The 9th

ALIN Expert Forum

Land Rights Law in Asian Countries

Date and time

June 12, 2014 (Thursday) 13:00 – 18:00

Location

Faculty of Law, University of Gadjah Mada,
Yogyakarta, Indonesia

UNIVERSITAS GADJAH MADA
FACULTY OF LAW

KLRI KOREA LEGISLATION RESEARCH INSTITUTE

ALIN ASIA LEGAL INFORMATION NETWORK

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PROGRAM

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3. Theme

Land Rights Law in Asian Countries

4. Schedule:

Time	Location/Agenda		Details
The 9th ALIN Expert Forum on Land Rights Law in Asian Countries			
13:00 – 13:30	Conference Room, UGM	Opening Ceremony	**Welcome Addresses** Prof. Paripurna P. Sugarda (Dean, UGM)
Moderator: Dr. Rikardo Simarmata (UGM)			
13:30 – 14:30	Conference Room, UGM	Session #1	**Traditional Values and Land Rights in Indonesia**
			Presenter Dr. Rafael Edy Bosco (UGM)
			Discussant Prof. Maria SW Sumardjono (UGM)
14:40 – 15:40	Conference Room, UGM	Session #2	**Developments of Land Rights and Registration Law in Korea**
			Presenter Dr. Kwang Dong Park (Senior Research Fellow, KLRI)
			Discussant Prof. Heung Ahn Moon (Kunkuk University, Law school)
15:50 – 16:50	Conference Room, UGM	Session #3	**Land Rights Law in Cambodia**
			Presenter Dr. Phalthy Hap (Vice Director of Graduate Program, Royal University of Law and Economics (RULE))
			Discussant Dr. Sophorn Soeun (Vice Dean of the Faculty of Public Administration, Royal University of Law and Economics (RULE))
16:50 – 17:00	Conference Room, UGM	Closing Ceremony	**Closing Remarks** Dr. Kwang Dong Park (Senior Research Fellow, KLRI)
17:00 – 17:30	Conference Room, UGM	Official Photograph	Take Official Photograph
18:00 – 19:30	Restaurant	Farewell Dinner	Farewell Dinner

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Moderator

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Presentation

Traditional Values and Land Rights in Indonesia

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Reconsidering the Inalienability of Communal Ulayat Rights: Theoretical Overview

Rafael Edy Bosko*[1]

"[I]t is a sad thing to see these fine people exchanging their lands for drink;
That is really what, in the end, the transaction amounts to" (New Zealand Herald, 18 March 1882).

Inalienability of land constitutes as an important character of *ulayat* right. This principle is also a common feature of communal or common property in general. It has been a norm in customary law related to communal land tenure. Although historically there have been various efforts and measures taken to diminish or evento remove it—both in conceptual and theoretical domain and in state policies and practices—this principle has regain momentum in the last few decades. As noted by Murray Li, in the contemporary period, a group of experts and advocates has emerged stressing the virtue of collective, inalienable landholding as a means to protect rural people from dispossession. She also noted that even the World Bank which continues to promote the commodification of land through titling to transform inefficient smallholders into proper capitalists, finally recognize that there are good, pragmatic reasons to keep some land outside the market because of its social-insurance function (Murray Li, 2010: 388). International human rights instruments, together withjurisprudence (case laws)on human rights have progressively develop and justify the institution of communal property of indigenous peoples, including the principle of inalienability of property rights. As some states have been very strong in retaining/preserving the communal property right regime, some states have been eager to re-institutionalize the regime of communal property and the principle of inalienability of property right.

The aim of this paper is to discuss this principle in order to look into its relevance for Indonesia in the present context, especially in the context of the real recognition, respect to and the protection of *ulayat* right. This is important because following the amendment of the Constitution, *ulayat* right have gained a new status as a constitutional right, a right which is guaranteed and protected by the Constitution. This paper will begin by describing what is *ulayat* right. The following section (Section II) will make an overview on some dominant theories of property right and on the inalienability of property right, from which we will detect some theoretical bias related to the issues of private-individual *vis a vis* common property debate. In Section III I will discuss some important human rights jurisprudence (case laws) which "legalized" and legally strengthened the principle of inalienability. In this Section I will also briefly discuss the policies and practices of some states related to the institutionalization of the principle. The last section, Section IV, will discuss some legal implications on the future laws related to the recognition and the protection of *ulayat* right. I will look into some possible changes and reform of law in order to really protect the *ulayat* right in Indonesia.

I. What is Ulayat Right

Based on the references on *adat* (customary) law, it can be stated here that *ulayat* right is a *sui generis* property right. These *sui gereris* aspects of *ulayat* right are that: (1) Ulayat right is a communal right, i.e. the right that is possessed in common by the *adat* law community as an entity; (2) Being possessedby *adat* law community, the *ulayat* right gives to such acommunity public (government-like) authorities to regulate and controlthe use of the *ulayat* land; (3) Ulayat land are permanently inalienable.

In order to understand *ulayat* right, it is first necessary to understand another concept: "*adat* law community" or "jural community"(Holleman, 1981:43; Burns, 2007:74). This is a translation of a Dutch term "rechtsgemeenschap", coined by van Vollenhoven, to refer to an organized group of a permanent character with their own administration and material and non-material assets. This group or community can be a kin group, a territorial group or a combination of both. Burns (2007: 76) suggest that various *adat* law communities were, in their several autonomies, nascent village democracies or republics. Various forms of authorities of *adat* law communities resemble those powers which might be manifest in emerging polities – communities evolving towards sovereign statehood. In the past (at least at the time Van Vollenhoven wrote his great works on *adat* law), each *adat* law area (*adatrechtskring*)[2]comprised many *adat* law communities, all of which were governed by their respective *adat* laws. The existence of these *adat* law communities in Indonesia is however not as strong and prevalent as it were in the past. The same situation also happens with regard to *ulayat* rights. This development is due to

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2) Adat law area (*adatrechtskring*) was used by van Vollenhoven to refer to specific area or region in Indonesia that has specific and distinct customary (*adat*) that differs from other *adat* law area. Van Vollenhoven divided Indonesian region into19 *adat* law areas (*adatrechtskringen*).

the internal factors, such as individualism that develops and prevails in the community, and foremost because of external factors. These external factors are mainly the laws and policies of the state.

In Indonesian *adat* law, the existence of *adat* law communities can't be separated from the existence of *ulayat* right; that is because *ulayat* right is an inherent right of *adat* law community, and it is only *adat* law communities which can be the subject or owner of *ulayat* right.

Van Vollenhoven used the Dutch term "beschikkingsrecht" to refer to "*ulayat* right" and other similar communal rights of *adat* law communities; Holleman then translated the term into English as "right of disposal" (Holleman, 1984: 43)[3]."Beschikkingsrecht"or"rightofdisposal"literally implies to include the power toalienate the land. However, Van Vollenhoven, after describing characteristic features of *ulayat* right ("beschikkingsrecht"), warned that there is no power to alienate permanently *ulayat* land (Ter Haar, 1962: 89). It means that *ulayat* land could not be permanently alienated (Ter Haar, 1962: 102; Franz and Keebet von Benda-Beckman, 2011: 177).

As a general principle, under hak *ulayat*, the *adat* law community has the authority to manage and control land use and ownership, both internally and externally. Internally, members of *adat* law community are entitled to use, cultivate and derive benefit from the land for themselves and their families; but not for trading purposes or individual enrichment. Adat law community has authority to make land use planning, such as to allocate land for particular communal needs, such as grazing areas, cemeteries and places of worship. Externally, the community has the power to exclude non-members from using the *ulayat* land. In certain circumstances, non-members will be allowed to use land but permission must be granted by the community and a recognition fee paid (Haverfield, 2001, p.45).

Ulayat right is a common property of *adat* law community. [4]Ithas the character of both private and public law. Private law, because it refers to the communal possession of *ulayat* territory by the whole community. It also comes to the domain of public law, because it refers to the government-like authorities and powers of the community (through its "government" apparatus) to regulate and control the use of *ulayat* land by its members and non-members (Boedi Harsono 2008 : 185-190).

Ulayat right givesthe community authorities or powers to (i) regulate and manage the use of land (for residence, for agriculture, etc.), to determine the availability and allocationof land for future use, and for land/soil conservation; (ii) regulate and determine the legal relationship between persons and land (e.g., issuing specific land rights for community members); and (iii)regulate and determine the legal relationship between persons and legal acts concerning land (transfer, inheritance, etc.) (Sumardjono, 1993).

Some scholars, such as Burns, contends that *ulayat* right or "beschikkingsrecht" is public rather than private in nature (Burns, 2007: 76). This later notion of Burns resembles the opinion of Utrecht scholars such as G.J. Nolst Trenite (1927), Izak A. Nederburgh (1934) and Eduard H. s'Jacob (1945) who argued that *beschikkingsrecht* would have been regarded as a public right of the village government; and because it was a public right of the village government, it would have been absorbed by the new, overridingpublic rights of the (colonial) government emanating from the state's sovereignty (Franz and Keebet von Benda-Beckmann, 2011: 179; Franz and Keebet von Benda-Beckmann, 2009: 205). It is worthy to note that this opinion of Utrecht scholars is arguably similar to the opinion ofIman Soetiknjo, one of the drafter of Basic Agrarian Law. He stated: "… since national tribes and *adat* law communities are no longer autonomous because they have been part of one nation, Indonesia, then, power related to land rights which is derived from *ulayat* rights and which formerly was in the hands of head of tribes/*adat* law communities/villages as the highest authority holder in their respective territories,…now automatically shifts to central government as the highest authority, who functions as holder of right of control by state or state *ulayat* right over all territory of state. However, authority derived from this state *ulayat* right can be delegated in its implementation to self-governing regions and *adat* law communities if deemed necessary (Article 2 Para. 4 BAL)." (Iman Soetiknjo, 1983).

From the above description, it is clear that *ulayat* right is an exclusive right towards outsiders. But how about between members?Do individual members have individual rights to the exclusion of another member(s)? Any individual members may obtain individual land right through a legal act or event by clearing the forest to make it a cultivated land, through inheritance, purchase between members or as a gift (Sudiyat, 1981: 9). When the individual wants to cultivate land, and seeking individual right for that, he must comply with certain processes or requirements. In general he is required to put some form of effort into the land, such as 'making marks' (Slaats, 1992:102) or clearing the forest (Darmono, 1996:24).

According to Van Vollenhoven *ulayat* right will gradually weaken though not in all its manifestations at the same time.This trend goes hand in hand with the development of the individual right of possession into what may be called a form of oriental right of ownership (Sonius, 1963.30). We can refer this as internal factor that weakens the existence of *ulayat* right. However, it is arguably the external factors which mainly influence the existence of *ulayat* right in Indonesia. And such external factors refer to the laws, policies and programs of the state which led to the weakening of *ulayat* right and *adat* law communities.

Ulayat right encompasses land, water (rivers and stretches of the sea) and natural resources contained therein (flora and fauna).

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3) Franz and Keebet von Benda-Beckmann used the English translation "right of avail", while Peter Burns used "right of allocation". See Franz and Keebet von Benda-Beckmann, 2009: 204. See Peter Burns, 2007: 73.

4) Some scholars, such as Burns, misunderstood van Vollenhoven by saying that according to van Vollenhoven, *ulayat* right is private in nature. See Burns (2007: 76). Against Burns, von Benda-Beckmann stated that it is very clear from his works that according to van Vollenhoven, *ulayat* right has both private and public nature. See Franz and Keebet von Benda-Beckmann (2011: 178-179)

II. Theoretical Overview: Biased Theory on Property and the Inalienability of Property Rights.

A. Unfair Theoretical Treatment of Property Regimes

"The meaning of property is not constant. The actual institution and the way people see it, and hence the meaning they give to the word, all change over time" (Macpherson, 1978: 2). This also applies to the property theories, including the theories which will be discussed in this section. It means that when we read property theories, we have to look into the socio-economic-cultural and political context when the theory was proposed, even we have to look into the individual background and interest of the theorists.

In this section I will discussed what I call "mainstream theories" of property rights, in the meaning, that those theories have been very dominant in influencing the way people see or understand property right, and influencing—and even used to dictate—policies and legal regimes related to land rights in many parts of the world. I will discuss two theories: labor theory and evolutionary theory of property right. After discussing these two theories, I will discuss common property theory, which arguably try to see and understand and to "capture" the various empirical facts, where common property regimes are still widely practiced. The development of common property theory is also in line with the development in the international human rights law, which through its "progressive development", seeks to reconcile the dominant Western liberal model of property as a individual marketable commodity with deeply rooted non-Western cultural conceptions of property as homeland (Ankersen, 2006: 684).

1. Labor Theory of John Locke

There are two important notions in labor theory of property by John Locke. First, property right is a natural right, meaning that it exists because of natural law, not because of grant by the state or government. Second, property right comes out because individual mixes his labor to the natural resources which are common to human kinds, and makes the proceeds of his labor his property.

Until the time John Locke wrote his Two Treaties of Government in 1690, property had been viewed as something exclusively created by government. It is worthy to note that the political system that prevailed by the time Locke proposed his theory were under absolute monarchy. The proponents of this system, as represented by Sir Robert Filmer, argued that since the relation between King and subject was the same as that between father and child, it followed logically that individual property can only be granted by the crown. John Locke rejected this argument, insisting that God had not bestowed on the monarchy exclusively, but to all human beings. John Locke argued that not only individual private property existed previous to government, but that it was also upheld by natural law and the doctrine of natural rights. Property, according Locke, is the source of government; and as a consequence, "government has no other end but the preservation of property." (West, 2003: 20-21).

Labor theory doesn't only provide a logic about the origin of property rights, but it also postulate the justification of property right. According to Locke, God gave the world to men in common, yet "every man has a property [right] in his own person" and from such right follows also his right to "[t]he Labour of his Body, and the Work of his Hands." Therefore, whatever a person has removed out of its natural state and mixed her labor therewith belongs to her (Locke, Ch.5 Section 25-27).

In Section 25-27 of Chapter 5 entitled Of Property, Locke maintains that "God ….has given the Earth to the children of Men, given it to mankind in common" (emphasis added). The use of the phrase "in common" might at first sight suggest elements of collectivism, what today would be called commonly owned or communally owned property. However, the most possible interpretation of this phrase refers to the absence of ownership, or open access owned by no one (West, 2003:22).

The labor theory has been criticized on various grounds. First is that labor theory merely justifies one mechanism for attaining private property while ignoring another mechanisms, such as inheritance or gift. Another critique is that the theory which is based on assumption that labor can be attributed exclusively to a single individual is unrealistic, as work in modern day is typically done in teams comprised of numerous individuals in an environment that provides the laborer with the necessary tools and opportunity to work (Ofer-Sinai, 2012:259-260).

Another critic stated that it was mainly Locke's personal background which influenced his theory. In this context, two features of Locke's own life have come to fore: first, his association with a radical (early liberal) politics which aimed to broaden the base of political participation; second, his theoretical and personal interest in justifying colonial expansion (Davies, 2007: 66).

Locke's approach to property is first and foremost a theory of and justification for enclosure, not only in Britain, not only in the so-called "new" world, but everywhere, anywhere and for all time. Even Paul Thomas said that what Locke has provided is not a theory of property at all, but merely a "notion of appropriation." (Thomas, 2003: 30)

Locke's thought was intended to be universal, but it was however a Eurocentric universalism which assumed that ownership involved fencing and using an item (in this case, land), that political organization took a particular standard institutionalized form, and that accumulation was not only a natural desire but a God-given

duty (Davies, 2007: 67).

Locke's theoretical enclosures start with the commons and the presumption of a state of nature: in the Christian world inhabited by Locke, the commons were a gift from God, available to all in the state of nature, but ultimately to be used for the benefit and prosperity of 'mankind'. Evidently, Locke considered his term "common" as res/terra nullius or an open access. It was not a protected public domain, nor a limited commons, since objects could be removed from the commons without the consent or even the participation of other "commoners". This is important, because ultimately it gave colonialists the power to appropriate land and resources without the consent of indigenous populations (Davies, 2007: 67).

John Locke has been considered as the father of "agricultural argument" for the justification of property (Gilbert, 2006: 24). The general idea in this argument was that only agriculture (in the European model) could be regarded as a basis of a real land tenure system, the central argument being that because the indigenous did not improve the soil by cultivating it, "they did not assert exclusivity; therefore, . . . their rights were so negligibly thin as to disintegrate automatically wherever the European invader set literal or constructive foot" (Bell, cited in Gilbert, id.).Locke expressed the idea that uncultivated land was not possessed closely enough to constitute property. Locke recognized that the "Indians" had some usufructuary rights over their hunting products, but that they are "commonly without any fixed property in the ground" (Tully, cited in Gilbert, id.). Thus, according to this argument, territories used by hunters and gatherers or non-sedentary agriculturists were to be regarded as vacant. The Lockean argument that rights in land arose only from appropriation and improvement of the land by European-model agriculture was accepted widely. For example, Rousseau (cited in Gilbert, id.) explained the origin of private property by using the model of the development of agriculture.

These theories of the 18th century fostered the idea that ownership of the land could only be based on the definite occupancy of such land, and that sedentary agriculture was the only means to define the terms of occupation. The agricultural argument had a crucial impact on the indigenous rights under international law in the past (Gilbert, 2006:25).

John Locke's writings provided a manifesto in favor of individual property and against common property which prevailed in that time. He wrote at the time of enclosures, whereby common property resources in England were individualized, often being put into the hands of the most powerful individuals in the area concerned. His writings supported and justified this process (van Banning, 2001:302).

