



Utilization of Communal Land (Ulayat) for Property Businesses with a Build-Up System through a Notary in Padang City

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Abstract

Padang is a city in Indonesia in which the presence of Ulayat (Communal Land) is still existed in the middle of its community. However, the recent world's economy development, especially in the field of property business, reveals a very significant improvement, so that it demans land availability. The present research uses normative judicial research method. The result of discussion from the problem studied in this research showing that the implementation of profit sharing agreement for housing reveals that after profit sharing agreement, ganggam bauntuak (a term for utilization distribution of communal land) that makes the essence and the existence of ulayat (communal land) becomes more forgotten. The implementation of profit sharing agreement for shophouse shows that after profit sharing agreement, it is more tendencious to be maintained and preserved. Then, to provide certainty guarantee in terms of cooperation between both parties, it uses an agreement before a Notary as the party that plays in making authentic deed which is highly essential, because it can provide legal inputs and advices for the parties involved for the sake of keeping the parties' interests. In Padang, the technical process of land registration is conducted by fulfilling terms and conditions that have been set in Circular Letter of Regional Head of National Land Agency of West Sumatera Province Number 500/ 88/ BPN-2007 Dated 8 February 2007. However, the implementation of right over land registration, both the first time registration or conversion and the data maintenance done in form of transferring, merging, and splitting, it does not have significant difference when related to profit sharing cooperation system based on concept; everything is processed based on standard provision.

Keywords: Notary; *Ulayat* Land; Property; Profit Sharing

Introduction

Land has a central role in supporting human's life, especially as a medium in form of a site for all the human's life needs fulfillment. Thus, from years to years, there is always an improvement of needs on this land along with the growth number of population and economy development. However, contradictory with the development, the amount of land will never increase even the latest research in the field of sciences shows that the discharge and sea level are always increasing every year which lead to decrease land quantity. Therefore, since land is highlt important, so that based on economy, it has formed a business pattern that has been interested by businessmen; the business related to this land is called

property business. According to Bank of Indonesia regarding to Commercial Property Development (PPKom), especially supply problem that keeps increasing along with the demand level that keeps increasing as well.¹ Moreover, the land price is always increasing every year,² not only commercial property, it is still based on the survey data conducted by Statistics Department of Bank of Indonesia on Quarter Triwulan III-2018 regarding Occupancy Property Development, both demand and price increase always grow every year. Thus, many are interested to get involved in it to gain much in it. However, the main condition for it is the land availability itself.

Besides from the need level that grows bigger, the legal regulation regarding land which is known as Law Number 5 of 1960 regarding Basic Regulation of Agrarian Principles (UUPA) on September 24, 1960, is also one of the dualism resolutions of land law, so that the existing land law in Indonesia is national.³ The fundamental of this national land law is customary law and to fill the legal vacuum as the transfer from Western system that is applied previously, then the customary law that is still alive in the middle of community will be applied and becomes the main reference in its setting.⁴ The main problem of this case is the inavailability of legal provision because the problem is indeed complex when related to the diversity of this *Ulayat* land regulation in each region in Indonesia which leads to dilemma that makes the land itself become more precious.

One of regions in Indonesia in which its *Ulayat* land is still alive in the middle of community is Padang. Padang is the western gate of Indonesia because it is a strategic and an essential city. These conditions absolutely will trigger the growth level of people and economy significantly. If it is studied on the culture living in the community in Padang, this city is counted as customary region of Minangkabau. It can be seen from the statement of [Tambo](#) (customary legend) using Minang language, which is:⁵

“*Dari Sikilang Aia Bangih, Hingga Taratak Aia Hitam, Dari Durian Ditakuak Rajo, Hingga Sialang Balantak Basi*”. *Sikilang Aia Bangih* is the northern territory, now it is in Western Pasaman, bordering with [Natal](#), North Sumatera. *Taratak Aia Hitam* is the southern territory, it is Bengkulu region. *Durian Ditakuak Rajo* is a region in Bungo Regency, Jambi. The last, *Sialang Balantak Basi* is a region in Rantau Barangin, [Kampar](#) Regency, [Riau](#) now. It means that it takes a line among every points mentioned above and then the lines are combined completely; Padang will be counted as the customary region of Minangkabau.

