



Transfer of Rights of Customary Land to Private Parties: Reconstruction Thought of Right to Controlled by the State

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Abstract

Release of "Tanah Ulayat" or ("Customary Land") by "Masyarakat Hukum Adat" or "the Customary Law Community" (CLC) to the Legal Entity as stipulated in the Regulation of the Minister of Agrarian / Head of the National Land Agency No. 5 of 1999, with the intent and purpose of accommodating the procedures for releasing Customary Land, in reality has caused many legal problems in its implementation. Such legal problems has had an impact on the conflict between the CLC and large companies and even multinational companies. The research question arising of such Regulation, is there control mechanism over the unequal contract between the CLC and large companies of which results in adverse CLC. This study aims to analyze the legal issues arising from the implementation of such Regulation to the private party and provide a solution to create community welfare as mandated in Article 33 (3) of the 1945 Indonesia Constitution. It is expected that this research can provide input for the government on such Regulation to private parties, by doing reconstruction though of Right to Controlled by the State against Customary Land as a higher law. The research method used in this study is a normative juridical research, which is carried out by examining library materials. This research was referred to philosophical understanding of corrective justice from Aristoteles. Of which in analyzing the transfer of Customary Land to the private party, corrective justice is carried out by the judge in deciding cases of transactions that are voluntary or involuntary.

Keywords: *Release of Rights; Customary Land; Customary Law Community*

I. Introduction

The release of "Tanah Ulayat" or "Ulayat Land" or ("Customary Land") by "Masyarakat Hukum Adat" or "the Customary Law Community" (CLC) to the Legal Entity has been regulated by Minister of Agrarian Regulation / Head of BPN No. 5 of 1999 concerning Guidelines for the Settlement of the Customary Community Rights Issue (Regulation 5 of 1999). In Article 4 of the Regulation 5 of 1999 mentioned that the release of customary land to the Government, Legal Entity or non-CLC citizens by granting rights from the State in accordance with Law Number 5 of 1960 Concerning Basic Agrarian Principles (UUPA) by the CLC or CLC peoples with the applicable Customary Law procedures. Such

Regulation of which accommodates the release of the Customary Land has in fact led to many legal issues (Iwan Erar Joesoef, Unnes Law Journal Volume 4 No 03, 2018).¹

The legal issue of the release of the Customary Land has had an impact on the conflict between the CLC and large companies and even multinational companies. So according to the researchers, it is necessary to further study the regulation because there is no control mechanism over the unequal contract between the CLC and large companies which results in adverse CLC (Herlien, 2015: 309-310). Herlien Budiono refers to the view of P. Atiyah (in P. Atiyah, *An Introduction to the Law of Contract*, 5th Ed., Oxford University Press Inc., New York, 1995: 35). It said the contract has three basic objectives: (1) enforcing a promise and protecting the natural expectations that arise from it, (2) preventing enrichment or enrichment efforts that are carried out unfairly or incorrectly, (3) "to prevent certain kinds of harm. Besides that, Herlien Budiono added from the three objectives that the other essence of the contract objective is derived from the principle of harmony in Customary Law, namely: (4) the fourth goal of the contract is to strike a balance between one's own interests and those of the opposing parties.

One of the assumptions arising from these legal issues according to researchers is the existence of an unbalanced condition of possession of information ("Asymmetric Information") between CLC and large and multinational companies over the condition of Natural Resources in the Customary Land area. Morten Hviid in (Morten Hviid, 2000: Chapter 4200 A.2-3) mentions that the doctrine of "Asymmetric Information", is:

“Consider a dynamic contract between a principal and an agent, where initially the productivity of the agent is not known to the principal. In any separating equilibrium, productivity of the agent will be known to the principal after the first period. For the ‘bad’ type of agent, separation of involves a distortion leading to a lower utility in every period of the contract than would be the case if his true type was known. If the true type is really the bad type, the distortion can be removed after the first period when the agent’s type is known for sure. Hence if renegotiation is possible, it will take place – the contract is not robust against renegotiation. Moreover, since both parties want to renegotiate, it is difficult to see how the legal system can prevent this happening. Papers such as Dewatripont (1989) turn the focus on contracts which are renegotiation-proof, that is contracts where there is never an incentive to renegotiate. With comprehensive contracting this is possible, because any incentive to renegotiate later could have been foreseen at the time of agreeing the original contract. As is shown in Dewatripont (1989), Hart and Tirole (1988), Laffont and Tirole (1987, 1990) the possibility of renegotiation slows down the speed of revelation. Essentially this is caused by a trade-off between speedy revelation and the damaging incentive to renegotiation.”