The notion that property rights are individual rights has been very dominant, not only in the past, but also until the present time. During the drafting of Article 17 of Universal Declaration of Human Rights, the idea which was dominant was the one that considered property right as individual right. The final text of the article, paragraph (1) which says that "Everyone has the right to own property, alone, as well as in association with others", was only adopted after the USSR persisted to add the phrase "as well as in association with others". When the USSR submitted her proposal, she clearly had in mind the concept of collective property which was practiced in the USSR that time (van Banning, 2001:38). The idea about communal property or common property regime (of indigenous peoples) was absent during the drafting process of UDHR. Notwithstanding its original association with collective property in the USSR, the phrase "as well as in association with others" has been progressively interpreted by international human rights institutions (such as Human Rights Committee, Inter-American Court of Human Rights, and African Commission on Human and Peoples' Rights) in such a way that it embraces also common/communal property regimes of indigenous and tribal peoples. Recognition and respect for communal/common property regimes of indigenous peoples have also been guaranteed in various international human instruments, such asILO Convention 169 of 1989, American Convention on Human Rights, and the United Nations Declaration on the Rights of Indigenous Peoples

2. Evolutionary Theory of Property Right

The pioneer of this theory is Harold Demsetz. He proposed his theory in his seminal article entitled "Towards a Theory of Property Rights." (Demsetz, 1967: 347-359). Another economic scholar such as Hernando de Soto (2000) also contributes to the development of this theory. The central tenet of this theory as stated by Platteau (1996: 29) is that when population pressure and market integration increase, land rights spontaneously evolve from communal/common property to individual property. Hence, landholders demand improved tenure security, which might be provided via a state-orchestrated process of adjudication and title registration (Plateau 1996:29), both of which tend to privatize land into individual parcels (Platteau, 1996; Barnes and Griffith-Charles, 2007).

This theory presents the evolution of property regimes as a one-way linear movement from common property to private individual property. According to him common property represents an inferior stage in the process of evolution towards a "perfect" stage, namely individual private property right. In his view, common property survives only when a society is so primitive that its members cannot realize great benefits resulted from the internalization. And when the benefits due to the internalization exceed the transaction costs, the transition from commons to private individual property becomes cost-effective and the resources irreversibly move towards private individual property (Bell and Pachomovsky, 2009:84).

Demsetz took as an example to support his thesis anthropological studies of Native American tribes inhabiting Labrador Peninsula in Canada. Initially, the tribes treated hunting land as a commons open to all tribal members, who used it for various purposes, including hunting beaver for furs. For a time, the Indians' modest needs for fur naturally limited the rate of hunting, but once commercial fur trade with European settlers devel-

oped in the early 1700s, the demand for furs increased. Phenomenon of over-hunting happened leading to a threat of scarcity. In response, the Indian tribes in the peninsula developed a system of private territories/areas for hunting that were allocated to individual families who had the right to retaliate against trespassers. Thus, according to Demsetz, "the emergence of new property rights takes place in response to . . . new benefit-cost possibilities" when the value of the resource changes (Demsetz, 1967: 350); in other words, property rights develop in a society when the benefits of having them exceed the costs of getting them (Krier, 2009:140).

Gershon Feder and David Feeny, taking an empirical evidence from Thailand, have also contributed to the formulation of this theory, arguing that certain institutional arrangements for land rights haveevolved towards individual private property in order to reduce uncertainty and increase efficiency in credit as well as in land markets(Feder and Feeny, 1991:135).

This theory intends to achieve a capitalization of property rights on land by formalization and individualization. Its supporters expect higher efficiency of the land markets and a reduction of poverty. Popularization of this theory with the stressing on the individualization and formalization of land rights has been particularly done by de Soto (2000).

Merges (2000: 1868), citing Eggertsson, stated that Demsetz's theory is a "naïve theory of property rights," according to which the entire history of civilization is an inexorable, unidirectional movement towards private-individual ownership of land and other natural resources. This theory is naïve because: (a) it is ignorant to the failure of some private ownership regimes to conserve scarce resources over time; (b) it neglects the effectiveness of alternative property/regulatory arrangements that have evolved to manage scarce natural resources successfully throughout the world; and (c) it implausibly promotes private-individual ownership as an institutional panacea (Cole and Ostrom, 2010: 2).

According to Cole and Ostrom, the adoption and the development of certain property rights regime depend not only on supply relative to demand (merely economical factors), but many other variables, including the structure of underlying institutions (social norms as well as formal laws), ecological conditions, and culture of the related community. And there might be various combinations of private-individual, common, and public property rights, applying differentially to various natural resources depending on those variables. Further Cole and Ostrom said that specific property regimes that prove viable and sustainable in one set of social-ecological circumstances (or in a single case) may prove nonviable or unsustainable in another (or many others) (Cole and Ostrom, 2010: 2). In the same line, Barnes stated that: "Variety of property regimes (private property, common property and public/state property) have been shaped by a variety of legal, political and moral considerations, not only based on economic logics. Such values are not limited to concerns about efficiency or social utility; they also may include concerns about the fair allocation of wealth and proper social order." (Barnes, 2009:9). These concerns may result in the forms of property regimes that are less optimal in terms of economy because they might be designed to facilitate non-economic goals.

The main critic to Demsetz is that he ignored the role of the state. What have been invented by society according to their customary laws (bottom-up) will not sustain if there is no positive/active role from the state/government. And the development of property rights regimes doesn't always follow the one-line bottom-up path as suggested by Demsetz; in many cases, it is the state who establishes property right regimes (top-down) (Merges, 2000: 1868). And what kind of property right regimes which are adopted or established by states depend very much on various backgrounds: ideology, politics, economy, social and cultural. Anderson and Grewell (1999: 77-84) provides some examples in the United States where property rights regimes are created by government (top-down) and where the regimes are created in a bottom-up process through custom and common. There are other examples where property rights regimes developed not only through the top-down or bottom-up path, but a mixture of these two. Example of this is *ejido* in Mexico which was established after a revolution in 1917. Another examples are the institutions of communal land of indigenous peoples in South America which had been "created" through customary law of indigenous peoples (bottom-up) and then had been guaranteedby state in the their respective constitutions and regulations (top-down) because of strong pressure from indigenous peoples movement there (bottom-up) (seeDeere and Leon, 2001:31-61).

The notion that the common property is a "backward" institution, the property regimes which existed only the past, or which will disappear in case they still exist, doesn't match with the empirical facts around the world. As stated by Ankersen (2006:683), "communally held lands, often referred to as 'common property,' have remained robust and adaptable in the face of the forces of globalization, and continue to persist in even the most developed nations."

In this context, it is worthy to note how these theories haveinfluenced—directly or indirectly, impliedly or tacitly—the line of thinking and policies on land in Indonesia. For this purpose it is interesting toquote the opinion of Boedi Harsono, another drafter of BAL. He stated: "….national agrarian law policy has given the signal not to perpetuate or to preserve the existence of *ulayat* right…..Regulating *ulayat* right, according to the drafter of BAL, will hamper natural development of *ulayat* right, which actually tends to weaken. This trend is accelerated by making stronger individual rights, via regulating this individual right in written law and by arranging its registration resulting in the granting of land certificate. The weakening or even the extinguishments of *ulayat* rights will be accommodated in the framework of the implementation of the right of control by State." (Boedi Harsono, 2008: 193).

B. The Evolving Concept of Common Property

It has to be acknowledged that compared to the regime of private (individual) property, common (or communal) property only gained few attention of a very few theoreticians. As a matter of fact, debate on which one between private and communal/common property that would be used has been initiated since the era of ancient Greece, between Plato (428-347 BC) dan Aristotle (384 – 322 BC). According to Plato, property should be communal both in ownership and in use. Aristotle criticized Plato and said that the property should be owned privately, although the property should be made accessible for the use by all (Anderson and McChesney, 2003: 14).

History also noted the debate between two ideologies, namely betweenthe socialist block led by the USSR who championed for the collective property and the western liberal block who triumphed individual private property. The debate, for example, resulted in the adopted version of article 17, paragraph 1 of the Universal Declaration of Human Rights. The final text: "[E]veryone has the right to own property, alone, as well as in association with others" in that article is actually a compromised formulation. Soviet Union who strongly proposedthe additional phrase "..as well as in association with others"clearly had in mind the concept of collective property as practiced in the USSR." (van Banning, 2002: 38).

However, beginning in the eighteenth century up to present individual private property gradually became the preferred form of property, supported by the philosophers and economists of the time. John Locke's writings formed a manifesto in favour of individual property and against common property which prevailed at that time. His writings contributed to a substantial extent to the propagation of individual property. He wrote at the time of enclosures, whereby common property resources in England were individualized, often with the result that vast area of common resources (i.e. land) wereput into the hands of the most powerful persons in the area concerned (van Banning, 2002:302).

During the nineteenth and the beginning of the twentieth century, somewhat absolute values were attached to individual property. The focus of legal scholars were predominantly on individual private property in land, often treating the right to exclude as the *sine qua non* of property. Together with resource economists, legal scholars were preoccupied with private-individual property right, often equating ownership with the right to alienate (Cole and Ostrom, 2010:4). Other forms of property such as common property were considered undesirable and unstable forms of ownership. Private property was seen as the best and only economically viable option (van Banning, 2002: 302).

It is only after the publication of Hardin's controver sial article "Tragedy of the Commons," and especially as critique to Hardin, that the concept, research and discussion on common property win the attention of some scholars, such as Ciriacy-Wantrup and Bishop[5], ElinorOstrom[6], and Arun Agrawal.[7]

However, common property still lacks clear and final definition. Following article 17 of UDHR, one can define common property as *property enjoyed by individuals in association with each other* (van Banning, 2002: 297).This interpretation has been used to cover communal land of indigenous peoples as a category of property protected by UDHR.

Cole and Ostrom define common property as a property system in which "[E]ach member of the ownership group has the *right* to access and use group-owned resources in accordance with access and use rules established collectively by the group, and a *duty* not to violate access and use rules. Each member also has the *right* to exclude non-members of the ownership group, but no right to exclude other members of the ownership group. Non-members of the ownership group have a *duty* not to access and use the resource, except in accordance with rules adopted collectively by the ownership group." (Cole and Ostrom, 2010: 8)

Eggertsson further said that in common property regime, the members of the group not only have rights of entry and withdrawal, but also full rights of management and right to exclude non-members. In common property regimes, however, the members do not have full rights of alienation or fully transferable titles to their assets. This limit or restriction on the rights of alienation distinguishes common property from other types of exclusive rights. Joint ownership with (more or less) unrestricted alienability, which is the basis of the corporation and many other popular property rights arrangements in modern societies, thus, is not common property according to this definition (Eggertsson, 2003: 74-75).

The definition provided by Cole and Ostrom, which is further elaborated by Eggertsson, is well-suited for the tenurial regime of common pool resources. Common-pool resources are types of resources, whose size or characteristics makes it costly, although not impossible, to exclude individuals from using the resources either through physical barriers or legal instruments and that benefits consumed by one individual subtract from the benefits available to others. Examples of typical common-pool resource systems include lakes, rivers, irrigation systems, groundwater basins, forests, fishery stocks and grazing areas.Common-pool resources may be owned by national, regional or local governments as public goods, by communal groups as common property resources, or by private individuals or corporations as private goods. When they are owned by no one, they are used as open access resources (Ostrom, 2000: 337-338).

The concept of common property is still evolving. In its evolution, the concept doesn't only apply for

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5) It was Ciriacy_wantrup and Bishop who firstly made a distinction between open access and common property. See Ciriacy-Wantrup and Bishop, 1975. "'Common Property' as a Concept in Natural Resources Policy," in *Natural Resources Journal,* vol. 15: 713-727

6) Of several works of Ostrom, two are worthy to mention: Elinor Ostrom, 1999, Private and Common Property Rights, in B. Bouckaert and G.De Geest (eds.), Encyclopedia of Law and Economics, http://encyclo.findlaw/index.html; and

7) Arun Agrawal, 2001. "Common Property Institutions and Sustainable Governance of Resources," in World Development, 29(10):1649-1672

common pool resources, but also for communal land tenure. More recently, common property regimes have been promoted by human rights advocates and also by international human rights institutions seeking to secure the communal land rights of indigenous peoples and traditional societies whose values and traditional tenure conflict with the dominant Western property paradigm (Ankersen, 2006: 585-588).

C. Theoretical Bias on the Inalienability of Communal Property Right.

Inalienability of property right is "pervasive in modern, developed societies, in developing nations, and in the historical past." The prevalence and variety of the restrictions on alienability suggest that one should analyze this issue not only from the perspective of economy but also from the perspective of social, cultural, environmental and political aspects. This is truly correct if we discuss and analyze the phenomena of common/communal property. That is because one of distinctive features of common/communal property regimes (including *ulayat* right) is the inalienability of land.

It should be noted at the outset, however, that there is no one-agreed upon definition of the concept of inalienability.[8] It might be the result of the various practices worldwide about the prohibition or restrictions of the alienability of property rights. In many communities with common property regimes, transfer of landrights to the non-members is prohibited or the transfer can only happen after the whole community agrees. In some communities, transfer is possible, but not for permanent, like in the *adat* law communities in Indonesia. In Minangkabau, West Sumatra, for example, permanent alienation is prohibited; only temporary alienation or transfers such as through pawning is allowed. And pawned property (i.e.land) can always be redeemed. Inprinciple, it is the whole lineage who redeem the pawned *pusako*[9] and the individual member or sub-group will contribute equally (Franz and Keebet von Benda-Beckmann, 2009: 198).

"History shows the worldwide prevalence of common property. If there is such a wide prevalence, there must be a justification" (van Banning, 2002: 296). From the state practices worldwide and the practices in several communities (especially indigenous communities) worldwide regarding the inalienability of common/communal land, we can find some justifications of the inalienability of land. [10]In many cases, inalienability serves as protective measures for certain groups of people. Restrictions on the alienability are needed to protect the right to culture. It seeks to protect social mores and to promote distributional goals by preventing the commodification of land (Hsu,2003:815), protecting poor and less-educated peoples from market pressures and restricting accumulation (Li, 2006:385-386; Ellsworth, 2004:14-15). In Africa, the idea that land is permanently inalienable because land belongs tothe dead, the living andthe unborn (Powelson, 1988), arguably reflects the philosophy of intergenerational justice.Especially for indigenous peoples, the main justification is that they have a strong cultural and physical connection to and dependence upon their communal land, for which it is fundamental to the definition of their existence, identity, and integrity.

Interestingly, the prohibition or restriction on the transferability of land to the non-members of the community also exists in the level of state. In Indonesia, non-citizens is prohibited from having ownership right, and if Indonesian citizen transfer ownership right to non-citizens, the transfer is void. In another states, such as in the (post-Soviet) Baltic states the similar restrictions have been instituted. Even in the United States, several states have maintained restrictions on the rights of real property ownership by non-resident aliens, and in a few cases, by resident aliens as well (see Metzer and Engerman (2004: 7-10). Actually, atthe level of state, various restrictions on the transfer of property (i.e. land) to aliens is a common phenomena.There are some approaches used by states to restrict ownership of land by aliens. One of the approaches is known as 'key factor' restrictions in which a state limits the amount or type of land which can be acquired by alien, based on the purpose for which land will be used, or the geographical area where the land is located. These restrictions are used to prevent foreign interests from controlling land of economic or military importance, such as farmland, border or coastal zones, or land with mineral or other natural resources. Other restrictions are applied not alien or foreign land acquisitions per se, but rather to all foreign or alien acquisition in the particular country. These restrictions include: percentage limitations on alien ownership, special authorization requirements for alien acquisitions, case by case review of alien acquisitions and registration procedures for foreign owners(Campbell, ed. 1980: 8-9).

This principle of alienability or restriction on the transferability of land has existed in the common property regimes long time in the past since pre-literate communities, and it is still widely adopted and sustained until now, not only in developing countries, but also in developed countries (see Ellickson, 1993; Rose-Ackerman, 1985). However, most economists and mainstream property theorists consider inalienability of land as constraint to economic development, especially as disincentive for land market.

For them individual, private, tradable titles in land are an indispensable precondition to economic growth and development and the cause of the prosperity of western countries. Moreover, property systems anchored in

8) It should be noted at the outset that there is no single-agreed upon definition of the concept of inalienability.Ackermandefines iInalienability in a broad sense to include, not onlyany restriction on the transferability, but also regulations that restrictownership, or use of an entitlement (Ackerman 1985: 931). Another scholars provide another definitions. McConnell (1984: 27)defines inalienability as "….not transferable to the ownership of another;" Calabresi and Melamed (1972:1092) equates "inalienable" with "non-saleable", saying that "An entitlement is inalienable to the extent that its transfer is not permitted between a willing buyer and a willing seller;" and Meyers (defines inalienable as "unrelinquishable", saying that "Inalienable rights are rights that cannot be relinquished by the individuals who posses them." (Meyers, 1981:127).

9) *Pusako* is a communal property (mainly land) of a (sub)lineage of Minangkabau people in West Sumatra.

10) According to Ankersen and Ruppert (2006:746)," … limitations on alienability, severability, and use of land as collateral may be acceptable from an international law standpoint, because a primary justification for the international human right to communal property is protection of the right to culture. History has demonstrated that individualization of plots of indigenous land to members of the community has often led to the demise of the culture of the group."

individual, tradable titles are (in their view) the best option around for managing property of all kinds because they encourage efficiency in producing things (Ellsworth, 2004:10). Economist, such as Feder and Onchan (1989:215), even tied land tenure security with transferability by saying that "ownership security includes the right to use land as collateral, thereby obtaining better access to credit." Thus, to be secure, land rights must be transferable.

For indigenous peoples, however, inalienability of land gives them more security of tenure. Thus "effective security and legal stability of lands are affected whenever the law fails to guarantee the inalienability of communal lands and instead allows communities to freely dispose of them, to establish liens, mortgages or other encumbrances, or to lease them." (Inter-American Commission on Human Rights, 2011: 24).

According to Ellsworth (2004: 14-15), tradable title "can provide as much insecurity of tenure as security. This is because tradable title easily exposes the poor to market forces. For example, just because of family crisis or bad weather, poor farmers(albeit efficient farmers) might be forced to sell their land. Ellsworth also mentioned that in many places of the world tradable title have led to perverse accumulation of land by the wealthy few: a corporation, a hacienda owner, or an absentee landlord. She also mentioned data that show that wealthy landowners tend to be less efficient per hectare or per person than small farmers.