From every difficulty that has been explained above, the creativity to obtain this land is an art that must be mastered by property businessmen. In the nowadays field practice, many conduct cooperation system, between investor as the capital or money owner, developer as field technical implementor, and land owner as the party that has the land. In addition, one of the cooperation systems that is mostly applied in Sumatera is profit sharing system.

The phenomenon of this profit sharing grows in community as the consequence of habits in community in doing profit sharing activity as a result of limitation of each party. The profit sharing agreement in its reality in customary community is done orally (before Customary Head).⁶ Moreover, the concept of this distribution is not something new in many customary laws all over Indonesia. In Aceh,

¹ Division of Real Sector Statistics. *Quarter Survey III-2018 Commercial Property Development*. Statistics Department of Bank of Indonesia. Jakarta. 2018. p. 3

² *Ibid.* p. 1

³ Considering letter c Law Number 5 of 1960 regarding Basic Agrarian Law.

⁴ Helmy Panuh. *Ulayat Nagari Land Administration in Governance Decentralization Era in West Sumatera*. Raja Grafindo Persada. Jakarta. 2012. p. 87-99

⁵ Edison and Nasrun Dt. Marajo Sungut. *Tambo Minangkabau*. Kristal Multimedia. Bukittinggi. 2010. p.17

⁶ Soerjono Soekanto. *Customary Law of Indonesia*. Raja Grafindo Persada. Jakarta. 2011. p.209.

profit sharing is called “*Mawaih*”, especially in terms of husbandry and livestock profit sharing. Besides, in Sinjai Regency, profit sharing agreement regarding to land is called “*Akkinanreang*”.⁷

In its practice, Profit Sharing Agreement generally makes an agreement before a Notary between the right over land holder and capital owner as the manifestation of legal guarantee for every parties that makes it. Thus, role and function of a Notary as one of general officials that has an authority to make an authentic deed is highly important. Even though profit sharing agreement comes from customary law habit and this profit sharing agreement is not set or not known yet when Civil Code is made and no other special laws that regulate it.⁸ Thus, it is categorized as non-statutory agreement. Besides, according to 1319 of Civil Code: All agreements, both that have special name and that is not known by certain name, is obliged to general regulations, and stipulated in this chapter and previous chapter.⁹

The utilization of this cooperation system also has different reasons; there is chosen because of capital issue, to make the expense more efficient, then the land owner is invited to cooperate, related to the land limitation above; there is also that conducts cooperation because his land status and/or indeed is not expected to be sold by the owner, one of the reasons is communal land, in this case *Ulayat* land. It is because the communal members are willing to maintain status quo, otherwise economically from developer side, it is highly interesting. Therefore, in this case, it leads to a dilemma condition between willing to maintain their *Ulayat* existence and welcoming this cooperation offer that automatically will provide gain for the customary community members, instead of becoming a useless land.

Thus, the researcher is willing to focus the research on profit sharing cooperation option in which the object involves *Ulayat* land in making its agreement by involving a Notary.

Research Method

The present research uses normative judicial research method by adding empirical judicial approach. The type of normative judicial research is the research that focuses on prevailing legal norms. Besides, empirical judicial research is also conducted which means that a legal studt to find or analyze the occuring facts. This research will be focused on the agreement that has been made in Notary Office in Padang besides Library Review and other Scientific Literatures both from printed books, mass media, and online data. The data that are succesfully collected are processed systematically. Then, qualitative descriptive analysis is done which is to study, research the existing data in form of description form logically and sistematically to answer the research problems.