The condition of having unbalanced information between the CLC and the private sector that results in an imbalance in the negotiations that results in the CLC not getting optimal results as mandated by Article 33 paragraph (3) of the 1945 Indonesian Constitution. Even though from the formal juridical aspect, the CLC has received attention from both the national, regional and global dimensions, but in the

¹ CLC is a legal association that has territorial territory, community and self-government system which in the positive national legal system of Indonesia is recognized as long as in reality it still exists and in accordance with national and state interests. In its existence in Indonesia's national development, it is seen that the CLC was marginalized by the many conflicts related to the Customary Land of the CLC with large and multinational companies which were detrimental to the CLC. Besides the problem of having an unbalanced information possession ("Asymmetric Information") between the CLC and large and multinational companies over the condition of Natural Resources in the Customary Land area, there is also no CLC participation in the Democracy process that can represent the aspirations of the CLC. Academically CLC can qualify as a government based on MD3 law or Representative Law (MPR, DPR, DPD and DPRD) Number 17 of 2014 and Election Law Number 7 of 2017. It means that CLC is a pseudo government ("pseudo government") which has area coverage (Customary Land) within the province and even across provinces. So it should have representation in the DPD (local representative) to realize the aspirations of the CLC in line with Article 33 (3) of the 1945 Indonesian Constitution.

sociological aspect of its application in the field there are still some problems, including problems regarding the recognition of the existence of customary rights and with regard to the use of customary forests. This is related to research on the results of the Seminar in solving the problems of Riau Malay CLC customary forests, which requires a Regional Regulation that can solve the problem of utilizing this customary forest (Sumardjono (a), 2009: 169). Then also the dispute regarding the customary land in Papua Province, which made a claim against the customary land from the CLC to the parties involved both the government, inter-ethnic groups and business entities such as PT. Freeport Indonesia, PT. Sinar Mas Group (Sumardjono (a), 2009: 183-194).

The main problem of conflict between CLC and legal entity (especially large multinational companies) is the perception of inequality between the Executive, Judiciary and Legislative institutions in particular in the consistency of compensation that results in the re-claim of Customary Land. Then there is no basis for a multi-dimensional approach (anthropology, sociology and others besides the juridical approach). This means that a formal juridical approach is just like the implementation of such Regulation 5 of 1999 mentioned above did not achieve effective results (Iwan Erar Joesoef, Unnes Law Journal Volume 4 No. 03, 2018).

Based on the background of the problem above, the questions that arise from this research are: (a) whether the implementation of the transfer of Customary Land Rights based on the Regulation 5 of 1999 to the private party raises legal issues for the CLC, and (b) how should the transfer of Customary Land Rights based on the Regulation 5 of 1999 to private parties that provide legal protection for the CLC to obtain welfare based on Article 33 paragraph (3) of the 1945 Indonesian Constitution? This research question will use the theory of corrective justice, as is the philosophical understanding of corrective justice stated by Aristotle.

II. Literature Review

A. National Land Law

1. Indonesian Nation Rights

In Article 1 paragraph (1) and (2) of the UUPA in relation to the Rights of the Indonesian Nation, attention needs to be paid to Article 1 paragraph (1) namely that the entire territory of Indonesia is the unitary land of all the people of Indonesia, which has been united as the Indonesian nation. Thus, the earth, water and space in the territory of the Republic of Indonesia whose independence was championed by the Indonesian people as a whole, also became the right of the Indonesian people, so it was not merely the rights of their owners. Likewise, lands in the regions and islands are not merely the rights of the indigenous people (CLC) of the region or island concerned. With this understanding, the relationship of the Indonesian people with the earth, water and space of Indonesia is a kind of customary right relationship, which is appointed at the highest level, which is the level of the entire territory of the country as explained in the Elucidation of the UUPA.