According to Franz and Keebet vo Benda Beckmann, the assumption that communal property is not suitable for economic development is not supported by the Minangkabau example. The function of *pusako* in terms ofsocial security and continuity of lineages has always been strong, but mainly related to the non-alienability of *pusako* property. They show the fact that some of the most advanced farms are on *pusako* land. There are only few Minangkabau farmers who favour abolition of the *pusako* system because it hinders economic development (Franz and Keebet von Benda-Beckmann, 2009: 198-199).

III. Prevalence of the Inalienability of Communal Land

As stated before, common property regime have been prevalent in both the developed and developing world. In developed world, common property continues to be a main natural resource management system over a substantial part of the land in certain countries.In Switzerland, for example, 80 % of alpine territory are under the system of common property, while in Japan, about 3 million hectares of land are managed based on common property system. In Sub-Saharan Africa and in Latin America, numerous other countries also have large scale common property regimes (van Banning, 2002: 303).In the United States, Ellickson (1993: 1346-1348) mentioned two most enduring and robust communal land tenure systems in the last 500 years of Western history, namelyHutterite colonies of the Great Plains in the United States and the kibbutzim in Israel. These communal land tenures are voluntarily or self-established by the respective community (bottom-up).

In developing countries, communal land tenure is widely prevalent.In Africa, for example, despite the government policies in Africa to convert communal tenure to the western-style individual property (Manji, 2006; Deininger, 2003:39), communal tenure systems still persist until nowadays. In South Africa, The Communal Land Rights Act (CLRA) no. 11 of 2004 has been promulgated to recognise and formalise the South African traditional system of communal tenure, bringing it in line with constitutional principles and to provide for systematic and democratic administration of ommunal land through statutorily instituted community rules. The target of this Act is the 15 million South Africans who live in (rural) communal arrangements (Mostert and Pienaar, 2005:530). In Ghana, Bassett (2007:1) mentioned a case study of self-instituted common property for a resettlement project. Apart from customary communal land tenure which still exist in (rural areas) in Ghana, Bassett found a group of people (Voi people) who are beneficiaries of a resettlement project and who opted to have a group title rather than individual title over the land where they resettle. According to Bassett, the Voi residents' decision to hold land in common reflected their perception of themselves as a powerless group vulnerable to losing land to outsiders. Their decision to hold land together was entirely rational – that a collective institution better served to protect their individual self-interest than the individual institution predicted by the Evolutionary Theory of Property.

In the context of Africa, it is worthy to mention that communal land rights of indigenous peoples has been recognized and protected through the "quasi" decision (i.e. recommendation) of African Commission of Human Rights in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (Endorois case) in 2003.

The existence of inalienable communal land rights is one of the main distinctive characteristics of indigenous peoples worldwide. It is the main feature of Aboriginal title in Canada, native title in Australia, Indian land in the United States, and Maori title in New Zeeland. In Latin America, the existence of inalienable communal land of indigenous peoples has been recognized and protected in state laws, even in the state constitution.In Mexico, for example, large part of its rural area is organized around the *ejido* system, a communal tenure system which was re-invented in 1915 by Zapata. The land under the *Ejido* system belongs to municipalities or a population group, and is worked in common by communities. It is inalienable. In another form, *ejido* is also practiced in Venezuela (van B anning, 2002: 303).

In Latin America, the existence of the inalienable communal land rights of indigenous peoples has been strongly recognized and protected through a series of case laws of Inter-American Commission of Human Rights (IACHR) and Inter-American Court of Human Rights(Inter-American Court). Recognizing that "for indigenous

communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy,[11] even to preserve their cultural legacy and transmit it to future generations," IACHR and Inter-American Court emphasized the importance of the principle of inalienability of communal land rights indigenous peoples. According to IACHR, [12]effective security and legal stability of communal land rights are affected if the law fails to guarantee the inalienability of communal lands and instead allows communities to freely dispose of them or to establish mortgages on such land.

In Asia, the communal land right of indigenous peoples has also been recognized and guaranteed in state laws. In Cambodia, for example, Article 26 of its Land Law of 2001, gives the inalienability status to the collective land rights of indigenous communities there. Lands under the collective rights of these communities are the lands in which the said communities have established their residences and where they carry out traditional agriculture. The lands include not only lands actually cultivated but also includes the reserved landsnecessary for the shifting cultivation which is required by the agricultural methods they currently practice and which are recognized by the administrative authorities (article 25).

In Papua New Guinea, about 95 % of the country's land is customary land belonging to indigenous tribes based on traditional or customary title. Based largely on subsistence economy, indigenous tribes there considered land as the source of their life-blood. Land ownership gives them insurance and social security. Having a deep physical and spiritual connection with their land, indigenous tribes do not consider their land as "property" in the sense of being easily commoditized and alienated. Notwithstanding this traditional ways of "treating" land, and contrary to the common believe by economists that customary land tenure constitutes the main constraints of PNG economic development—because it is not a saleable commodity—land has recently brought PNG's indigenous peoples into cash economy through the production of crops like coffee and cocoa, providing the people with the livelihood that serves more than mere subsistence needs (Dixon, 2007:220-221; see also,

11) Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ' 149 (Jan. 31, 2001); Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, Ш 124, 131 (June 17, 2005); Case of the Plan de Sánchez Massacre v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 1 16Д 85 (Nov. 19, 2004).

12) The general international legal principles applicable in the context of indigenous peoples' human rights include, the recognition by the State of the permanent and inalienable title of indigenous peoples relative thereto (Mary and Carrie Dann (United States), Case 11.140, Inter- Am. Comm'n H.R., Report No. 75/02, f 130 (Dec. 27, 2002);see also Second Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/IL106, doc. 59 rev. ch. X,1 18 (June 2, 2000).

IV. Legal Implications for Indonesia

For Indonesia, the principle of inalienability of land right is relevant at least concerning two issues: firstly, related to the legal regime of right of exploitation, and secondly, related to the protection of *adat* law communities against the risks of land market.

Right of exploitation (Hak Guna Usaha/HGU), according to the Basic Agrarian Law of 1960, can only be granted over land directly controlled by the state. In case the land is individual land or communal *ulayat* land, the right holder (whether individual or *adat* law community) has to relinquish the land right to the state, in order for the state to grant the right of exploitation to the third party. It can be arguably stated here that this regime (or procedure) is not in line with the genuine recognition and protection of *ulayat* right. Genuine recognition and protection of *ulayat* right necessitate the respect of one of its main characteristics: permanent inalienability. Therefore, it is recommended here that the right of exploitation can be directly granted over *ulayat* right, without the need for the relinquishmentof the right to the state. Consequently the granting and the extension or the renewal of the right of exploitation are based on the free consent of the said *adat* law community. Seeing through this lens, at least, *adat* law community will not lost their land bases permanently.

Related to the second issue, it can be said that in general, *adat* law community is in a weaker position relative to other people in society. They are left behind in terms of economy and education. They are very prone to risks or dangers of the market. Takege (2001) describes about the condition in Papua, when the native people there are gettingopen to land market, together with the entrance of development program and the influx of migrant from outside Papua, their view about land changes. Rather than seeing land as a mother which is inalienable, they now consider land more asa commodity, which they can easily sell or release for instant money.

The depiction in the front page of this paper was quoted from newspaper editorial more than 132 decades ago. It described the fate of Maori people, indigenous peoples in New Zeeland by that time, but the message is still relevant up to present: the need of protective measures to safeguard vulnerable groups of people from dispossession of land.

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Discussion

Traditional Values and Land Rights in Indonesia

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Recognition and Protection of the Rights of Adat (Customary Law) Communities: The Indonesian Experience

Maria Sumardjono*[1]

Recognition of "adat" (customary law) communities along with their rights known as "hak ulayat" is stipulated in Law No. 5 of 1960 on Basic Law on Agrarian Principles/Basic Agrarian Law ("BAL"). This formal recognition was not immediately followed by implementing regulations. Partly because of this, severalproblems that then arise are: (1) [2]that formal recognition in the BAL is "conditional" recognition based on concerns that existence of ulayat land could potentially hinder developmentprojects; (2) in the absence of criteria on the existence of ulayat right there is a tendency to a unilateral or single interpretation on the existence of certain ulayat land by the Government resulting in misinterpretation of ulayat land as State land; (3) the granting of land rights according to BAL in the area of ulayat land requires that the ulayat land should be released in order to become State land as a basis for granting the land rights to another party; (4) that the lack of genuine recognition of adat communities and their rights have increased the number and severity of disputes over land.

While issues related to the recognition of adat communities and their rights are complex, in terms of the conceptual-theoretical aspects, the Government's legal policy, the growth of the movements and initiatives toward the recognition of adat communities, and the increasing number of disputes over ulayat land; this paper is attempted to provide a general overview of the long journey of the strive to recognize adat communities and their rights as well as future challenges.

It is expected that through this conference we can share our experience that although the existence of adat communities with their culture, rules and customs, local wisdom and territory has existed long before the national independence was declared on August 17, 1945, to obtain a genuine recognition needs a continuing effort, even up to this day (June 12, 2014). Implementation of Constitutional Court Ruling related to the protection of adat communities and their rights, e.g. Ruling No. 35/2012 on Customary Forest still needs a serious of actions.

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2) Explanatory Memorandum, General Elucidation part (3).

Recognition of adat communities and their rights needs a strong political will of the government. The main task of the Parliament and Government is promulgating Law on the Recognitionand Protection of the Rights of Adat Communities which will serve as a strong legal basis for ensuring the economic, social and cultural well-being of adat communities.

Ⅰ. Recognition of adat communities and their rights Pre Amendment of the Constitution of the Republic of Indonesia of 1945

The Constitution of the Republic of Indonesia of 1945 does not mention human rights explicitly. Only after the Second Amendment in 2000, Article 18B paragraph (2) states that: "The State shall recognize and respect, to be regulated by law, the homogeneity of societies with customary law along with their traditional rights for as long as they remain in existence and in agreement with societal development and with the principle of the Unitary State of the Republic of Indonesia."

In general, ulayat right is the adat community's right of disposal. It contains the relationship between the adat community and their territory which consists of commitment and obligations. The term "territory" refers to all areas belonging to adat community comprising lands, inland waters, coastal areas and natural resources therein which are necessary to ensure their welfare.

Recognition of the existence of ulayat land is also stipulated in Article 2 of BAL. The Explanatory Memorandum, General Elucidation part (2) states that through the State's right of disposal, the authority of the State is limited in so far there are ulayat land of the adat community. [3]

Recognition of the existence of ulayat land is subject to certain requirements. Article 3 of BAL states that "implementation of the hak ulayat (customary land right), in so far as they still exist, shall be adjusted as such as to fit in the National and State's interests, based on the unity of the Nation and shall not be in conflict with the

3) The State's power over land which is not possessed under a certain right by an individual or another party is broader and full. With reference to the objectives mentioned above, the State can grant such land to an individual or corporate body under a certain right, e.g. hak milik (right of ownership), hak guna bangunan (right of use of structure), hak guna usaha (right of use) according to the allotment or the need or grant it to a certain public entity (e.g. Department, Jawatan (Service), or Daerah Swatantra (Autonomous Region)) under a right of management for use by the latter to facilitate the implementation of its duties (Article 2(4)). Meanwhile, the State's power over such land is also limited, more or less, by the hak ulayat of masyarakat-masyarakat hukum adat (rights of adat communities) as long as the hak ulayat in question, in reality, still exists. This will be elaborated on in point #3 below."

acts and other regulations of higher levels."

Limitation of the existence of ulayat right is based on the concern that ulayat right will potentially hinder large-scale Government projects or programs, which among other things encourage the idea that the interests of the adat community should be subordinate to the broader interests of the nation and of the state and that the implementation of ulayat right should also be consistent with the broader interests. In other words, ulayat rights are not exclusive.

BAL does not provide criteria of the existence of ulayat right. The reason of the BAL drafters for not providing criteria for the existence of ulayat right is that giving the criteria will result in preserving ulayat right, while there is a natural tendency that ulayat right will become weaker with the lapse of time [4](Boedi Harsono).

In fact, in the absence of such criteria, adat communities have particularly suffered from the effects of development. They are also suffering from environmental effects of the loss of habitat and biological diversity indirectly, and have been directly losing their lands and natural resources therein, and even their lives as a result of large-scale development projects as well as natural resource extractive industries such as mining and logging concessions.

Conflicts recurring over ulayat land and resources have led to the thoughts that criteria of existence of ulayat right should be based on the existence of the holder of the right, their territory and their authority to dispose land and resources (Sumardjono, 1993).[5]

Thirty nine years after the promulgation of BAL, after a lot of pros and cons, the government introduced criteria of the existence of ulayat right through Regulation of the State Minister for Agrarian Affairs/Head of National Land Agency Number 5 of 1999. Article 2 of the Regulation stipulated the criteria of the existence of ulayat right consisting of three elements, namely: (1) a group of people or homogenous societies sharing common bonds of rules recognized, accepted and observed by the community; (2) ulayat land that have been occupied, possessed and utilized by the adat community; (3) a body of written and/or unwritten rules, customs, concerning the management, utilization of ulayat right observed by the respected adat community.

Effectiveness of the Regulation depends on the Local Government initiative to conduct research involving the said adat community, customary law expert, NGO, and relevant agencies. The existence of ulayat land should be recorded in a Register in the Land of Office.

4) Boedi-Harsono, 1999, *Hukum Agraria Indonesia, Sejarah Penyusunan Undang-Undang Pokok Agraria, Isi dan Pelaksanaannya*, edisi revisi, Djambatan, Jakarta.

5) Sumardjono, Maria, 1993, *Hak Ulayat dan Pengakuannya dalam UUPA*, SKH Kompas, 13 Mei 1993.

Ⅱ. Recognition of adat communities and their rights in accordance with the Second Amendment of the Constitution of the Republic of Indonesia of 1945.

The basis of recognition of the legal rights of Indigenous Peoples to land and resources traditionally held was established in 1945 through the United Nations Charter. Following the United Nations Charter, various international conventions concerning the recognition of Indigenous Peoples are as follows:

1. The Universal Declaration of Human Rights (1948);
2. The United Nations Convention on the Prevention and Punishment of the Crime of Genocide (1951);
3. Recommendation 104: ILO Recommendation Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations In Independent Countries (1957);
4. Convention 107: Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations In Independent Countries (1957), International Labour Organization (ILO);
5. The International Convention on the Elimination of All Forms of Racial Discrimination (1966);
6. The International Covenant on Civil and Political Rights (1966);
7. The International Covenant on Economic, Social, and Cultural Rights (1966);
8. Convention 169: Convention Concerning Indigenous and Tribal Peoples in Independent Countries (1989), International Labour Organization (ILO);
9. The Limburg Principles on the Implementation of theInternationalCovenant on Economic, Social and Cultural Rights (1986);
10. Declaration on the Rights of Persons belonging to National of Ethnic, Religious,Language Minorities (1992);
11. Rio Declaration on Environment and Development (1992);
12. Agenda 21 (UN Conference on Environment and Development, 1992);
13. The Vienna Declaration and programmed of Action (1993);
14. Technical Review of the UN Draft Declaration on the Rights of Indigenous Peoples, as Agreed Upon by the Members of the Working Group at its Eleventh Session, UN Doc. E/CN.4Sub.2/1994/Add.1

(20 April 1994)

15. The Maastricht Guidelines on Violations of Economic, Social, And Cultural Rights, (1997);

16. The UN Declaration on the Rights of Indigenous Peoples (13 September 2007).

A. National level regulations concerning recognition of adat communities and their rights.

1. The Constitution of the Republic of Indonesia of 1945 (Second Amendment), Article 18B paragraph (2) states that: "The State shall recognize and respect, to be regulated by law, the homogeneity of societies with customary law along with their traditional rights for as long as they remain in existence and in agreement with societal development and with the principle of the Unitary State of the Republic of Indonesia."

Article 28 I paragraph (3) states that: "The cultural identities and rights of traditional communities are to be respected in conjunction with progressing times and civilization."

2. Decree of the People's Consultative Assembly No. IX/2001 Article 4 letter (j) states that: "Recognizing, respecting and protecting the rights of adat community and the cultural diversity of the nation concerning agrarian/natural resources."

In the course of time, various regulations including sectoral laws contain provisions on ulayat right. The essence of recognition varies between sectoral laws, among others:

1. Law No. 39 of 1999 Concerning Human Rights

- Article 5 paragraph (3): "All members of disadvantaged groups in society, such as children, the poor, and the disabled, are entitled to greater protection of human rights."
- Article 6 paragraph (1): "In the interests of upholding human rights, the differences and needs of adat communities must be taken into consideration and protected by the law, the public and the Government.
- Article 6 paragraph (1): "The cultural identity of adat communities, including customary land rights, must be upheld, in accordance with the development of the times."

2. Law No. 41 of 1999 on Forestry

Constitutional Court Ruling No. 35/2012 has determined that adat community forests are not included in the category of state forest . Thus, Article 1 letter f and the related articles which states that adat community forests is included in the category of state forest is contrary to the Constitution.

3. Law No. 22 of 2001 on Petroleum and Natural Gas

- Article 34 paragraph (1): "In the case of business entities or permanent establishments planning to use land attached to a right or state land in their working areas, the relevant business entities or permanent establishments shall firstly make a settlement with the right holder or users of the state land in accordance with laws in force."
- Article 34 paragraph (2): "The settlement as meant in paragraph (1) shall be done under a way of deliberation to reach a consensus by means of transactions, granting a reasonable compensation, recognition or other forms of compensation to the right holder or users of the state land."
- Elucidation of Article 34 paragraph (2): "Recognition as intended under Article 34 paragraph (2) is recognition of the existence of the rights of adat communities, that the settlement should be conducted through deliberations based on the law of the adat communities."

4. Law No. 7 of 2004 on Water Resources

- Article 6 paragraph (2): "The control of water resources as intended under paragraph (1) is organized by the Government and/or regional governments by maintaining the recognition of local traditional communal rights and similar rights, so long as they are not contradictory to national interests and legislative regulations."
- Article 6 paragraph (3): "Traditional communal rights on water resources, as intended under paragraph (2), will be recognized so long as they actually exist and have been confirmed with local/regional regulations."