Research Result and Discussion

The Term Use of Profit Sharing Agreement

Profit sharing agreement is an agreement which does not recognize its name in Civil Code. Profit sharing agreement is categorized as Non-statutory agreement (*Innominaat/on benoemde*), which is born because of the business needs in business law dynamics happening in the community. Principally, profit sharing agreement is included into a reciprocal agreement between two parties namely developer or capital owner and land owner that make an agreement in which developer or capital owner party will develop houses or shophouses or other buildings, with terms and conditions that have been agreed by both parties in which commonly developer or capital owner party will provide some building doors for land

⁷ Hilman Hadikusuma. *Customary Agreement Law*. Alumni. Bandung. 1991. p. 37.

⁸ Salim H.S.1. *Development of Innominaat Contract Law in Indonesia*. Sinar Grafika. Jakarta. 2014. p. 4.

⁹ R. Subekti dan R. Tjitrosudibio. *Civil Code*. Pradaya Paramita. Jakarta. 2009. p.339

owner as the performance contract from land submission that has been done by land owner or by providing addition in form of money.

Profit sharing agreement can be divided into two main parts, which are:

1. Pure Profit Sharing Agreement

Pure profit sharing agreement is what is done between developer and land owner in which developer party is obliged to provide some building units to land owner based on the agreement that has been made by both parties, and the developer party does not pay by using cash.

2. Mixed Profit Sharing Agreement

Mixed profit sharing agreement is a profit sharing agreement between developer and land owner in which in the agreement, it is agreed that in the implementation of profit sharing agreement, the developer is obliged to show a performance in form of payment of money added with house building based on the agreement between the developer and the land owner.

The existence of profit sharing agreement is a manifestation of freedom principle in agreement making in the regulation of Article 1338 section (1) of Civil Code which mentions that, "All agreements made legally is applied as a law for those who make it". The word "all" in Article 1338 section (1) in Civil Code shows the presence of freedom for all people to make an agreement for whomever and about everything as long as it is not contradicting with the prevailing legal regulations, religion norms, and obedience and justice principles recognized commonly. While, the definition of "applied as a law for those who make it" is the agreement that has been made by the parties must be obeyed and implemented with good conviction as like a law for both parties.¹⁰

The Phases of Making Profit Sharing Agreement for Ulayat Land

Principally, the parties that want to make an agreement are free to determine the form of agreement, the content of agreement, and the conditions of agreement. However, in order that the agreement is designed well and systematically which cover and maintain the parties' interest well which then can be made as a strong proof, then the parties are better to make an agreement before a Notary in order that the agreement deed becomes the notarial deed. In making a notarial deed, a Notary must pay attention on things that do not violate the Regulations, Public Order, and Morality.

Before making a notarial agreement deed, a Notary must pay attention on conditions of agreement legality. It is about whether the agreement has fulfilled the conditions or not. The following is the table that explains the conditions of agreement legality according to Civil Code and out of Civil Code.¹¹

Table 1. Conditions of Agreement's Legality

No	Conditions of Agreement's Legality According to Civil Code	Conditions of Agreement's Legality According to outside of Civil Code
1.	They agree to bind themselves;	It must be done with good conviction;
2.	Able to make an agreement;	It must be not contradicting with habit;
3.	A particular thing, and	It must be based on expediency principle;
4.	A legal cause.	It must be not contradicting with public order

¹⁰ Herman Widjinanto. *Non-Statutory Agreement*. Mitra Ilmu. Surabaya. 2013. p. 65

¹¹ *Ibid.* p. 34-35

The conditions of agreement's legality based on Article 1320 in Civil Code that determine 4 conditions of agreement's legality which are:¹²

1) The Presence of Agreement from Parties that Make the Agreement

Regarding to the word "agree", there are several theories that can be used as a guideline, namely:¹³

a) Theory of Willingness

This theory considers that the parties are only bound on things that are really wanted.

b) Theory of Statement or Trust

Here, the parties are bound to things that have been stated, with the meaning that this case from other parties has perspective and trust that the statement is appropriate with real willingness from the parties who state it.¹⁴

The agreement in an agreement must be stated by both parties without any force or pressure from any parties and any deception (*beedrog*) to get the deal. If the deal is obtained from an agreement, then the deal is considered illegal and the cancellation for agreement can be requested to the court.

