjo & Fuad<sup>6</sup>, is of the opinion that customary law is the same as law that is not written in legislative regulations (statutory law), laws that exist as conventions in state bodies (provincial councils, etc.), laws that arise because of judges' decisions (judge made law), the living law as a customary regulation that is maintained in social life, both in the city and in the village (customary law), all of these are customary law or unwritten law as mentioned in Article 32 of the 1950 Constitution.

Indigenous peoples are communities with a communal form. Communal society is a society where all areas of life are covered by togetherness<sup>7</sup>. The realization of recognition as well as protection of indigenous peoples in Indonesia is in line with Jimmly Asshiddiqie in Suharyo, interpretation, to the existence of a customary law community and its traditional rights, the existence that is recognized is the existence of indigenous peoples<sup>8</sup>. This means that recognition is given to one by one of these units so that the customary law community must be certain; The customary law community is alive (still alive); in a certain environment (lebensraum); Such recognition and respect are given without neglecting the feasibility measurements for humanity in accordance with the level of development of the nation's existence. For example, certain traditions that are no longer worthy of being defended, should not be allowed to not follow the flow of civilization progress just for sentimental reasons. Such recognition and respect must not reduce the meaning of Indonesia as a country in the form of the Unitary State of the Republic of Indonesia.

### LEGAL CONSEQUENCES OF COMMUNAL LAND REGISTRATION FOR THE TENGGER PROBLINGGO CUSTOMARY LAW COMMUNITY

Based on Article 19 of the UUPA, that in order to guarantee legal certainty by the Government, land

registration is held throughout the territory of the Republic of Indonesia according to the provisions stipulated in a Government Regulation. Legal consequences of communal land registration MHA can fully guarantee legal certainty of land rights if they meet the requirements that the land registration maps that were produced prove the boundaries of the land parcels defined therein as legal boundaries. This requirement relates to the issue of land registration with evidence power; public registers held for the purpose of registration of rights prove that the rights holders registered therein are lawful rights holders; every land title and assignment thereof is registered in a public register, so that the lists provide a complete picture that corresponds to the actual situation of land rights.

Land registration aims to provide legal certainty to land rights holders. By registering customary land based on the prevailing land policy, a certificate of ownership as ownership of land will be obtained in the form of a certificate of land rights which is strong evidence for the holder of the land rights.

Land tenure that is proven by means of evidence in writing can also be called the basis of rights. The basis for rights is defined as evidence of legal control over land. Based on the provisions of Government Regulation Number 24 of 1997 and Regulation of the State Minister for Agrarian Affairs/Head of BPN Number 3 of 1997 concerning Provisions for the Implementation of Government Regulation Number 24 of 1997 concerning Land Registration, the basis for this right is in the form of strong evidence that guarantees legal certainty and legal protection for the holder the right is called a certificate of land rights.

The legal consequence of registration of land rights as stipulated in Article 3 paragraph (1) of Government Regulation No. 24 of 1997, not only guarantees legal certainty, but also provides legal protection to land rights holders. The certificate of communal rights issued to the customary law community in Tengger Probolinggo is a form of recognition of the rights of the customary law community even though the certificate is in the name of an individual. The certificate also contains a red stamp and the inscription, "This land may not be sold or leased to a community other than the customary law community itself". As a result of the law, the MHA's communal rights are certified, so that it can be used as collateral for debt that is burdened with Mortgage Rights like other land rights. Moreover, the certificate is in the name of a member of the customary law community. However, with the red stamp on the certificate as local wisdom, personally the owner cannot act freely without the recommendation of the Village Head/Customary Chair as the territory and customary leader.

The status of the MHA's customary land which was originally communal (joint rights) of the MHA becomes individual property rights. According to ATR Regulation 10/2016, the legal consequence of granting communal rights certificates is that individuals can provide legal protection for indigenous peoples and can reduce conflicts between members of the MHA and third parties. It was proven when this research was conducted that the enthusiasm of the community and village in certifying land through Complete Systematic Land Registration increased every year<sup>9</sup>.

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### CONCLUSION

The control of the land rights of the Tengger Customary Law Community in Probolinggo by the Village Head and the Customary Chair, however, since 2015 the communal land of MHA Ten<sup>2</sup>er began to be certified individually at the time of the Complete Systematic Land Registration (Prona PTSL) which was held by the government and remains sustainable until 2020. Although the land has been legally certified in the name of a private person, it is still like a non-transferable communal right (onvervreemdbaarheid) without the recommendation of the Village Head/Customary Chair. The religious-magical value of the MHA makes this principle firmly applicable among them. Even though the communal land has been on the name as an individual by the MHA members, the right holder is still obliged to require the permission of the Village Head/Customary Chief for the transfer of their rights. Within the Tengger customary law environment in Probolinggo Regency, de facto control of land rights is exercised by the Customary Head and the Village Head. Although de yore ownership of MHA land rights in this area has experienced development with the existence of individual MHA communal land certificates, this has occurred due to the times.

The legal consequence of land registration or land title certification not only guarantees legal certainty, but also provides legal protection to land rights holders. This also applies to communal land certificates for MHA Tengger members in Probolinggo Regency. As a result of the law, the communal rights of the MHA are registered as individual communal lands of members of the Tengger MHA, so legally the land can be transferred, used as collateral for debts that are burdened with Mortgage Rights like other land rights, although in reality it must require a recommendation/permission from the Village Head/Customary Chair. the local area strictly with a sign "Stamped Red" on the certificate, and if without a recommendation permit from the Village Head/Customary Chair, the Land Office will not register (will not reverse name) the transfer.

### Ethical Clearance:

This research was ethically approved by Faculty of Law, Universitas Diponegoro, Semarang, Indonesia.

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### Conflict of Interests:

There are no conflict of interests.

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