5. Law No. 18 of 2004 on Plantation

- Article 9 paragraph (2): "In terms of the required land is customary land rights of adat communities, the applicant shall conduct deliberations with the holder of adat rights to obtain agreement on the relinquishment of their land and the compensation" .

6. Law No. 31 of 2004 on Fisheries

- Article 6 (2): "Management of fisheries for the benefit of fishing and aquaculture must consider the rights of adat communities and/or local knowledge taking into account community participation."

7. Law No. 38 of 2004 on Way

- Article 58 paragraph (3): "The holder of land rights, or users of state land, or adat communities, whose land required for the construction of roads, is entitled to compensation."

8. Law No. 27 of 2007 on The Management of Coastal Zones and Small Islands

- General provisions: "Adat Community is a group of coastal communities which for generations have live in particular geographic area, and has a strong bond with the coastal zones and small islands resources, sharing value systems which determined the economic, political, social and legal institutions."
- Article 61:

(1) The Government recognizes, respects and protect the rights of the adat community, traditional community, and local wisdom with regard to coastal zones and small islands which has been exploited for generations.

(2) The recognition of the rights of the adat community, traditional community, and local wisdom as stipulated in paragraph (1) shall be used as a guidance in the sustainable management of coastal zones and small islands.

9. Law No. 30 of 2009 on Electricity

- Article 30 paragraph (6): "Where power supply license holders use land, the partial area of which is communal land, any solution thereto shall be achieved under provisions of land laws and regulations subject to the local customary law"

10. Law No. 32 of 2009 on Environmental Protection And Management

- Article 63 paragraph (1) letter t: "stipulate policies on procedures for recognizing the existence of traditional communities, local wisdom, and rights of traditional communities with respects to environmental protection and management."
- Article 63 paragraph (2) letter n: "stipulate policies on procedures for recognizing the existence of traditional communities, local wisdom, and rights of traditional communities with respects to environmental protection and management in the provincial level."
- Article 63 paragraph (3) letter k: "implement policies on procedures for recognizing the existence of traditional communities, local wisdom, and rights of traditional communities with respects to environmental protection and management in the regency/municipal level."

11. Law No. 6 of 2014 on Village

- Article 97 states the requirement to establish an adat village. This article provides further explanation of the criteria for recognition of the rights of adat communities, namely: criteria for their existence, agreement with societal development, and the principle of the Unitary State of the Republic of Indonesia.

B. Regional level regulations concerning recognition of adat communities and their rights

1. Law No. 21 of 2001 on Special Autonomy for Papua Province

a. General Provisions :

- Adat communities is indigenous Papuan people who live in the area and are bond to certain custom with high sense of solidarity among its members.
- Adat Law is the unwritten rules or norms of the adat communities accepted and observed by respected communities.
- Ulayat rights is the right of disposal of adat communities over a certain territory, which includes the right to use the land , forest , and water as well as the resources therein in accordance with laws and regulations.

b. Chapter XI Protection of the Rights of Adat Communities.

c. Special Regulation of Papua Province No. 22 of 2008 on the Protection and Management of Natural Resources of Adat Communities of Papua;

d. Special Regulation of Papua Province No. 23 of 2008 on Land Rights of Adat Communities and Individual Rights.

2. In 2000 Regulation No. 9 of West Sumatra Province on the Basic Administration of Nagari Village was introduced, concerning the administration and the relationship between the village and the resources located in its territory.

Regulation of West Sumatra Province No. 9 of 2000 was followed by the issuance of various district regulation, eg Regional Regulation No. 1 of 2001 and Regulation No. 31 of 2001 which regulates the Nagari Government.

Even at the level of Nagari, Nagari has issued various regulations (Perda), for example, Regulation No. 1 of 2003 on Ulayat Land Utilization in Nagari Kamuyang; Regulation No. 1 of 2002 on Territorial and Ulayat Land of Nagari Simarosok.

Regulation No. 9 of 2000 has been revoked by Regulation No. 2 of 2007 of West Sumatra Province on the Basic Administration of Nagari Village. Concerning ulayat land, in 2008 Regulation No. 6 of 2008 of West Sumatra Province was introduced concerning Utilization of Ulayat Land.

3. Other regulations

a. Regulation No. 31 of 2001 on Protection of Land Rights of Baduy Communities.

b. Regulation No. 3 of 2004 on Ulayat Rights of Nunukan Communities.

c. Regulation No. 4 of 2004 on Ulayat Rights of Lundayeh Communities.

C. Constitutional Court Rulings

At the very least, it can be noted two Constitutional Court Rulings concerning the right of adat communities.

First, the Constitutional Court Ruling No. 3 /2010 related to Law No. 27 of 2007 concerning the Management of Coastal Zones and Small Islands, among others, states that the presence of Right To Undertake Business in Coastal Waters (HP – 3) threatens the existence of traditional communities with their local wisdom, based on the following reasons:

1. Ambiguity of HP - 3 region (except in conservation areas, fisheries sanctuary, navigational routes, port area, and public beach).There is a potential for making the territory of The Republic of Indonesia as HP - 3 region that can threaten the existence of adat community and traditional fishery community.
2. If the adat community granted HP - 3 for a period of 20 years with the possibility to extend, it is contrary to the concept of customary rights that are hereditary.
3. When HP - 3 is granted to individuals and legal entities in the areas of adat community, they obtain compensation. This concept is contrary to the customary rights that are hereditary. Obtaining compensation means disconnecting the adat community and their territory.

Secondly, the Constitutional Court Ruling No. 35/2012 related to Law No. 41 of 1999. In summary, the Constitutional Court states that adat forest is forest that is owned by adat community, it does not belong to state forest.

Article 1 paragraph (6) of Law No. 41 of 1999 on Forestry states that: “Ulayat Forest is a state forest located in the area of adat community.”

The Court argued that Article 1 paragraph (6) is contrary to the 1945 Constitution and have no binding legal effect because:

(1) Adat community is a legal entity .

(2) as a legal entity, adat community is discriminated because they lack of legal rights related to forests.

(3) as a result, adat community lost their rights to the forest, including their traditional rights, causing difficulty in meeting their needs.

(4) the enactment of the Forest Act norms does not guarantee legal certainty and cause injustice to the adat community related to their rights over forests .

The Court Ruling:

Forest status is distinguished between state forests and private forest; adat forests are not included in the category of state forest, it is categorized as private forest.

Ⅳ. Closing Remarks

Recognition and protection of adat communities and their rights is stipulated in Article 18B paragraph (2) of the Constitution of the Republic of Indonesia of 1945. Recognition and protection of adat communities and their rights to preserve and develop their cultures, traditions and institutions within the framework of national unity and development means that the state should consider these rights in the formulation of national laws and policies. Towards these ends, the state is expected to establish the necessary mechanism to guarantee the realization of these rights by promulgating the Law on Recognition and Protection of the Rights of Adat Communities (“Law”).

In one hand, discussions on the Bill of the Recognition and Protection of the Rights of Adat Communities have been taking place for over two years. The Special Committee of the Parliament responsible for promulgating the law, has invited various interest groups to participate in the formulation of the Bill.

On the other hand, in the absence of the law, marginalization of adat communities, taking over ulayat land within free and prior informed consent of the said communities, lacking just compensation, have increased disputes over ulayat land and resources.

It needs a serious political will of the Government and Parliament to ensure the realization of the constitutional rights of adat communities.

Promulgation and implementation of the Law could minimize sectoral interpretation of the rights of adat communities, preventing injustice towards adat communities.

Once the Law is implemented, sectoral laws should adjust to the general principles stipulated in the Law, to ensure legal certainty on the rights of adat communities.

The Bill of Land Law is aimed at, among others, recognition and protection of the rights of adat communities.

By securing the rights of adat communities on their land and resources, it opens the possibility to grant a land right according to BAL directly over ulayat land without an obligation for the adat communities to release the said land to the State. Granting land rights over ulayat land should be based on free and prior informed consent along with just compensation for the utilization of their land.

Any business activity utilizing ulayat land should benefit the respected community as well as safeguarding the environment.

When the time of the land right expires, the land in question falls back to the adat community, and if the former holder of land right wish to utilize the said land, the granting of such land right should be based on a new agreement based on free and prior informed consent with the adat community.

Presentation

Developments of Land Rights and Registration Law in Korea

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Changes and Recent Trends of Korean Registration of Real Estate Act[1]

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Ⅰ. Introduction

In Korea, the concept of registration consists of both a substantive and procedural meaning. Registration, in terms of its substantive meaning, specifies that a registration officer enters a relationship of rights regarding real estate in the column for the description of the register[2] or such entry itself.[3] Registration, in terms of its procedural meaning, specifies not only the entry to the column for description, but also the entry to the column for indication[4].[5] In this sense, real estate registration in Korea defines the act of a government registration officer entering a change to the real rights of real estate in the official book, which is termed the register, in accordance with legal procedures or the entry itself.[6]

In the past, real estate registration referred to the entry of information in the official register or the entry itself. The current real estate registration system contains a completed digital record of all registers. The previous manually recorded registers (which were physical binders) now exist only as a closed register[7]. The register and concept of registration have been amended accordingly. Where registration work is processed by a computer data processing organization, auxiliary storage devices that store the registered data (including magnetic discs, magnetic tapes, and other electronic data storage devices capable of reliably recording and storing registration information) are regarded as the register. In this case, real estate registration refers to writing information on the auxiliary storage devices or the record itself (Registration of Real Estate Act, art. 177-2, art. 177-4). Although registration is made through the digitalized real estate registration system, the manually prepared closed registers prepared previously maintain the public notification function. Thus, matters pertaining to not only the current registers but also previous ones are important.[8]

There have been many recent changes in the Korean system for real estate registration. It is therefore necessary to discuss a variety of matters regarding the changes to the system.

This paper analyzes the changes to, and recent trends of, the Korean Registration of Real Estate Act and discusses matters of significance.

Ⅱ. History and Features of the Korean Real Estate Registration System

There are many laws related to real estate registration in Korea, including the “Registration of Real Estate Act”, “Act on the Referral for Registration of National and Public Real Estates”, “Act on Special Measures for the Registration of Real Estate”, and “Act on the Registration of Real Estate under Actual Titleholder’s Name”. There are many laws that have recently been abolished, such as “Regulations on the Application of Provisos in Article 40 Paragraph 2 and Article 45 of Registration of Real Estate Act”, and “Act on Special Measures for Registration, etc. of Transfer of Real Estates Ownership”.[9]

1) Of this paper, “II. History and Features of Korean Real Estate Registration System” has been written by revising and complementing it, based on Park, Kwang-Dong’s (2014) Digital Real-estate Registration System in Korea for Supporting Legal Exchange, The Korea Legislation Research Institute, 2009.

2) The form of register has changed from book-type register to card-type register and to digital register. [Office of Court Administration. “Real Estate Registration Practice [I].” Office of Court Administration (2007): p. 78.]

3) As the purpose of registration is the public notification of the real rights of real estate, only information on changes to real rights should be entered in the register. In reality, other matters not related to the information on changes to real rights, such as an indication of real estate (location, area, etc.), are also registered. Here, entries regarding changes in real rights of real estate are called “registration of rights”, while entries regarding the indication of real estate are called “registration of facts”. [Office of Court Administration. op. cit.: p. 3.]

4) Registration in the column for indication is the public notification of physical status of real estate, an object of rights. It is entered in the column to indicate the title section of the register sheet. Registration of changes is mandatory as the owner of the real estate is obliged to apply for it, and in some cases, the registration official must register the information ex officio. [http://www.iros.go.kr/pos1/pfrontservlet?cmd=PTRMGetListRgsTrmC].

5) Lee, Sang-tae. Property Law. Beopwonsa (2009): pp. 76-77.

6) Registration means entering information in the register, and in this sense, if the information has not been entered in the register due to, for example, a mistake by the registration official, even though application for registration has been accepted or even the registration certificate has been issued, it cannot be said that the registration exists [Office of Court Administration. op. cit.: p. 5.].

7) When the entire information in the past register is transferred to the new register, the past one will be closed. In addition, when the registration record of the registration form for a certain real estate is transferred to the new register sheet, the past registration form will be closed. The reasons of closing a register include the transfer of a record to a new register to prevent the destruction of the register and the transfer of a record to a registration card for a shift to the card register system. In addition, the reasons for closing a registration form include the transfer of a record on movables and the transfer of a record to a registration card for a shift to the card register system. The reasons for closing a registration form include the registration of the destruction of movables for a cause other than the above-mentioned ones, the registration of a combination of lots or buildings, the transformation of land to river, and the transfer of records to a new registration form due to an excessive number of pages of the registration form. Registers that have been closed for any of these reasons are referred to as closed registers.

8) Office of Court Administration. op. cit.: pp. 4-5.

9) Jang, Byeong-il. “A Study on Historical Changes of Real Estate Notification System”. Land Law Studies No.29-1,Korea Land Law Studies Association (Jun. 2013): pp. 58-59.

From here, we will review the history and features of the Registration of Real Estate Act.

1. History

(1) Establishment

The registration system remained unchanged from the "Joseon Real Estate Registration Act" after the liberation of Korea in 1945, the period of rule by US military government. It was enforced by the newly established Korean government until the newly enacted Registration of Real Estate Act, which arose in accordance with the Article 100 of the first Constitution of Korea. On January 1, 1960, the day when the Civil Act took effect, Registration of Real Estate Act (Act No.536) was enacted and came into immediate effect.

Registration of Real Estate Act is an act consisting of 192 articles, of which 187 are in the body of the text and 5 in the addenda. It is divided into five chapters: General Provisions, Registry Office and Registration Officer, Registration Books, Registration Procedures, and Objections. In order to define specific matters regarding the enforcement of the Registration of Real Estate Act, the Enforcement Regulations of the Registration of Real Estate Act was enacted and took effect on January 1, 1960, by Supreme Court Regulations No.63. This enactment abolished the Joseon Real Estate Registration Act and all regulations pursuant to it.

(2) Amendments

There were 31 amendments to the Registration of Real Estate Act from its enactment on January 1, 1960 to March 2013. Of the amendments, 14 were made due to an amendment to other laws[10] , and 17 were made as partial amendments. This paper now explores the partial amendments made to the Registration of Real Estate Act.

① The first amendment (Jan. 1, 1970 Act No. 2170) established a new regulation regarding the registration of a change in the name of the management office for state-owned real estate.[11] ② The second amendment (Dec. 6, 1987 Act No. 3158) made it mandatory to use an (official) seal-affixed contract form[12] in real estate transactions. ③ The third amendment (Dec. 31, 1983 Act No. 3692) features overall amendments pertaining to the act for an arrangement of provisions to reflect the new card type registration form, an improvement to the registration procedure by applying a letter of guarantee to prevent unauthorized registration, and the mechanization and streamlining of registration processing. ④ The fourth amendment (Apr. 10, 1984 Act No. 3726) established a new registration form for partitioned buildings as an exception for the site right registration system[13] and the principle of 'one real estate one registration form' related to the enforcement of the Act on the Ownership and Management of Aggregate Buildings. ⑤ The fifth amendment (Sep. 14, 1985 Act No. 3789) simplified the registration procedure for cases where the registration certificate regarding the rights of the person responsible for registration has been destroyed; it abolished the mandatory use of Chinese characters in entries to the register and the registration application form, and improved and complemented some imperfections found in its operation, such as the terms used in the current regulations. ⑥ The sixth amendment (Dec. 23, 1986 Act No. 3859) imposed an obligation for registration to government organizations, municipalities, international organizations, foreign governments, foreigners, corporations, associations and foundations by allocating a real estate registration number to them. ⑦ The eighth amendment (Dec. 14, 1991 Act No. 4422) eased the complexity of the real estate registration procedures and improved the notice registration system and the letter of guarantee attachment system. ⑧ The eleventh amendment (Dec. 30, 1996 Act No. 5205) established applicable provisions for registration application fees, and defined special cases for processing of real estate registration work by computer data processing organization. ⑨ The twelfth amendment (Dec. 28, 1998. Act No. 5592) complemented the provisions, terms and related regulations that are not suitable to the processing of registration work by computer data processing organization. ⑩ The thirteenth amendment (Dec. 19, 2001. Act No. 6525) was made to reflect the establishment of a series of classes for registration work on January 1, 2002. ⑪ The fourteenth amendment (Jan. 26, 2002. Act No. 6631)

reflected the regulations of Article 81 of the Civil Execution Act[14]to the act. ⑫ The fifteenth amendment

10) 7th [Amendment by Other Act Aug. 1, 1990. Act No. 4244 - Act on Special Measures for the Registration of Real Estate], 9th [Amendment by Other Act Dec. 8, 1992. Act No. 4522 - Immigration Control Act], 10th [Amendment by Other Act Dec. 10, 1993. Act No. 4592 - Immigration Control Act], 16th [Amendment by Other Act Jan. 27, 2005. Act No. 7357 - Attorney-at-Law Act], 19th [Amendment by Other Act May 17, 2007. Act No. 8435 - Act on the Registration, etc. of Family Relationship], 20th [Amendment by Other Act Feb. 29, 2008. Act No. 8852 - Government Organization Act], 22nd [Amendment by Other Act Jan. 30, 2009. Act No. 9401 - State Property Act], 23rd [Amendment by Other Act Jun. 9, 2009. Act No. 9774 - Act on Land Survey, Waterway Survey and Cadastral Records], 24th [Amendment by Other Act Mar. 31, 2010. Act No. 10221 - Local Tax Act], 25th [Amendment by Other Act Jun. 10, 2010. Act No. 10366 - Local Tax Act], 26th [Amendment by Other Act Dec. 27, 2010. Act No. 10416 - Local Tax Act], 28th [Amendment by Other Act May 19, 2011. Act No. 10693 - Special Purpose Companies for Mortgage-Backed Bonds Act], 29th [Amendment by Other Act Jul. 25, 2011. Act No. 10924 - Trust Act], 30th [Amendment by Other Act Mar. 23, 2013. Act No. 11690 - Government Organization Act].