2) The Ability to Perform Legal Action

The parties that make the agreement must be able to do in law or have been mature and health in mind. "Mature" in law definition is 21 years old for male and 18 years old for female according to Civil Code. Maturity is seen as the ability to do in law not only seen from age factor only but also from physical and mental health factor, in which the parties do not contain deformity psychologically like drunkard, idiot, crazy, or under amnesty. The people mentioned previously, although their ages are mature, but they are seen not able to do in law.

3) The Presence of Particular Object or Quite Clear

An agreement must have particular object that has been existed when the agreement is conducted. An agreement should not agree on the object that has not existed yet or that will exist later. If an agreement agrees on the object that has not exist yet or that will exist later is null and void.

4) By Legal Power of Attorney

An agreement that does not use a legal cause, or made with illegal or forbidden cause, does not have legal power, for instance, the agreement of forbidden objects sale and purchase according to law like drugs or human trafficking.¹⁵

Article 1320 of Civil Code that contains conditions of an agreement's legality has a clear sanction if it is not fulfilled by the parties that make the agreement. The regulation of Article 1320 of Civil Code in number 1 and 2 mention subjective condition in which if it is not fulfilled, then the cancellation of the agreement can be requested to the court. Besides, for number 3 and 4, if the conditions are not fulfilled, then the agreement is null and void.

¹² Ridwan Khairandy. *Good Conviction in Contracting Freedom*. Master Program, Law Faculty, University of Indonesia. Jakarta. 2004. p. 27

¹³ Wirjono Prodjodikoro. *Principles of Agreement Law*. Bale Bandung. Bandung. 2000. p. 29

¹⁴ Purwahid Patrik. *Basic Binding Law*. Mandar Maju. Bandung. 1994. p. 56-57

¹⁵ Hartono Hadisoeparto. *Principles of Binding Law and Guarantee Law*. Liberty. Yogyakarta. 2005. p. 40

The Parties in Profit Sharing Agreement

According to regulation in Article 1313 of Civil Code, what is meant by agreement is an action with one person or more to bind themselves on another person or more.¹⁶ The agreement that has this binding causes rights and obligations between the parties who perform it. In terms of profit sharing agreement, it is between developer as the capital owner and customary community as the *Ulayat* over land owner.

Textually, there is no special thing related to parties' comparison from developer; it means that it will not be different from the understanding of making comparison for agreement generally. However, it is different when the thing includes *Ulayat* land in it, then a Notary must understand its customary law related to object setting of *Ulayat* land itself and who deserves to do or represent in doing a legal action towards it. In terms of *Ulayat* land of Minangkabau customs, it is adjusted to the type of its *Ulayat* land. Commonly, it is the female party that is recognized based on customary law and customary head that are in charge of it.

The Utilization of Ulayat Land for Property Businesses in form of Housing with Profit Sharing System Done through a Notary in Padang

If viewed from writing technique of notarial deed, there is significant difference. The things set must obey principles and regulations that have been mentioned previously. Besides, regarding to housing object, special thing that is met by the researcher, except that there are two main things that become the main problems are:

- a. Distribution Value between *Ulayat* Owner and Developer
- b. Internal distribution between *Ulayat* land or the members of it.

Factually, actually there is a tendency from many developers to avoid profit sharing in form of building, because there will be an intervention and lack of freedom in development. However, the interesting part is it is also applied for the landowner. It is their willingness; if cooperation is chosen, the option that tends to be taken is in form of profit sharing. It means that profit sharing in form of cash after sale is done. In terms of housing distribution, there is a tendency to do distribution with system 70:30 meaning that the land owner will get 70% from the work value, while the *ulayat* owner will get 30 from work result. It is with note that there is a tolerance for 60:40 distributions when the land is in the strategic position and good economically. Other tolerance is with cash addition as the compensation of calculation difference.¹⁷

Furthermore, if it is analyzed deeper, it is obtained that actually in the event of profit sharing done for housing, mostly it is out of developer agreement which leads to deal and profit sharing distribution for each individuals in the member which is by dealing in the member internal to conduct *ganggam bauntuak*. Therefore, the house building unit that becomes the customary community's right will be followed by the land ownership right registration to each members agreed as deservable. The final result from this all is the lose of essential part of *Ulayat* land as the medium of communal interest protection makes it become each members' ownership, so that the stronger the individual's interest of each member, the weaker the communal group's interest.¹⁸

¹⁶ *Ibid.* p. 338.