11) Article 48-2 (Registration of change of the name of the management office for state-owned real estate). When the management office of state-owned property has been changed due to, for example, a transfer of management rights, the new management office must immediately entrust the registration office with registration of change of the registered titleholder by attaching a document proving the change of the management office .

12) A seal-affixed contract form is a contract form that requires government authority's seal in accordance with the Registration of Real Estate Act in order to prevent covert real estate transactions and speculation when transacting or exchanging real estate. [http://terms.nate.com/dicsearch/view.html?i=4000145]

13) Site right is the right to use the building site in the exclusively possessed area, and one cannot oppose to a third party unless registering the site right.

14) Article 81 (Attachments) ① The application form for the forced sale by auction shall be attached with the executory exemplification and one of the following documents.
1. A certified copy of the register for real estate registered as possessed by the debtor
2. For real estate not registered as possessed by the debtor, a document proving that the real estate can be registered as the possession of the debtor immediately. In the event where the real estate is a building not registered, a document proving that the building is possessed by the debtor, a document proving the lot number, structure and area of the building, and a document proving the permit or declaration of the building.

(Jul. 18, 2003. Act No. 6926) complemented submission documents for applications to mark the registration of partitioned shops in aggregate buildings in order to clarify the boundary marking of partitioned shops. ⑬ The seventeenth amendment (Dec. 29, 2005. Act No. 7764) made it mandatory, when applying for registration of the transfer of ownership resulting from a transaction, to enter the transaction price specified in the certificate of the declaration of the transaction in the registration application form and to enter the transaction price specified in the application form in the column for the correct holder and other matters in the "Gap" part of the real estate register. ⑭ The eighteenth amendment (May 10, 2006. Act No. 7954) established the grounds for an application for registration by using a computer data processing organization, improved problems found in the operation of duplicate registration[15], registration for the transfer of site usage rights of partitioned buildings and registration for combination of lots[16], and improved and complemented weaknesses found in the enforcement of the regulations. ⑮ The twenty-first amendment (Mar. 21, 2008. Act No. 8922) specified the localization of the act, the purification of difficult legal terms, linguistic compliance such as to be written in accordance with the generally accepted rules of Korean orthography, the composition of accurate and natural texts, and the aim of simplification and clarification through system improvement. ⑯ The twenty-seventh amendment (Apr. 12, 2011. Act No. 10580), given the fact that after the completion of the computerization of the real estate register system, registration is currently being handled by computer data processing organization with electronic application being implemented nationwide, improved provisions established on the premise of paper-based registers, enabled the operation of more flexible registration procedures by transferring to the Supreme Court Regulations or deleting matters not suitable to be defined directly in law, and abolished notice registration system, which is likely to be misused. ⑰ The thirty-first amendment (May 28, 2013. Act No. 11826) was made to establish new provisions and improve existing ones related to registration because the Trust Act was fully amended (Act No. 10924. Promulgated on July 25, 2011 andtook effect on July 26, 2012); consequently, there was the introduction of re-trust, beneficiary certificate issue trust, limited liability trust, and mergers and divisions of the trust system; improvement was made with regard to the reason of appointment, the dismissal of trustees and the reason of appointment of trust administrators and their authority.

② The debtor may request the authority in charge of the official book to verify the matters of the provisos specified in para. 1, item 2.
③ With regard to the provisos in para. 1, item 2, in cases where the lot number, structure and area of the building has not been proven, the debtor may request the investigation to the executing court at the same time as the request for auction.
④ With regard to para. 3, the court shall have enforcement officer(s) conduct the investigation.
⑤ In cases where the real estate has been already attached for forced management, and any of the documents specified in the items under para. 1 has been attached to the execution record, the document may not be attached again.

15) The Registration of Real Estate Act prohibits the establishment of more than one registration form for one real estate in accordance with the regulation on only "one registration form for one lot or building" (The principle of one real estate one registration form). Where there is a redundant application for registration of ownership preservation of a registered real estate, the application must be dismissed as it falls under the case "where the case is not subject to registration" specified in art. 55, item 2 of the Registration of Real Estate Act.

16) It refers to, for example, merging several lots of land owned by "A" and "B" into one lot of land owned by "B". To merge lots of land, the landowner must declare it to the authority concerned in accordance with the Cadastral Act (the Act on Land Survey, Waterway Survey and Cadastral Records from December 10, 2009).

2. Features

Notable features of Korea's Registration of Real Estate Act include: ① Control of registration work by the court, ② Realfolium and separation of land and building registers, ③ Separation of the register and the cadaster, ④ The principle of joint application, ⑤ Formal review, ⑥ The principle of requisite for establishment, and ⑦ The disapproval of public confidence. More specifically:

① Registration work in Korea is controlled by the court (Court Organization Act, art. 2, para. 3), and ② in accordance with the principle of realfolium, registration is processed by creating one registration form per real estate (Registration of Real Estate Act, art. 15, para. 1: One real estate, one registration form). In addition, registers for land and buildings are separated with regard to real estate.

③ Both the register and the cadaster are an official book managed by state authorities. The register is a system designed to ensure safe transactions through the public notification of the relationship of rights of real estate. The cadaster is designed to check the factual condition or status quo of the real estate itself and provide taxation information. Korea uses a dual system in which the register is managed by the court and the cadasters by the office in charge of cadasters (city, gun, gu). In addition, the Registration of Real Estate Act stipulates that in order to match the entries of the register and the cadaster, in cases where the register and the cadaster do not match, an application for other registrations of the real estate is not permitted (Article 29, Item 11). In addition, the marking of real estate is based on the cadaster, while the relationship of rights is based on the register.

④ Korea's Registration of Real Estate Act employs the principle of joint application with regard to the application for registration of real estate (Article 23, Paragraph 1).

⑤ Despite an absence of stipulations in the Korean Registration of Real Estate Act, it can be said that Korea employs the principle of formal review. There is no guidance on the provision of authority for review. There is only limited guidance given regarding reasons for dismissal in Article 29 of Registration of Real Estate Act[17].

17) Article 29 (Dismissal of application) The registration officer shall dismiss an application only when the application falls under any of the following items, with the provision of the reason of dismissal in writing. An exception shall apply, however, for cases where incorrect part of the application can be corrected and the applicant has corrected it not later than the day next to the day when the registration officer ordered the correction.
1. The case is not within the jurisdiction of the registry office.
2. The case is not subject to registration.
3. The applicant is not eligible for application.
4. The person directly concerned or his or her representative is not present when submitting application for registration in accordance with Article 1, Paragraph 1, Item 1.
5. Provision of the application information does not meet the method defined as per Supreme Court Regulations.
6. The marking of real estate or rights, which are the purpose of registration, in the application information does not match with registration records.
7. The marking of the person responsible for registration in the application information does not match with registration records. An exception shall apply for cases where a general successor subject to Article 27 applies for registration.
8. The application information does not match with the information proving the cause of registration.
9. Attachments required for registration have not been submitted.

As such, the registration officer is required only to submit a written review focused on whether the required documents have been prepared.[18]

⑥ With regard to the effect of registration, Article 186 of the Civil Act adopted the principle of requisite for establishment by stipulating that, "The transfer of real rights by any legal act related to real estate[19]shall take effect only when registered." It therefore defines the principle of registration or forced registration. A change in the real rights of real estate is effective only when registration is made[20]. Real rights over immovables are limited to ownership, easement, leasehold right and mortgage. Registration of the pledge of rights is permitted (Civil Act, art. 348[21], and Registration of Real Estate Act, art.3). The possessory right and the lien cannot be registered for the real rights over immovables, as they use the possession of real estate itself as a notification method, while the right of lease or the right of repurchase can be registered despite the absence of real rights.

In the meantime, Article 187 of the Civil Act has the provision stipulating that changes in the real rights over immovables resulting from inheritance, public expropriation, formation decision, public auction and other legal provisions shall be effective without registration. This means there is a special provision that a change in rights can occur without registration for reasons that include the impossibility of registration due to their nature (inheritance) and legal political considerations (decisions and public expropriation). Although a party may have acquired the real right over real estate without registration, that party must register it to dispose of it by legal means, and consequently the process of the transfer of the real right is publicly notified (Proviso of Article 187 of Civil Act).

⑦ Despite the absence of any related written provision, it is the position found in legal precedent[22] and theory that Korea's real estate registration system does not follow the principle of public confidence[23]. To ensure the safety of transactions, the Civil Act provides provisions to protect a bona-fide third party, even in the case of a lapse due to the nullification, cancellation or revocation according to Article 107[24] or Article 110[25]and Article 548[26].

10. Acquisition tax (or the installment amount to be paid before registration in the case of installment payment of the tax in accordance with the Article 20-2 of the Local Tax Act), registration license tax (limited to the registration license tax for registration), or the registration fee has not been paid or any other legal obligation has not been fulfilled.
11. The marking of real estate in the application information or registration record does not match with that of the land or forestland cadaster or the building cadaster.

18) Supreme Court's Decision 2003Da13048 dated February 25, 2005

19) Under the Korean Civil Act, immovables refers to land and fixtures on it (Civil Act, art. 99, para. 1), and all the articles other than immovables are movables. Of immovables, the subjects for registration are only land and buildings, and the fixtures on land other than buildings are not subject to registration, unless separately specified in special acts such as the Standing Timber Act [Office of Court Administration. op. cit.: p. 2].

20) As registration is made by application in principle, the procedure for registration is largely divided into the registration application procedure and the registration execution procedure (the procedure after completion of the receipt, investigation, entry and registration processes for application). In addition, the applicant may raise objection to the decision by the registration officer, and such objection procedure can be included in the registration procedure [Office of Court Administration. op. cit.:p. 4].

21) Article 348 (Pledge and additional registration of mortgage bond) Where mortgage bond is the purpose of the pledge, its effect is applied to the mortgage only when the additional registration of the pledge is made for the mortgage registration.

22) Although registration is made on the premise that a certain fact or legal relationship registered exists in substance, registration of what practically does not exist may exist as well. The principle of public confidence is to have confidence in registration and grant legal relationship even when a fact or legal relationship does not exist in substance in the same way as when it exists. Some assert that it is necessary to recognize the public confidence in registration to ensure the safety and quickness of transactions, but public confidence in registration is not recognized in Korea yet.

23) Supreme Court's Decision 80Da49 dated March 11, 1980

24) Article 107 (Expression of intention that is not real intention) ① Expression of intention is effective even when the person who expressed it knew that it is not a real intention. It shall be nullified if the counterpart knew, or was able to know, that the person expressed an intention that was not real.
② Nullification of expression of intention described in the above paragraph cannot oppose to a bona-fide third party.

25) Article 110 (Expression of intention forced by fraud or coercion) ① Expression of intention forced by fraud or coercion may be cancelled.
② Expression of intention made to the counterpart due to fraud or coercion by a third party may be cancelled,provided that the counterpart knew, or was able to know, the fact.
③ Cancellation of expression of intention described in paragraph 2 cannot oppose to a bona-fide third party.

26) 26) Article 548 (Effect of revocation and obligation of restoration) ① Where one party revokes the contract unilaterally, the party is responsible for restoration for the other party to the contract. Rights of a third party, however, cannot be infringed.
② In paragraph 1, the amount to be returned shall be added with the interest from the date of payment.

Ⅲ. The main content and effect of the current Korean Registration of Real Estate Act

With regard to the latest Korea Registration of Real Estate Act, it is necessary to see the 27th amendment to the act (April 12, 2011. Act No. 10580). The latest Registration of Real Estate Act has been fully amended based on the principle of the computerized register system. This amendment was to establish or abolish provisions, as appropriate, related to the problems faced in legal interpretation or practice.

1. Full amendment toward the computerized register system

① All registers have now been digitalized. This means computers now handle the processing of all registration work. This is in accordance with the new principle of a computer data processing organization handling registration work. This system has been defined as the principle of the registration work processing method. Provisions or terms (e.g. registration forms, entries, seals) established on the premise of paper-based register system have been abolished, as they do not accord with the computerized register system (Registration of Real Estate Act, art. 11, para. 2).

② With regard to the reinforcement of the real estate registration regulations, it is difficult to operate fast and responsive registration procedures capable of addressing external changes or public need, such as comput-

erization. This is because even simple matters that can be effectively defined in Supreme Court Regulations or published rulings are actually defined in the act. To address this, the current legal system, comprising entries for the application form and its attachments, has been amended to focus on matters related to registration. The portions of specific registration application procedures or registration execution methods have been transferred to Supreme Court Regulations (Registration of Real Estate Act, art. 24 para. 2, art. 34, art. 40, art. 48, art. 69 through art. 72, and art. 72 through art. 74.)

2. Provisions on establishment and abolition

① Establishment of a provision on the time when registration takes effect: To clarify the time when registration takes effect, once the registration officer completes registration, the registration shall take effect from the time of receipt (Registration of Real Estate Act, art. 6, para. 2).

② Establishment of a provision on registration of partial transfer of leasehold right[27] for partial transfer of lease deposit return claim: In cases where the leasehold right has lapsed due to, for example, the expiration of the period of existence, the leasehold right shall be effective within the scope of the security of the lease deposit return claim. As a partial transfer of the lease deposit return claim is possible, registration of the amount transferred is allowed in the registration of partial transfer of leasehold right for partial transfer of the lease deposit return claim (Registration of Real Estate Act, art. 73).

③ Establishment of a provision on the registration of subrogation of joint mortgage: The latter part of Paragraph 2 of Article 368 of the Civil Act[28]stipulates that, in cases where joint mortgage has been set, if the senior mortgagee has obtained the whole refund of his claim by exercising the mortgage on only a portion of the real estate, the subordinated mortgagee may exercise the mortgage on another real estate provided as a joint mortgage by subrogating the senior mortgagee. To allow this to be registered, a new provision on the registration of a subrogation of a joint mortgage has been established (Registration of Real Estate Act, art. 80).

④ Establishment of a provision on the ex officio cancellation of registration made after provisional registration in cases where main registration has been made: To clarify the procedures for cancellation of registration made after provisional registration, which infringes rights granted under the provisional registration in cases where the registration officer makes main registration by provisional registration, the registration that infringes the rights under the provisional registration shall be cancelled ex officio without delay (Registration of Real Estate Act, art. 92).

⑤ Establishment of a provision on the procedure for cancellation of registration that falls foul of registration of provisional disposition: Where a person who claims provisional disposition makes a registration for the claim, registration of the provisional disposition shall be cancelled ex officio by the registration officer, and registration that falls foul of the provisional disposition can be cancelled upon application by the person who claims provisional disposition (Registration of Real Estate Act, art. 94 and art. 95).

⑥ Abolition of notice registration: Notice registration is a system recognized to protect the safety of transactions in the legislation where the public confidence of registration is not recognized, but it causes much damage: it imposes much disadvantage on the registered person in transactions and there are cases where notice registration is exercised by suing in order to hinder execution. For this reason, this system has been abolished (Deletion of art. 4, art. 39, art. 170 and art. 170-2 of the preceding Registration of Real Estate Act).

⑦ Deletion of the right to practical review by the registration officer regarding the marking of partitioned buildings: The right for a practical review by the registration officer regarding the marking of partitioned buildings was introduced to eliminate confusion surrounding the criteria for the identification of partitioned buildings in the early stage of the enforcement of the Act on the Ownership and Management of Aggregate Buildings. However, the act is currently enforced stably and it is appropriate for the authority in charge of the building cadaster to decide whether the building is partitioned. In addition, if the right to practical review by the registration officer regarding the marking of partitioned buildings is maintained, a building that has been specified as a general building in the building cadaster can be marked as a partitioned one in the register, which will give rise to concern in transactions. The right has therefore been abolished (the preceding Registration of Real Estate Act, art. 52).

3. Discussion on amendments to the act

With regard to the above-mentioned amendments to the act, there was discussion of several matters related to the amendments. These matters are now discussed.

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27) With regard to leasehold right, one can pay lease deposit and possess the real estate of other person and use it for the intended purpose and receive profit from it, and is given right to preferential payment of the lease deposit over subordinated right holders and other creditors (Civil Act, art. 303, para. 1).

28) Article 368 (Allocation of joint mortgage and reward and subrogation of subordinated right holder) □ In cases where the mortgage is set to multiple real estates under security of the same claim and their auction prices are allocated simultaneously, the apportionment of the claim shall be determined in proportion to the auction price of the respective real estate.
② In cases where the auction price of some of the real estates described in the above paragraph is allocated first, it is possible to obtain a refund of the whole claim from the price. In this case, the subordinated mortgagee of the real estates sold by auction may exercise their mortgage by subrogating the senior mortgagee within the amount of refund the senior mortgagee can obtain from the auction prices of other real estate in accordance with the provision stipulated in the above paragraph.

① With regard to the establishment of a provision on the time when registration takes effect, the current amendment stipulates that after completion of registration by the registration officer, the registration shall take effect from the time of receipt. In this case, the transfer of the real right will occur at registration, but the time when it takes effect is retroactively the time when its application is received. There have been some debate about this because: a substantive legal relationship exists, there are significant doubts about whether it accords with the will of the party concerned with the legal act to set the time when the application is received as the time of transfer of the real right registered through application, receipt and registration procedure, and this also does not accord with the principle of private autonomy, the fundamental principle of a legal act, and thus it contravenes the spirit and content of Article 186 of the Civil Act.[29] With regard to this, however, retroactively setting the time to the time when the application is received is a matter of legislation, and it is necessary to consider complementary provisions regarding the priority and time of effectuation of registration should there be a failure or delay in saving data, which is possible after the amendment to the Registration of Real Estate Act.[30]

② With regard to the establishment of a provision on registration of a partial transfer of a leasehold right for a partial transfer of a lease deposit return claim, it is necessary to expand the matters on the registration of a partial transfer of a leasehold right to the transferee and the registration of the whole transfer of a leasehold right for whole transfer. This is to reinforce the notification power or establish a new provision for it.[31] It is necessary to make it mandatory to attach the civil requisites for counteraction regarding the transfer of a secured claim (Civil Act, art. 450, para. 1)[32], or a written letter evidencing notification of the transfer or the debtor's written consent to the application for the registration of the transfer. The legislation thus builds on legal precedent by establishing a provision regarding the registration of partial transfer of a leasehold right for the partial transfer of a lease deposit return claim. Notification or consent as the requisite for counteraction against the debtor does not require a method to be enforcement, which is unlike requisites for counteraction against a third party other than the debtor. Therefore, it will be possible to demand the submission of a certain form of written document for the registration of a counteraction against a third party (Refer to Article 43, Paragraph 1 of the Act on the Security over Movable Property and Claims). [33]

③ With regard to the establishment of a provision on the registration of subrogation of joint mortgage, in cases where the registration of the subrogation of a joint mortgage disagrees with the registration of payment subrogation, registration of the subrogation of a joint mortgage must be executed when its application is submitted regardless of the priority of the subrogation right of the person liable for performance. This will make both subrogation registration and payment subrogation registration co-exist in the joint mortgage, despite the priority of substantive subrogation rights, and thus may impose unsuspected damage to stakeholders or third parties. To prevent this, it is necessary to define cases where the subordinated mortgagee can apply for registration of subrogation of a joint mortgage as an established rule of registration so that the subrogation of a joint mortgage can be properly made by the registration officer, preventing any unsuspected damage to stakeholders or third parties.[34]

④ With regard to the establishment of a provision on the ex officio cancellation of registration made after provisional registration in cases where main registration has been made, there are opinions that it is more appropriate in terms of the legislative system to stipulate a provision regarding the effect of provisional registration in terms of substantive law in the Civil Act first, and then on the premise of it, define the procedures for the cancellation of registration after provisional registration in the Registration of Real Estate Act.[35]

⑤ With regard to the abolition of notice registration system, there have been several opinions given regarding the problem of cost and the simplicity of procedures. It will be necessary to consider the reduction of cost for registration of provisional disposition.

⑥ With regard to the deletion of right to a practical review by the registration officer regarding the marking of partitioned buildings, there is a high likelihood of the property right conflicting with the rights of stakeholders regarding the incorrect boundary marking and the markings of partitioned buildings due to the exercise of formal review rights. There is concern a building that has been specified as a general building in the building cadaster can be marked as a partitioned one in the register. As suggested in the reason of amendment, it will be resolved by overruling it through a review right of the registration officer, subject to Article 29, Item 11 of the Registration of Real Estate Act. This move will further reinforce the review right of the registration officer, which is against the responsibility of the state for actively protecting the property rights of the people.[36]

29) Choi, Myeong-gu. "A Review of the Key Matters on the Amendment to the Registration of Real Estate Act". Land Law Studies No. 28-1, Korea Land Law Studies Association (Jun. 2012): pp. 66-67.

30) Park Kwang-dong. "A Study of the Amendment to the Registration of Real Estate Act". Ilkam Law Review, vol. 20. Law Research Institute of Konkuk University (2011): p. 61.

31) Choi, Myeong-gu. op. cit.: p. 70.

32) Article 450 (Requisite for opposition for transfer of nominative claim) ① Transfer of nominative claims cannot oppose to the debtor or third party without the transferer's notifying the debtor or consent of the debtor. ② The notification or consent cannot oppose a third party other than the debtor without a certificate with a fixed date.

33) Park Kwang-dong, op. cit.: p. 64.

34) Choi Myeong-gu. "A Review of the Registration of Real Estate Act, Article 80. registration of subrogation of joint mortgage". Summary of Topic Presentation, Registration Act Forum Report 2013, Beommusa (May 2013): p. 9.

35) Kim Young-hyeon. "Interpretation of the Main Contents of the Amendments to the Registration of Real Estate Act".Beommusa, Korea Association of Beommusa Lawyer (May 2011): p. 12.

36) Choi Byeong-gu. op. cit.: p. 86.

4. Effect

With regard to the effect of registration in Korea, we need to see it as two: the effect of main registration and that of provisional registration.

(1) Effect of main registration

What needs to be considered with regard to the effect of the main registration includes ① the effect of the transfer of rights, ② opposing power, ③ the effect of priority confirmation, ④ possessory effect, ⑤ presumption power, and ⑥ latter registration blocking power.

① Under the current act that adopts the formalism with regard to transfer of a real right, transfer of a real right will take effect only when there is an act of real right and the corresponding registration is completed (Civil Act, art. 186 – Effect of transfer of right).

② Unless registered, a certain matter is effective as a claim only between the parties directly concerned. If it is registered, it is possible to oppose to a third party based on the registration, and this effect is referred to as an opposing power. For example, matters regarding the leasehold interest on real property (Civil Act, art. 621 para. 2[37]), and special agreement for repurchase (Civil Act, art. 592[38]) can be claimed to a third party after they have been registered.

③ The priority of the rights registered for the same real estate is determined based on the order of registration unless separately stipulated by law (Registration of Real Estate Act, art.5 para.1), and this is referred to as the effect of priority confirmation. With regard to the order of registration, the priority of registrations made in the same part of the registration form is determined based on the receipt number (Registration of Real Estate Act, art. 5 para. 2). The priority of additional registration[39], is determined based on the priority of main registration[40], but the priority between additional registrations is determined based on the order of registration (Registration of Real Estate Act, art. 6 para. 1).

37) Article 621 (Lease registration) ① The lessee of a real estate may request the lessor of the real estate for cooperation with lease registration procedure unless there is any opposing agreement between the parties. ② The leasehold registration will be effective to a third party from the time when it is made.

38) Article 592 (Repurchase registration) In cases where the object of transaction is real estate and reservation of repurchase right is registered at the same time when the transaction is registered, the registration will be effective to a third party.

39) Additional registration refers to a registration that does not have its own priority number but is made by attaching additional number to the priority number of the existing registration.

40) The opposite to additional registration is common registration, which is given its own priority number following the preceding priority number.

④ In cases where the person registered as the owner of a piece of real estate has possessed it for 10 years with the intention to possess it peacefully and obviously in good faith, without a mistake, he or she shall acquire the title to the real estate (Civil Act, art. 245, para. 2). This provision is applied, with modifications, to other property rights in addition to the title (Civil Act, art. 248), and this is referred to as the acquisitive prescription of register. In this case, registration has the effect as that of possession in the acquisitive prescription of possession, and this is referred to as the possessory effect of registration. The acquisitive prescription of real estate by possession is 20 years (Civil Act, art. 245 para. 1) but the person registered as the owner in the register acquires the title after hostile possession[41] for 10 years.

⑤ Presumption power is the effect of presuming that when there is a certain registration, there exists a substantive right relationship for it. Although there is no stipulated provision on this under current law, the presumption power of registration has been recognized in theories and legal precedent. When a certain right is registered, the right for the registered information is presumed to exist, and the person who asserts that such substantive relationship does not exist or is different from reality will be responsible for proving it[42].

As the content of the registration is presumed to be effective, the following presumptions from this are also recognized. First, the person who trusted the content of the registration is presumed to have acted in good faith and to have made no mistake[43]. Second, the person who intends to acquire the real right of real estate is presumed to have known the content of the registration, unless they provide counterevidence as they examine the register.

⑥ As long as a certain registration exists, it will have the effect of a certain form, even when it has no effect in terms of substantive law. In other words, unless the registration is cancelled in accordance with legal requirements and procedures, other registration not compatible with it cannot be made, and this is referred to as latter registration blocking power.

(2) Effect of provisional registration

In Korea, provisional registration has the effect of preserving the priority of main registration. The priority of main registration by provisional registration[44] is based on the priority of provisional registration (Registration of Real Estate Act, art. 6, para.2). This is referred to as the effect of provisional registration for priority preser-

41) Hostile possession refers to possession with the intention of obtaining the title to the real estate.

42) Supreme Court's Decision 2002Da46256 dated February 28, 2003.

43) Supreme Court's Decision 80Da2881 dated May 11, 1982.

44) Provisional registration is made as a preliminary registration for preservation of the priority of its main registration in order to preserve the claim for establishment, transfer, change and lapse of rights or when the claim has time condition or other conditions or is to be confirmed in the future.

vation. If the main registration by provisional registration is completed, it will have the same effect as priority preservation. It is different from principal registration in that provisional registration itself has no effect of causing the transfer of real rights. With regard to the effect of provisional registration before main registration, provisional registration alone has no effect in terms of substantive law to stop the disposition by the person who made provisional registration or to oppose to a third party acquisitor.[45] With regard to the special effect of provisional registration for security, in cases where provisional registration for security has been completed in accordance with the Provisional Registration Security Act and the object of the provisional registration for security has been set up for auction by other creditor, the provisional registration security right holder can exercise the claim for preferential payment based on the priority of the provisional registration (Provisional Registration Security Act, art. 13), and certain effects in terms of substantive law are recognized, including the claim for an auction of the object of the provisional registration for security (Provisional Registration Security Act, art. 12).

Ⅳ. Recent trends

1. The Registration of Real Estate Act

The Korean administration submitted the Proposition on the Partial Amendment to the Registration of Real Estate Act[46] to the National Assembly on July 17, 2013. With the amendment to the Civil Act, a lien holder[47] for unregistered real estate can claim the establishment of a mortgage for the real estate when it is registered, and the mortgage, unlike other general mortgages, is deemed to have been established in time for performance, and thus it is necessary to record this information in the register. The proposition suggests indicating in the register that the mortgage is subject to the provision of the Civil Act and also recording the time for performance when the registration of establishment of mortgage is made.[48] For this, the proposition intends to limit a lien to movables, marketable securities, and unregistered real estates that are not eligible for notification as a mortgage. This is unlike the current act that recognizes all movables, real estates and marketable securities. The proposition intends to abolish a lien for registered real estates and replace it with the mortgage establishment claim system. It is necessary to enter into an in-depth discussion on whether it is appropriate to abolish the system itself to prevent its side effects or whether it is better to complement the system while maintaining it.[49]

With regard to the claim for the establishment of a mortgage by the lien holder for unregistered real estate, as stipulated in Article 369-2 of the proposed amendment to the Civil Act, the lien holder for unregistered real estate can claim the establishment of mortgage for the real estate to the title holder to the real estate if the real estate is registered, but this mortgage establishment claim right will lapse unless exercised within 6 months of the date of registration. A mortgage established by the mortgage establishment claim is regarded to have been established in time for performance rather than when the registration of the mortgage is made (Proposed amendment to the act, art. 369-2, para. 3). In order for a third party to be able to check the accurate priority of the mortgage, the time for performance needs to be publicly notified. Accordingly, in line with the amendment to the Civil Act, the proposition suggest establishing Article 75, Paragraph 3 of the Registration of Real Estate Act to make registration officers record the time for performance as well as the claim amount and the name of the debtor with re-

45) Supreme Court's Decision 2000Da51285 dated March 23, 2001; Supreme Court's Decision 79Da239 dated May 22, 1979.

46) As-Is vs. To-be

As-Is	To-Be
Article 75 (Registration of mortgage) ① · ② (Omitted) <Newly established>	Article 75 (Registration of mortgage) ① · ② (Same as the current provisions) ③ Where the mortgage defined in para. 1 is the one subject to the Article 369-2, Paragraph 1 of the Civil Act, the registration officer shall record the following information in addition to the information defined in Article 48. 1. Amount of claim 2. Name (title) and address (office location) of the debtor 3. The fact that the mortgage is subject to Article 369-2, Paragraph 1 of the Civil Act 4. Time for performance

47) When a person who possesses another person's article or marketable securities and the claim related to thearticle or marketable securities is in its time for performance, the person can have the right to retain the article or marketable securities until payment is made, and this right is referred to as a lien (Civil Act, art. 320).

48) This proposition is subject to the passage of the Proposition on the Partial Amendment to the Civil Act and the Proposition on the Partial Amendment to the Civil Execution Act, which have been submitted together with the proposition. If these propositions do not pass or pass with modifications, the proposition must be adjusted depending on such results.

49) Those who agree to the abolition of the lien for registered real estate provide the following reasons: ① The biggest problem of the lien is that it is not publicly notified by registration. ② When the object is a real estate and a mortgage is established to the object before the line, the third party who has been transferred with the real estate cannot use it until the claim of the lien holder is paid. For this reason, the lien holder can obtain performance even before the senior mortgagee, arousing the issue of fairness. ③ To maintain a lien for real estate under the current law, the lien holder must keep possessing the real estate, and this makes it impossible for the title holder or a third party to use the real estate, and the lien holder cannot use retained articles on the real estate without consent of the debtor (Civil Act, art. 324). Consequently, none of them can use the real estate during the lien period, preventing both from obtaining sufficient benefits and causing social cost. Those who agree to maintain the lien for registered real estate argue that the lien is the right based on the principle of fairness, and provides the last means to the creditors who cannot find other means to secure their claim, and that protecting the rights of such creditors is more important than maintaining the consistency of notification methods. The proposition intends to protect creditors through the mortgage establishment claim system instead of the line for real estate, but unlike the current law under which the lien can be established simply by possessing the real estate, the proposition demands establishing mortgage and undergoing civil execution procedures, and those who oppose to the abolition of the lien argue that this will impose excessive burden on creditors. In addition, they argue that some countries with similar legal systems to Korea, such as Germany, Austria and Japan, still maintain the lien system and that the fact that many precedents and theories that extensively interpret the relevance between real estates and claims, one of the requisites for establishment of the linen for real estate (dualistic theory), facilitate the establishment of a real estate lien also proves that the real estate lien system is still necessary [Lee, Sang-yong. Report on the Review of the Proposition on the Partial Amendment to the Registration of Real Estate Act. Legislation and Judiciary Committee (2013): p. 7].

gard to the mortgage. If the time for performance is regarded as the time for establishment of mortgage, there is a concern about the debtor and the creditor potentially conspiring with each other to set an earlier time as the time for performance for the purpose of receiving preferential payment. It would likely to damage the safety of transactions if the time for performance is split into several times, as in cases where cost input is made repetitively for unregistered real estate, making it uncertain to decide which of the split times for performance is the time when the mortgage was established.[50]

2. Laws related to real estate registration

As of 2014, there have been various changes to the Korean electronic registration system. First, a new total real estate public book system was established. The Act on Land Survey, Waterway Survey and Cadastral Records provides the grounds for the management and operation of the total real estate public book system, which integrates 18 public books related to real estate, including the land cadaster, forestland cadaster, cadastral map and building cadaster. The total real estate public book system is to record and save all real estate data, including information on the marking and title holders of land, information on the marking and owner of buildings, information on the use and regulations of land, and information on the prices of real estate (The Act on Land Survey, Waterway Survey and Cadastral Records, art. 2-19). In addition, the authority in charge of cadasters should manage and operate the total real estate public book system for the efficient utilization of real estate and the comprehensive management and operation of information related to real estate (The Act on Land Survey, Waterway Survey and Cadastral Records, art. 76-2, para. 1). The total real estate public book system is registered with ① the information on the marking and title holder of land, ② the information on the marking and title holder of buildings, ③ the information on the utilization and regulations of land, ④ the information on the prices of real estate, and ⑤ the information required for efficient utilization of real estate and comprehensive management and operation of information related to real estate (The Act on Land Survey, Waterway Survey and Cadastral Records, art. 76-3).

A person who intends to access the real estate public book or be issued with a certificate of the whole or part of the record of the real estate public book may apply for it to the authority in charge of cadasters or the head of the district (eup, myeon or dong) (The Act on Land Survey, Waterway Survey and Cadastral Records, art. 76-4). With regard to the operation of the total real estate public book system, it is necessary to review how the real estate public book system should be operated when establishing a relationship between the total real estate public book and the real estate register and when undertaking an application for the registration of real estate.

Second, a signature verification system and electronic signature verification system have been established. Their legal basis is the Act on the Signature Verification System. The signature verification system enables the use of a signature as a seal certificate by issuing a certificate through a signature, instead of a seal. It issues two kinds of certificates: signature certificate and electronic signature certificate. As to the signature certificate, if one visits an administrative office in person and completes and signs a specific form, the office verifies the signature and issues the certificate. The electronic signature certificate refers to standardized information stored in the issuance system by entering the required information, such as purpose, in the Internet issuance system and verifying it through the certified electronic signature.[51]

With regard to the issuance of signature certificates, one visits the issuing authority (mayor, gun head, gu head, including the head of non-autonomous gus, or the head of eup, myeon, dong or branch office), applies for the issuance of a certificate, undergoes identity verification and then goes through the procedures for issuance and distribution[52]. In addition, with regard to the issuance of an electronic signature certificate, one needs to undergo the following procedures: ① Prior application and approval of the use of the issuance system (by visiting eup, myeon or dong office) → ② Access to the issuance system (Minwon 24 site)[53] → ③ Identity verification (authentication certificate) → ④ Completion of the certificate → ⑤ Signing electronic signature → ⑥ Issue of the certificate → ⑦ Printout and submission of the issuance certificate → ⑧ Confirmation of the certificate and complaint processing (users) from the issuance system

The signature certificate and the electronic signature certificate that completed such procedures have the same effect as a seal certificate (the Act on the Signature Verification System, art. 13).

In the case of signature certificate, the meaning of signature verification can be controversial. In other words, when it comes to whether it is the legal verification of the signature or it is the verification of the fact that one has signed his or her signature, signature verification is deemed to be the verification of the fact that one has signed his or her signature. In this case, there can be controversy regarding the extent to which signature verification can provide the same level of public confidence as the public certification signed when applying for the registration of real estate for transactions of real estate. As the electronic signature certificate has no official seal, it is also necessary to discuss whether the electronic certificate is a public or private document, and the issue of the responsibilities for the management of the issuance system.

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50) Lee, Sang-yong. op. cit.: pp. 19-20.

51) Ministry of Security and Public Administration. "Guidelines to Signature Verification Systemfor 2012". Ministryof Security and Public Administration (2012): p. 3.

52) ① The applicant signs his or her signature in the electronic image signature input system. → ② Print the signed signature certificate. → □ Enter information such as the purpose in the certificate → ④ Enter the record of issuance in the issuance ledger → ⑤ Issue the certificate.