¹⁷ Roni Ramadhon, interview in Padang. Dated April 18, 2019, at 20:00-21:30. The developer that ever has profit sharing agreement in customary *Ulayat* land.

¹⁸ Muhammad Ishaq. Interview in Padang. Dated January 7, 2019. At 09:00-12.00. a Notary in Padang.

Out of the things mentioned previously, the researcher finds that there is no significant difference related to clause of profit sharing agreement done on *Ulayat* land compared to the profit sharing agreement on land which is not *Ulayat*. Thus, the utilization of *Ulayat* land for Housing business with profit sharing system according to researcher is not a wise option when willing to stand in the center to accommodate the interest to maintain *Ulayat* right along with its function and benefits, when it meets with accommodating the needs on land for developer.

The Utilization of Ulayat Land for Property Businesses in form of Shophouse with Profit Sharing System Done through A Notary in Padang

Not that different from what the researcher finds when the activity in building housing, regarding to the utilization of *Ulayat* land for Shophouse with profit sharing system, except when it is compared to the agreement in which its object is house, that there are two main things that become the attention so that it becomes the difference of profit sharing agreement itself both profit sharing agreement in *Ulayat* land and not in *Ulayat* land.

Based on conceptual, it is the tendency from developer and *ulayat* parties in terms of shophouse distribution to choose profit sharing system. In which instead of choosing other cooperation system, both parties have same willingness which is to bind them in profit sharing cooperation agreement. In addition, it is the tendency to do distribution with a 60:40 system meaning that the capital owner will get 40% from work result. It is with note that there is a tolerance for a 50:50 distributions when the land is in the strategic position and good economically. Other tolerance is with cash addition as compensation of calculation difference.

When analyzed further, then it is obtained that profit sharing event done for shophouse leads to an agreement in the internal of *ulayat* owner to keep maintaining the existence of profit sharing building and make it as a place to rent which is then the result is in form of money, and shared to the *ulayat* members that deserve. It means that, in this case, the economical value of *ulayat* which is previously a land has been increasing further and beneficial as well; which then it keeps being able to get the main goal from the presence of *Ulayat* itself without decreasing the meaning of its existence itself.¹⁹

The Implementation of Land Registration based on Profit Sharing Agreement

1. The Need of Land Registration

Before Basic Agrarian Law is made as has been explained previously, there is dualism of agrarian law in Indonesia namely the presence of rights over land to register the changes to Land Office.

The activity of land registration covers the initial land registration and existing data maintenance.

- a. The first-time land registration is the land registration for the first time which is previously not registered yet according to the regulation of related land registration and data maintenance of land registration. Initial registration covers three activities namely:
 - 1) Physical or real estate registry field
 - 2) Judicial field
 - 3) Document of right proof publication field.

¹⁹ Muhammad Ishaq. Interview in Padang. Dated January 7, 2019, at 09:00-12.00. a Notary in Padang.

Initial land registration is done through land registration systematically and land registration sporadically.²⁰

- b. Land registration systematically is initial land registration done collectively which covers all objects of land registration which is not registered yet in the region or part of village/subdistrict area. Land registration systematically is conducted based on government initiative based on long-term and yearly work plan and conducted in the regions that have been determined by the Minister of Agrarian Affairs and Spatial Planning/National Land Agency.
- c. Land registration sporadically is initial land registration regarding one or some objects of land registration in the region or part of region individually or collectively and conducted based on the parties' request which are the parties that deserve the object of related land registration.²¹
- d. Data maintenance of land registration is land registration to adjust physical and judicial data in registration map, land list, name list, measuring letter, land book, and certificate with the changes that may happen later, for instance, the right holder name that has been registered, it is removed or its period is renewed, splitting, separating, and merging a land in which its right has been registered. In order that the data available in Land Office is always in line, the right holder is obliged to register and to inform.