53) http://www.minwon.go.kr/.

Third, the real estate transaction report system has its legal basis in the Business Affairs of Licensed Real Estate Agents and Report of Real Estate Transactions Act and, from July 29, 2014, from the Report of Real Estate Transactions Act. The latter has been newly enacted and is separated from the former. Although the report of real estate transactions subject to the Business Affairs of Licensed Real Estate Agents and Report of Real Estate Transactions Act is an obligation for all parties of a real estate transaction, the public recognizes it only as an obligation of the real estate agent. The obligation is defined together with the provisions on the business of real estate agents and false report of real estate transactions frequently occurs. In this sense, the purpose of the new Report of Real Estate Transactions Act is to establish a separate act on real estate transaction report system to improve public awareness, establish the foundation for system development, and legislatively complement the matters required to manage the system more efficiently.[54] The Report of Real Estate Transactions Act has the following features:① With regard to the signing of a contract on transactions of real estate, the parties to the contract must jointly report the information on the transaction, including the actual price, to the mayor or the head of gun or gu within 60 days of the date of signing the contract (The Report of Real Estate Transactions Act, art. 3, para. 1). ② In cases where a real estate agent has prepared and issued a transaction contract, the agent must report the real estate transaction (The Report of Real Estate Transactions Act, art. 3, para. 2). ③ In cases where a real estate agent has prepared and issued a transaction contract for a house located in the house transaction report area, the agent must report the transaction within 15 days of the date of signing the contract (The Report of Real Estate Transactions Act, art. 3, para. 5). ④ In cases where a realcontent of real estate report is regarded to have been omitted or be incorrect, the mayor or the head of the gun or gu office must take necessary action, such as requesting the applicant to complement the report or having the relevant public official request the parties to the contract or the real estate agent to submit relevant documents, such as the transaction contract form and any document evidencing the payment of the price, in order to verify the facts (The Report of Real Estate Transactions Act, art. 5). ⑤ In order to make central administrative agency-level management more efficient, the new act makes it mandatory for the mayor or the provincial governor to report the results of the verification of real transactions of real estate to the Minister of Land, Infrastructure and Transport.

This act reflects the content of the real estate transaction report system stipulated in the Business Affairs of Licensed Real Estate Agents and Report of Real Estate Transactions Act as it is. The Report of Real Estate Transactions Act is deemed to pose no particular problem in the relationship with the Registration of Real Estate Act. If any lower-level law of the act is established, it will be necessary to review its compatibility with the Registration of Real Estate Act.

54) http://www.law.go.kr/lsInfoP.do?lsiSeq=150844&lsId=&efYd=20140729&chrClsCd=010202&urlMode=lsEfInfoR&viewCls=lsRvsDocInfoR#0000.

Ⅴ. Conclusion

The Korean Registration of Real Estate Act features: ① Control of registration work by the court, ② Realfolium and separation of land and building registers, ③ Separation of the register and the cadaster, ④ The principle of joint application, ⑤ Formal review, ⑥ The principle of a requisite for establishment, and ⑦ The disapproval of public confidence. In addition, the effects of real estate main registration include: ① The effect of transfer of rights, ② Opposing power, ③ The effect of priority confirmation, ④ Possessory effect, ⑤ Presumption power, and ⑥ Latter registration blocking power.

The Registration of Real Estate Act with such features and effects has been continuously amended to improve weaknesses found in the operation of the real estate registration system, secure the authenticity of the content of registration, and provide convenient registration procedures for the public.

The recent introduction of the electronic register system with the full amendment to the Registration of Real Estate Act makes the registration procedure faster and more flexible. Additionally, systems related to registration are being legislated to enable their online procedures. Several matters require consideration.

First, although it is possible to improve the speed or flexibility of the procedures by enabling an online real estate registration system, it is still important to carefully prepare the plans to secure the authenticity of the main agents and contents of registration procedures. This is because real estate registration is directly related to public property rights, and if the authenticity of the main agents and contents of registration are not secured, despite faster and more flexible registration procedures, public confidence in the system as a public book will deteriorate, and the possibility of an infringement of public property rights will increase.

Second, it is necessary to introduce and operate systems that can contribute to securing public confidence in the amendments to the Registration of Real Estate Act. To secure public confidence, it will be necessary to devise a variety of plans to secure the authenticity of the main agents and contents of registration procedures and reinforce the effects of the existing registers for the general public. It is necessary to establish a variety of plans for a national consensus to form regarding the increasing economic burden faced by the public, despite the registration procedure becoming more convenient, faster and more flexible.

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Discussion

Developments of Land Rights and Registration Law in Korea

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A Discussion on the "Changes to the Korean Real Property Registration Act"

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Professor Moon Heung-ahn

Ⅰ. Introduction

At a time there first started to be discussion in Korea regarding a real property digital registration system, the presenter had already conducted extensive research on this topic at the University of Tokyo in Japan. Then, with support from National Research Foundation of Korea, he earned a Doctorate in Law through his dissertation on real property digital registration systems. The findings of his research on this topic can thus be thought to have contributed to the digitalization of the real property registration system in Korea.

The presenter has provided a clear and concise explanation of the 60-year history of Korea's real property registration system. He has provided context and insight regarding the amendment to the Real Property Registration Act, in which there is tremendous interest in Korea. What's more, he has offered suggestions of areas of improvement in the short-term. As a panelist, I was able through his presentation to understand the changes and continuity between the past, present and future of the Korean real property registration system. Participating in this debate has broadened the understanding of the real property laws of Indonesia and Cambodia, as well as that of Korea. I would like to express my gratitude to the co-supervising organizations of ALIN, the Korea Legislation Research Institute and Gadjah Mada University, Indonesia, for this valuable opportunity.

I am a little concerned that I may detract from, rather than add to, the presentation by a respected authority on Korean real property registration law. As a panelist, I hope to learn more about this topic and to, in some small way, be of assistance, particularly to researchers from Indonesia and Cambodia, who may not be fully aware of the situation in Korea.

Ⅱ. Correlation between the Real Property Registration Act and civil law on the status quo of real property

To survive, every person, regardless of nationality, must have access to the necessities of life: food, clothing and shelter. As land provides the basis for shelter, many see it as very important. A myriad of civil laws have come into force to document proper land use. Land use varies by nation in terms of both its use and possession. Given the finite scarcity of land and its desirable nature, it is necessary to codify the possession and usage rights of land in order to uphold the system of land ownership practiced within a country. This is the reason that the real property registration system exists in Korea; though, each country adopts its own system of official notification and enforcement of legal rights pertaining to land. Law related to notification is an essential part of the codex of civil law. Furthermore, it is vital to have a legislative attitude regarding civil law in order to understand the real property registration system.

Japan's 36-year subjugation of Korea lasted until Japan's defeat in the Second World War in 1945, but left a lasting legacy of Japanese laws enforced in Korea. In 1960 when Korea established and enforced civil law, it changed the status of real property registration in real property transactions from requisite for counteraction to requisite for establishment.

Despite efforts to the contrary, the public remained largely aware of the distinction between legal and actual ownership. Politics drove both real property transactions and the real property registration system. To remedy this inconsistency, Korea amended civil law twice and admonished people to register their real property. It was however impossible to bring rapid change to a 50 year legal tradition. There are many legal conflicts related to the acquisitive prescription of real property in Korea to prove this.

Given Korea's limited amount of usable land relative to the size of established population centers, there was a need to improve the efficiency of land use. Korea began to recognize 'partitioned ownership' and 'partitioned superficies'. The development of architectural technologies prefigured this trend. The term 'partitioned' does not adequately construe the rapid progress of particularly architectural technologies within Korea. There are cases where the real property registration act is insufficient as the basis of announcing land use relations or the current state of buildings whose construction is only possible through cutting-edge technological developments.

Several provisions of the Act on the Ownership and Management of Aggregate Buildings are sufficient to provide public notification of 'partitioned ownership'. Yet, although the substantive right of 'partitioned superficies' is recognized, there is no basis provided for publicly notification in the real property register. In other words, there was no provision made for the application to register partitioned superficies or the procedure to do so. It would seem that in this case superficies can only be applied on the basis of conjecture. What are your

thoughts on how to address this deficiency?

Ⅲ. Does notification by real property registration act faithfully meet the purpose of notification of the status quo of real property?

As you pointed out in your paper, the complexity of the Korean real property registration system is attributed to several features of the Korean Real Property Registration Act. These features concern the registry officials of courts, the separation of the land and building registers, the separation of the register and the ledger (both the land and building ledgers), and the dual system for the creation of land and building ledgers.

As explained in your paper, information on land and building rights is publicly notified through registration subject to the Real Property Registration Act. This is different to the method of notification regarding the status quo of real property. In principle, the status quo of land is publicly notified in accordance with the Act on Land Survey, Waterway Survey and Cadastral Records, while that of buildings is notified by registration to the building management ledger prepared in accordance with the Building Act. In this case, there is no specific problem when the right to be notified is ownership. In cases where you use, and benefit from, land owned by another person through superficies, easement, leasehold rights or the right of lease, however, it is impossible to identify the person who uses or benefits from the real property from the cadastral record or from the building ledger that notifies the status quo of the real property. It is therefore inconvenient to identify a specific person as you have to check the register subject to the Real Property Registration Act.

There are cases where the law as it currently stands includes provisions that hinder the growth of architectural technologies or social demand. For instance, in the case of hierarchically partitioned buildings, the registration of partitioned superficies aimed at the partitioned ownership of a specific level of the building is not recognized (Guideline to Registration of Partitioned Superficies No.6). It does not seem to me to be necessary in modern society to have to prohibit the registration of partitioned superficies in order to provision partitioned ownership of a specific level of a hierarchically partitioned building.

Architectural technologies have already advanced beyond what was imaginable even a couple of decades ago. The technical limits of the real property registration method make it impossible to incorporate new architectural technologies. This means the law hinders the progress of technology. For instance, when “A” constructs a curvy building through the use of cutting-edge technologies on the site, including his own land and land owned by “B”, but without imposing any inconvenience on “B”’s use of land, there is no way to provide public notification of this under current law. This means a building permit will not be issued.

Public notification aims to prevent conflicts related to real property. If notification is made only on items allowed under the current notification system, however, the function of providing notification for substantial relations will not be adequately exerted. In my opinion, if the digital cadastral record system can be utilized through the amendment of the Real Property Registration Act and the Act on Land Survey, Waterway Survey and Cadastral Records, people will be able to check the rights, use and revenue relations of real property more easily. This is because people would be able to access an official certificate displaying the rights relations of real property that are consistent with the status quo. Korea’s advanced IT technologies make it possible to use a three-dimensional digital cadastral record system.

I seem to remember that you actively conducted research and activities on not only the Korean real property digital registration system, but also the Korean digital cadastral record system. One of your previous papers has discussed the option of a total real property official book system. You stated that the Act on Land Survey, Waterway Survey and Cadastral Records provided the basis for the management and operation of a total real property official book system that integrates 18 official books related to real property, including the land ledger, forestland ledger, cadastral map and building ledger. Would you briefly talk about the problems that can occur from the introduction of a total real property official book system and how they can be addressed? If possible, please provide a visual presentation of the 3D public notification system based on the total real property official book system.

Presentation

Land Rights Law in Cambodia

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Land Rights in Cambodia

Phalthy Hap*[1]

Cambodian Government has been trying to improve the security of land tenure by conducting various strategies. For instance, in the early 2006 the national authority for land disputes resolutions was formed to be mainly responsible for preventing and reducing land disputes. Yet people have been still afflicted with the insecure land tenure.[2] Even the Prime Minister of Cambodia also recognized that land is a hot issue and is an important element in the reform process with a nature of revolution. Squatters could be one of huge factors which leads to aggravate the situation. Recently the eviction of squatters from the central parts of the cities has provided a bad environmental impact of tourism as well as donor countries. Hence it may affect the government's development scheme. The development, in this sense, requires that the squatter areas bed eveloped or improved in an acceptable way but the expulsion people away from those areas seems to have more influence on government policies.

According to the Constitution of the Kingdom of Cambodia, "all persons, individually or collectively, shall have the right to ownership"[3]and the legal private ownership is protected by law. The right to confiscate properties from any person is exercised only in the public interest as provided for under the law and is required to provide fair and just compensation in advance. However, in the real situation the application may be somehow different. In the late 1990s, people who had lived along the area which would be required to build Kizuna Bridge (a support from Japanese government) claimed for the compensation of their houses and lands which were affected by the bridge construction project. At first, the government just proposed the unreasonable compensation to the landholders without considering the land market price. Hence, the landholders used their rights against the unfair compensation from the government and lastly they won.[4]

Although Article 30 of the 2001 Cambodian Land Law tries to protect legal landholders who have possessed the land for no less than five years prior to August 31, 2001 has the right to request a definitive certificate of ownership, most people in Cambodia however are not highly aware the importance of legal land certificates. For example, people in group 19 of Tuol Sangke commune did not register their land and houses. They just have family record books and identity cards which are recognized and issued by the competent authorities. They just stay without registering their land. But looking at the people of group 78 who were living in Village 14, Tonle Bassac Commune of Chamkarmon District, Phnom Penh were forced to move out from their place although they were recognized as permanent residents. The Phnom Penh Municipal Cadastral Office had issued the house statistic receipts for them since 1992 and they also have family record books and identity cards. However since their place becomes a targeted area for developing, their right was suddenly restricted. [5]As a result, a large number of squatters who have stayed in their land for more than five years and have relevant documents recognized by the authorities have been suffered from the eviction. For instance in Phnom Penh Municipality, the areas of 569 communities in which several hundred families per community have been the targets for the city development.[6]

Article 44 of the Law on Commune/Sangkat Administration and Management, a Commune/Sangkat shall have the role to serve local affairs in the interests of the Commune/Sangkat and its citizens. But eviction of people to other communes must be under the control of province/municipality. The province /municipality shall also serve the interest of its citizens. Therefore the Phnom Penh municipality has tried to solve problems in a harmonious way whenever they want to develop some areas. The municipality had discussed with the companies to find a reasonable solution, and also bought some pieces of land in outskirts of the city to distribute to the squatters. Yet most of squatters always get hurt from the eviction done by the municipality. [7]Because of no infrastructure in the new areas, the squatters have been dissatisfactory to move there. More apparently 7, 714 families of squatters in Phnom Penh have been faced with their settlements for the reason of city development.[8] More remarkably, when squatters protested, they also faced not only eviction but also the arrest. For example, 8 people were arrested as a result of forced eviction of 300 families from Borei Keila in Phnom Penh.[9] In the aftermath of the municipality commitment, the welfare of people became more deteriorated. Thus a lot of criticisms from the civil society as well as citizens have come into existence.

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1)* The Vice Director of the Graduate Program of the Royal University of Law and Economics, Phnom Penh. He obtained a Doctoral Degree in Law specializing in Land Law at Nagoya University, Japan in 2010.

2) Prime Minister Hun Sen, in his speech on April 11, 2002 on Intensive Cultivation, Land Management, Logging Ban—Areas of Attention in Agriculture, Fisheries and Forestry.

3) Article 44 of the constitution of the Kingdom of Cambodia, 1993.

4) In the late 1990s, a large number of people whose lands were required to move out for building Kizuna Bridge which was supported by the Japanese Government complained for the unfair compensation although they were happily supporting the bridge construction. The bridge connect the west to the east of Mekong River that is across Kampong Cham Town and Tonle Bet.

5) Community Legal Education Center, Legal memo: Group 78, Tonle Bassac Commune, Chamkarmon District, Phnom Penh City (April 4, 2006).

6) No. 609 RBK.Kr, Report on the management and development of community of Phnom Penh Municipality on August 8, 2006.

7) A personal interview was conducted in 2008 with the squatters who were evicted in 2006 from Group 78, Village 14, Tonle Bassac Commune of Chamkarmon District. They looked very troublesome since the authority had forced them to move out from their old areas. They faced almost everything, such as no settlements, no food, especially no schools for their children. Another most important thing is that they lost their job because they are from the central city where they often sold small goods which could help them to support their everyday life.

8) Community Legal Education Center, Legal memo: Group 78, Tonle Bassac Commune, Chamkarmon District, Phnom Penh City (April 4, 2006).

9) LICADHO, *Attacks & Threats Against Human Rights Defenders in Cambodia 2010-2012* (December 2012), 54.

The rebuilding of the Cambodian property system began with the Instruction on the Implementation of Land Use and Management Policy dated June 3, 1989, under which the state recognized two proprietary rights: rights of ownership over residential land; and possession rights over agricultural land. The distinction between these substantive rights at that time was intended to be that possession rights were conditioned on continuation of actual use, while ownership was not subject to such a restriction. This article concerns efforts to protect private land rights in Cambodia since the collapse of the Khmer Rouge regime in 1979.

Land registration serves several important purposes, and is particularly important to a young land system such as that in Cambodia. Registered land certificates foster trust and stability in land transactions. They provide a basis for national and local taxation to support the costs of government. In a nation recovering basic legal and administrative institutions, registered rights in land are also an important channel for dissemination of legal consciousness and expertise.

Unfortunately, the registration process in Cambodia has not fully successful. During the period of one year in the early stage of land privatization, each individual landholder was required to apply for land possession and ownership within a given period of time. [10]As a result, from June 1989 to June 1990, 3.7 million land applications for land possession or ownership were filed.[11] This overwhelmed human resources at the local level, and most of those applying received only application receipts; most of these newly recognized interests did not find their way into a land register.

Since 1992, landholders have enjoyed the option of registering their land through a voluntary procedure ("sporadic land registration"), to acquire a "sporadic registration certificate" protection on the immovables registers. Apparently 604,569 sporadic registration certificates were issued as of 2013. [12]The 2001 Land Law provides additionally for a separate process of "systematic land registration", under which authorities register all properties in a given area, resulting in a conclusive registration and a "systematic registration certificate" for each landholders. While ideal in principle, systematic land registration is burdenso me and has proceeded slowly. From 2002 to 2013, only 2,249,362 systematic registration certificates were issued and distributed.[13] It is remarkable that in June 2012, the Prime Minister introduced another system which is volunteer youth registration. Until December 2013, this registration resulted in 403,000 land certificates.[14] As such, for a total, in 2013, of about 3,257,477 land certificates (including sporadic registration certificates) out of an estimated(and expanding) set of 12 million land parcels.

The failure of the registration process has had costs. The rights of many long-term occupants of land are unclear and fragile. Land disputes are common. The use of informal transactions to buy and sell land shields this important resource from taxation.

The current structure of the land registration process in Cambodia represents an attempt to respond to perceived problems in the initial phase of registrations. Sporadic land registration has been implemented through a voluntary procedure since 1992 and systematic land registration was implemented in 2002. In the early stage of land privatization, district and provincial authorities were given the power to issue "sporadic registration certificate" concerning possession rights and ownership rights respectively. However, as Cambodia faced a lack of cadastral staff together with a lack of technical and financial resources, only application receipts were issued in response to most of the early applications for land certificates. The capacity of national registration officials at the local level raised issues of technical difficulties, and in 1995 the government removed the authority to issue registered titles to the national level of administration. Since this reform, very few landholders have applied for land certificates, with only 70,357 sporadic registration certificates applied for from 1995 to 2000. [15]It should be noted that systematic registration certificates and sporadic registration certificates both serve a role in stabilizing the land system. Systematic registration certificates which comes from systematic land registration project refer to cadastral index maps with clear coordinates of the boundaries, and land parcels are recorded in land registers. Sporadic registration certificates which are ordinarily issued through sporadic land registration refer to sporadic index maps without clear coordinates of the boundaries, and land parcels are recorded in immovables registers.

In Cambodia currently, branches of the Ministry of Land Management, Urban Planning and Construction at district and provincial levels serve a secretarial function for the central ministry office, in terms of land management and administration. For example, at the district level, District Office of Land Management, Urban Planning, Construction, and Land is responsible for performing cadastral work such as demarcation, survey and adjudication in case of sporadic land registration. When all cadastral work is completed and land parcels are recorded with a sporadic index map, all land documents have to be sent to the Provincial Department of Land Management, Urban Planning, Construction and Cadastre for more examination and record of land parcels in land registers. The provincial authorities who received signature delegation from the Ministry of Land Management, Urban Planning and Construction are able to issue sporadic registration certificates while the General Department of Cadastre and Geography of the ministry issues sporadic registration certificates in provinces which

10) Instruction on the Implementation of Land Use and Management Policy, No.03SNN, June 03, 1989.

11) Joint Instruction in Addition to the Implementation of Joint Circular No. 006PK/KSK-00KHV and No.354PK/KSK-012/SNN-007KHV, October 18, 1990.

12) Ministry of Land Management, Urban Planning and Construction, *Report on the Outputs of Work in 2013 and the Work Plan 2014 of the Ministry of Land Management, Urban Planning and Construction* (March 11, 2014), 5.

13) Ministry of Land Management, Urban Planning and Construction, *Report on the Outputs of Work in 2013 and the Work Plan 2014 of the Ministry of Land Management, Urban Planning and Construction* (March 11, 2014), 5.

14) Ministry of Land Management, Urban Planning and Construction, *Report on the Outputs of Work in 2013 and the Work Plan 2014 of the Ministry of Land Management, Urban Planning and Construction* (March 11, 2014), 5.

15) Sophal Chan et al., *Land Tenure in Cambodia: A Date Update*, Working Paper No. 19 (Phnom Penh: Cambodia Development Resource Institute, October 2001), 30.

have not received signature delegation from the ministry. Since July 2010, all provincial authorities throughout Cambodia have been entitled to issue land certificates in their territorial province.

Under Cambodian land law, registered properties can be used for the transfers of rights. As formal transactions require that the properties be registered, Cambodia has not benefited from such a system because a large proportion of properties are unregistered. For example, excluding Phnom Penh Capital, only 21,671 formal land transactions were transacted the beginning of land privatization until May 2012. [16]Although the volume of informal land transactions is unknown, this number certainly does not reflect the real number of total land transactions. Buyers who buy unsecure land however are able to apply for land certificates in order to secure their purchased land if necessary; until such need arises, registration can be postponed. As a result, state revenues from transfer taxes and similar taxes are lost. It should be noted that the purposes of land registration in Cambodia are to secure transfers o f land rights, strengthen land tenure security as well as confident and efficient landmarkets.

While the circumstances of Cambodian land registration are rather special, valuable lessons can be learned from other jurisdictions. In particular, Japan undertook a similarly ambitious project of nationwide land registration in the 19th century, and today has a stable and successful registration system. The causes of the Cambodian registration failure are highlighted by comparison with this experience.

Japan in the Meiji Era undertook a similar project of national land registration. While the early years of Japanese private rights in land were not without disputes, the government avoided the problem of failed registration, from which Cambodia now suffers. Three differences from the conditions of Cambodian land registration should be noted. First, taxation was treated as an important motivation for the land registration system, because the government required stable tax revenues as a core requirement of reform.[17] Second, Japan benefitted from a high level of expertise and training in government administration. Third, the emphasis was on the issuance of certificates and completion of registration, and the accuracy of cadastral survey maps was of secondary importance. The Japanese government completed the assessment of all arable land by 1880, a period of just eight years from the announcement of the reform.[18] Although real boundaries were not clear, government-held information was sufficient to collect land taxes efficiently. As a result, land taxes covered 85 percent of the total national taxes in 1875 and 67 percent in 1884.[19] It should be noted that today, national officials at the local level have the power to complete registrations in Japan.

16) Sovann Sar, Director General of the General Department of Cadastre and Geography, Letter to Secretary of State of the Ministry of Land Management, Urban Planning, and Construction, No. 419LASSP, June 29, 2012.

17) David Flath, *The Japanese Economy*, 2nd ed. (Oxford: Oxford University Press, 2005), 30.

18) Niwa Kunio, "The Reform of the Land Tax and the Government Programme for the Encouragement of Industry," in *The Developing Economies* ([December 1966]), 466.

19) Niwa Kunio, "The Reform of the Land Tax and the Government Programme for the Encouragement of Industry," in *The Developing Economies* ([December 1966]), 457 Niwa Kunio, "The Reform of the Land Tax and the Government Programme for the Encouragement of Industry," in *The Developing Economies* ([December 1966]), 457.

Cambodian land system has faced several challenges. In the early inception of land privatization, the registration failed due to a lack of cadastral staff, and technical and financial resources. District and provincial authorities had limited legal awareness. Also, uncertain legal provisions became a hindrance for local authorities who implement laws and therefore the implementation could not be well performed. A lack of legal implementation mechanisms is also a way to lead to the failure of following the rule of law. However, the experience has shown that when the government met such difficulties, the government did not try to strengthen local authorities but centralized the power to the national authority making local authorities be less responsible for their actions. Consequently, the procedures have become complicated, time-consuming and costly, thereby deterring landholders from full participation in the system.

Currently, local authorities in Cambodia do not play a crucial role in managing state land which consists of 80 percent of the total land. Although provincial and district authorities play a vital role in identifying and mapping state land, these authorities do not have sole responsibilities to allocate and prepare land use planning for state private land. They must gain agreement with the Ministry of Interior and the Ministry of Economy and Finance. One of the apparent examples is that social economic land concessions which are very needed to allocate state private land to poor and landless people in the whole country have not worked well without the intervention of the central authority. Complicated approval processes and a lack of clarity on legal procedures have provoked the slowing down of social land concession programs thus making poor and landless people continue to be miserable. Therefore, the idea of introducing the intervention of national authorities to all level of authorities cannot ensure the success of social land concessions and good management of state land in general.

Separately, state land in Cambodia is divided into two types, state public land and state private land. The former is inalienable and may include any property that has a natural origin; is developed for a general use or public use; constitutes a natural reserve; archeological, cultural and historical patrimonies; and royal properties that are not the private properties of royal families. State public land however may be the subject of authorizations to occupy or use that are temporary, precarious and revocable; and is subject to no more than 15 year lease contracts. [20]It is noted that when state public land does not serve public interests, this state land can be converted to state private land by the government's sub-decrees. State private land on the other hand is the state land which does not belong to state public land. It may be the subject of sale, exchange, distribution or transfer of rights. For example, social land concessions and economic land concessions require only the allocation of state private land.[21]

Strengthening the existing local authorities to bear responsibilities for land management and adminis-

20) Sub-decree on the Rules and Procedures of Transferring Public Property of the State and Public Entities, No.129ANK/BK, November 27, 2006, Art. 18.

21) Land Law of Cambodia, No. NS/RKM/0801/14, August 30, 2001, Art. 58.

tration is a way to lead to success in Cambodian land system. With regard to land registration, it is necessary to speed up sporadic land registration rather than to wait for the complete systematic land registration. In this respect, sporadic land registration should be applied as a primary tool for rough registration, so that all landholders have the obligations to apply for sporadic registration certificates within a determined, reasonable period of time. Therefore, commune authorities should be entitled to receive land applications, verify the correctness of the applications and submit those land documents to district authorities. District authorities should be responsible for sporadic land registration so that these authorities are able to issue sporadic registration certificates. Also, the district authorities should be entitled to be responsible for the transfers of land rights, collection of land taxes and other relevant duties.

Provincial authorities should be empowered to confirm legality of land documentation made at the district level and receive land taxes as well as other duties from district authorities. Provincial authorities are able to use all land information especially cadastral land data to check with land taxes whether the land tax collection at the district level is right or not. Moreover, provincial authorities should be entitled to examine the implementation of district authorities. With this regard, if district authorities make misconduct, provincial authorities should have the right to impose a sanction on that misconduct and submit the case to the national authority or appeal to the court.

National authority that is the Ministry of Land Management, Urban Planning and Construction should be responsible only for systematic land registration and confirm all work legality done by provincial and district authorities. In case of provincial authorities partake in misconduct with district authorities, the national authority could also punish all of relevant authorities for their misconduct. Also, the national authority is able to sue the authorities committing misconduct in court. By so doing, provincial and district authorities are scared of partaking a wrongdoing and in return these authorities may pay more attention to their work rather than going to the wrong way because they could see that their misconduct will provoke them some trouble.

It should be noted that such a strategy would not completely resolve land issues in Cambodia. Certain legal provisions require clarification, and the question of the capacity of human resources, and of the effectiveness of administrative monitoring, must not be neglected.

Past experience has shown that the failure to impose land taxes has weakened the incentives of local authorities to push the registration forward thereby requiring land taxes. In order to show the duties of landholders, all land should be taxed. Remarkably, since 2011, the Cambodia imposed on land tax which is located in Phnom Penh and provincial towns with the tax rate 0.1% of the total land price. [22]The tax revenues are used to develop local areas where the taxpayers pay. It is however, necessary to tax all kind of land so as to make sure that all land holders have duties to pay their land tax. A careful land tax policy is very needed. In this respect, in order to avoid a serious impact on poor landholders, law on land taxes should limit the amount of land size with a little tax payment for example a parcel of residential land should be paid less than USD 1. Because poor people always have a small amount of land size, land taxation will not badly affect them. District authorities are appropriate government agencies to bear responsibilities to collect land taxes while provincial authorities should empowered to audit the tax collection done by district authorities.

In order to succeed in land registration, legal trainings should also be conducted for local authorities. It is necessary that all newly adopted laws and legal regulations be disseminated effectively to local authorities. The Ministry of Land Management, Urban Planning and Construction and other relevant ministries play a pivotal role in conducting legal trainings. Also, legal instruction and explanation guidance are also needed for law implementers to broaden their understanding of how law should be applied.

Amendments of uncertain legal provisions should be necessarily taken into account. The law, for example, should determine the criteria of "legal possession" in order to avoid ambiguous interpretation. Moreover, the 2001 Land Law recognizes the transfer of ownership of immovable property which is impossible for Cambodian land because of limited number of registered land parcels. However, the Civil Code of Cambodia recognizes that the transfer of ownership or the transfer of any rights over property. [23]The claiming of ownership in the narrow sense requiring a systematic registration certificate is to wait for systematic land registration in which each individual landholder cannot individually apply for.

It should also be noted that Cambodia started provided a limited foreign ownership since 2010. The Law on Foreign Ownership allows foreigners to own apartment or condominium units from the first floor. [24]Since the existence of available foreign ownership in Cambodia, 1,084 foreigners bought 597 private units of condominium as of 2013.[25]

The centralization of the authority to issue land certificates and complete registrations is not the only problematic issue faced by the Cambodian system of land registration, but the limitations that it imposes on registration capacity, in terms of volume, strongly suggests that this arrangement of authority is not suitable for handling a large number of filings in a short period of time. Comparison with Japan suggests that comprehensive coverage by the registration system is important, in particular for taxation of land. Comparison with Japan along

22) Law on Financial Management for 2010, No.NS/RKM/1209/026, December 16, 2009, Art. 13.

23) Civil Code of Cambodia, No. NS/RKM/1207/030, December 8, 2007, Art. 515.

24) Law on Granting Ownership over Private Part of Ownership Buildings for Foreigners, No. NS/RKM/ 0510/003, May 24, 2010, Art. 6.

25) General Department of Construction, Intervention of H.E.. Huy, Nara, Director General of the General Department of Construction on Participation in Prevention Measures of unlawful construction (Phnom Penh, February 27, 2014).

with reflection on Cambodian experience suggests that an effective taxation system helps to encourage maintenance of the registers, so that properties once registered continue to be updated in future transactions.Therefore, a policy of decentralizing the power to issue land certificates and complete registrations to national registration officials at the district level should be considered seriously as a future element of reform in this area. When all land is registered, all land rights are well protected by law.

Discussion

Land Rights Law in Cambodia

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Discussion paper for "Land Rights in Cambodia"

Sophorn Soeun

Ⅰ. Introduction:

The rebuilding of the Cambodian property system began with the Instruction on the Implementation of Land Use and Management Policy dated June 3, 1989, under which the state recognized two proprietary rights: rights of ownership over residential land; and possession rights over agricultural land. The distinction between these substantive rights at that time was intended to be that possession rights were conditioned on continuation of actual use, while ownership was not subject to such a restriction. This article concerns efforts to protect private land rights in Cambodia since the collapse of the Khmer Rouge regime in 1979.

Land registration serves several important purposes, and is particularly important to a young land system such as that in Cambodia. Registered land certificates foster trust and stability in land transactions. They provide a basis for national and local taxation to support the costs of government. In a nation recovering basic legal and administrative institutions, registered rights in land are also an important channel for dissemination of legal consciousness and expertise.

Ⅱ. The Challenges of Land Rights issue in Cambodia:

Cambodian land system has faced several challenges. In the early inception of land privatization, the registration failed due to a lack of cadastral staff, and technical and financial resources. District and provincial authorities had limited legal awareness. Also, uncertain legal provisions became a hindrance for local authorities who implement laws and therefore the implementation could not be well performed. A lack of legal implementation mechanisms is also a way to lead to the failure of following the rule of law. However, the experience has shown that when the government met such difficulties, the government did not try to strengthen local authorities but centralized the power to the national authority making local authorities be less responsible for their actions. Consequently, the procedures have become complicated, time-consuming and costly, thereby deterring landholders from full participation in the system.

Separately, state land in Cambodia is divided into two types, state public land and state private land. The former is inalienable and may include any property that has a natural origin; is developed for a general use or public use; constitutes a natural reserve; archeological, cultural and historical patrimonies; and royal properties that are not the private properties of royal families. State public land however may be the subject of authorizations to occupy or use that are temporary, precarious and revocable; and is subject to no more than 15 year lease contracts. [1]It is noted that when state public land does not serve public interests, this state land can be convertted to state private land by the government's sub-decrees. State private land on the other hand is the state land which does not belong to state public land. It may be the subject of sale, exchange, distribution or transfer of rights. For example, social land concessions and economic land concessions require only the allocation of state private land.[2]

Strengthening the existing local authorities to bear responsibilities for land management and administration is a way to lead to success in Cambodian land system. With regard to land registration, it is necessary to speed up sporadic land registration (voluntary procedure) rather than to wait for the complete systematic land registration (authorities register all properties in a specific location). In this respect, sporadic land registration should be applied as a primary tool for rough registration, so that all landholders have the obligations to apply for sporadic registration certificates within a determined, reasonable period of time. Therefore, commune authorities should be entitled to receive land applications, verify the correctness of the applications and submit those land documents to district authorities. District authorities should be responsible for sporadic land registration so that these authorities are able to issue sporadic registration certificates. Also, the district authorities should be entitled to be responsible for the transfers of land rights, collection of land taxes and other relevant duties.

It should be noted that such a strategy would not completely resolve land issues in Cambodia. Certain legal provisions require clarification, and the question of the capacity of human resources, and of the effectiveness of administrative monitoring, must not be neglected.

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1) Sub-decree on the Rules and Procedures of Transferring Public Property of the State and Public Entities, No.129ANK/BK, November 27, 2006, Art. 18.

2) Land Law of Cambodia, No. NS/RKM/0801/14, August 30, 2001, Art. 58.

Ⅲ. Conclusion:

In order to succeed in land registration, legal trainings should also be conducted for local authorities. It is necessary that all newly adopted laws and legal regulations be disseminated effectively to local authorities. The Ministry of Land Management, Urban Planning and Construction and other relevant ministries play a pivotal role in conducting legal trainings. Also, legal instruction and explanation guidance are also needed for law implementers to broaden their understanding of how law should be applied.

The centralization of the authority to issue land certificates and complete registrations is not the only problematic issue faced by the Cambodian system of land registration, but the limitations that it imposes on registration capacity, in terms of volume, strongly suggests that this arrangement of authority is not suitable for handling a large number of filings in a short period of time. It is suggested that an effective taxation system helps to encourage maintenance of the registers, so that properties once registered continue to be updated in future transactions.Therefore, a policy of decentralizing the power to issue land certificates and complete registrations to national registration officials at the district level should be considered seriously as a future element of reform in this area. When all land is registered, all land rights are well protected by law.


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