Ulayat land registration is categorized as initial registration or also called as conversion. Based on the data that the researcher obtains from National Land Agency, the initial land registration for Customary Land (Communal) must fulfill provisions below:²²

- a. Proposal
- b. Notice of border line installation
- c. Notice of land physical
- d. Notice of Subdistrict Head
- e. Copy communal descent line (*ranji kaum*) minimum four levels (Legalized by Communal Head)
- f. Copy of Identity Card of all comunals and 2 witnesses (legalized by authorized official)
- g. Copy of general power of attorney if it is given (original stamp duty worth of 6000)
- h. Copy of Notice of Land and Building Tax Payable in ongoing year (legalized by authorized official)
- i. Notice of Legal Heir Certificate (MKW) if one of the communal members passed away and he/she does not have a child
- j. All documents are legalized by subdistrict head/Notary/civil record.

When related to customary land that will be used as the object of profit sharing agreement, from administration side in National Land Agency, commonly it does not problematize regarding on how the process is and how the land utilization that will be registered or has been registered. Based on concept, the responsibility of National Land Agency only regulates the land administration activities by recording and making data. Therefore, when it has been in accordance with the provision, National Land Agency will issue a certificate that is just proposed (conversion) or the requested changes.²³

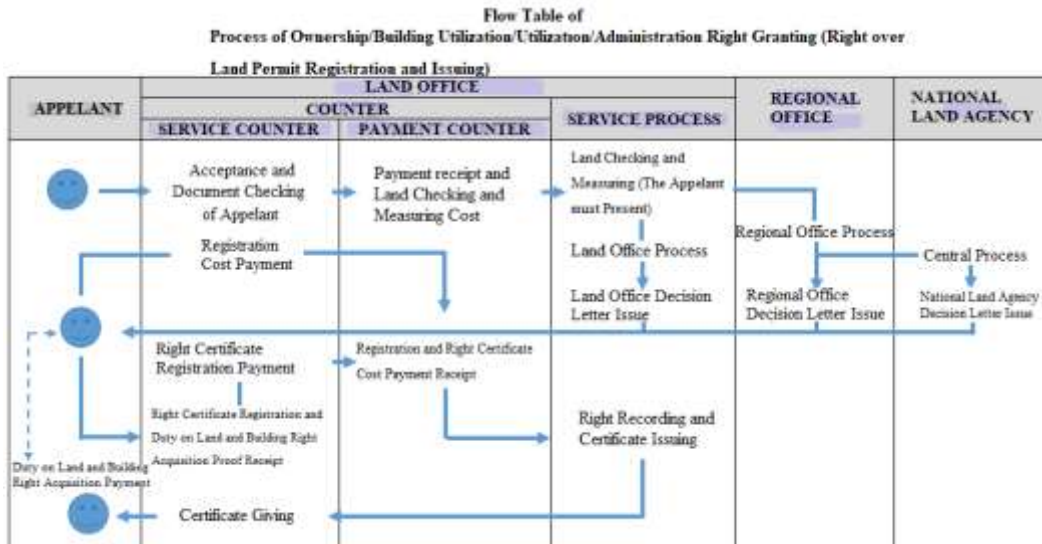
²⁰ AP. Parlindungan. *Indonesia's Land Registration*. Mandar Maju. Bandung. 1999. p. 90.

²¹ Boedi Harsono. *Op. Cit.* p. 76.

²² Circular Letter of National Land Agency Regional Head of West Sumatera Province Number. 500/ 88/ BPN-2007 Dated February 8, 2007

²³ Dasman. Tesis: *Customary Land Initial Registration by Community in Padang*. Master Program School of Gajah Mada University. Jogjakarta. 2009. p. 90-96

Thus, when it is related to profit sharing agreement, there is no significant difference in terms of administration and product of land registration result in National Land Agency. Generally, the process of proposing and giving the certificate follows the process that can be explained based on the following table:

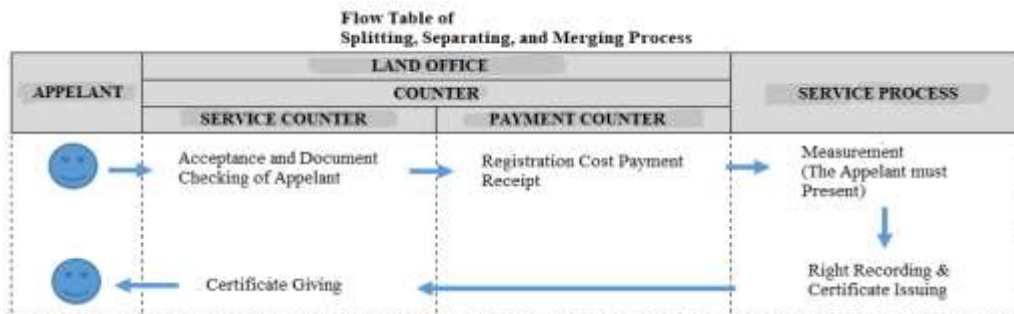


After certificate is issued, the developer performs the next duty by doing splitting or separating process, and/or certificate merging that has been issued to adjust with the needs on the plan that has been agreed and it is completely adjusting to the field condition.²⁴

Thus, to be able to do splitting, separating, and merging a land, administration requirements must be completed as follows:

- a. Proposal form that has been filled and signed by the appellant or his power of attorney.
- b. General power of attorney if it is handed to others.
- c. Copy of appellant’s identity card and general power of attorney if it is handed to others.
- d. Original certificate
- e. Permit of land utilization change if land utilization changes.
- f. Submitting proof of tax payment based on regulation
- g. Parcel of land site from land office
- h.

After the requirements aforementioned are completed, it is processed as the flow according to the figure below:



²⁴ Roni Ramadon, Interview in Padang. Dated April 18, 2019, at 20:00-21:30. Developer that ever has profit sharing agreement in customary *Ulayat* land.

After all certificate administration processes have been in accordance with the development plan in the field, it is the time to start the development process and to realize profit sharing agreement that has been made previously. In addition, to make the administration and technical process in the field easy, the portion for the developer that has been agreed, excluding the portion for land owner, the general power of attorney on sale or transfer of title to the developer party is directly done.²⁵

Conclusion

Based on the research result and discussion that have been explained in the previous chapter referring to the research problems, several conclusions can be taken as follows:

1. Customary Land in Padang is still there and still respected by Customary Law community and its existence is recognized by the laws. However, it is the perspective that because the recent development, *Ulayat* land becomes get forgotten by the era development. Therefore, the congruence between retarding *Ulayat* land scraped to keep its existence and the rapid era development is by making it the middle way for this condition by conducting profit sharing agreement. Even though from *Ulayat* land owner side, he/she still has lack of awareness to keep his/her *Ulayat* existence; besides, from developer side, it is not the popular option to choose profit sharing agreement.
2. The implementation of profit sharing agreement for housing shows that after profit sharing, *ganggam bauntuak* will occur that make *Ulayat* become more forgotten.
3. The implementation of profit sharing agreement for shophouse reveals that after profit sharing, it tends more to be kept and preserved by not selling it but by making it rent and obtaining benefits by sharing the money to the communal members that deserve.

In Padang, the implementation process of customary law land registration for the first time on the land that has not been registered yet in Land Office is done by fulfilling terms and conditions of Circular Letter of National Land Agency Regional Head of West Sumatera Province Number 500/ 88/ BPN-2007 Dated February 8, 2007. However, both the implementation of initial land registration, and land transfer, merging and splitting, based on the concept, it does not have significant difference; they are all in accordance with the standard regulation when it is related to the profit sharing working system.

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²⁵ Ismet Zaini. Interview in Padang. Dated April 8, 2019, at 14:33-15.30. developer that ever has profit sharing agreement in customary *Ulayat* land.

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