The statement that a National Right is a Customary Right means that in the conception of the National Land Law that such right is the highest control of land. This means that other tenure rights, including customary rights and individual rights to land referred to in the general explanation of the UUPA directly or indirectly, all originate from the Indonesian Nation's Rights (Harsono, 1997: 214-217). The relationship between the Indonesian people and the earth, water and space is eternal as Article 1 paragraph (3) of the UUPA.

The relationship of the Indonesian people with the earth, water and space is eternal, meaning that as long as the Indonesian people who are united as the Indonesian people still exist and as long as the earth, water and Indonesian space are still present, under any circumstances, there is no such thing as power will be able to break or negate the relationship. Thus, even though (at the time of 1960) the West Irian region, which is part of Indonesia's earth, water and space, is under the authority of the invaders, based on the provisions of this article, that part according to the law remains the earth, water and space the Indonesian nation as well as General Explanation II of the UUPA.

A relationship that is eternal means a relationship that will last uninterruptedly for ever. From the explanation of the meaning of article 1 paragraph (3) of the UUPA it turns out that the UUPA also provides a philosophical basis for the struggle to restore West Irian, now Irian Jaya (Papua), into the part of Indonesian Republic. We know that Irian Jaya has returned to the territory of the Republic of Indonesia based on the New York Agreement dated August 15, 1962 (Harsono, 1997: 216).

2. Right to Controlled by the State (RCS)

National Agrarian Law in accordance with the Presidential Decree of July 5, 1959 and Article 33 of the 1945 Indonesian Constitution, requires the State to regulate land ownership and lead its use, so that all land throughout Indonesia is for the greatest prosperity of the people, both individually and cooperatively. Article 33 of such Constitution : (2) Production branches which are important for the state and which control the livelihoods of the people are controlled by the state, (3) The earth and water and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people, (4) The national economy is based on economic democracy with the principles of togetherness, fair efficiency, sustainable, environmentally friendly, independent, and by maintaining a balance of progress and national economic unity.

Based on Article. 33 paragraph (3) of the 1945 Indonesian Constitution, the earth, water and space including natural resources contained therein are at the highest level controlled by the State as an organization of power for all people. The State's Right to Control (RCS) authorizes the State to: (1) regulate and administer the allocation, use, supply and maintenance of the earth, water and space, (2) determine and regulate legal relations between people and the earth, water and space, (3) determine and regulate the legal relations between people and legal actions concerning the earth, water and space. State authority originating from the RCS is used for the greatest prosperity of the people as Article 1 paragraph 2 of the UUPA.

The RCS is absolute. Without such mastery, prosperity is equitable and equitable will not be achieved. However, the right to control land by the state is impossible when the state through the government does not create legal certainty as a basis and guidance for its control. Lack of understanding of the meaning, substance of the intent and purpose of RCS on land is not impossible to be easily misused and misinterpreted that the state is an independent organ of power regardless of the aims and objectives it forms. If so, then the state alienates people from the ideals of their formation, namely a just and prosperous society that should be spelled out in every regulation, policy and attitude of action (Erwiningsih: 2009: 6-7).

3. Customary Lands

Van Vollenhoven introduced the term "Beschikking Recht" translated as "Customary Rights" and by Van Vollenhoven gave 6 characteristics of Customary Rights (Hutagalung, 2005: 120-122), namely:

- (a). Intra-Communal Relations: The main basis for establishing the nature of togetherness in customary rights lies in the mutual relationship between collective rights and individual rights: if an individual utilizes a piece of land, he will create a legal relationship between him as an individual and the land - at the same time then the communal power of the customary law community over land decreases; on the contrary, if the individual abandons the customary land, the communal power of the customary law community will reappear. Internal manifestations of customary land may be as individual dwellings or for use by the community as a unit: such as tomb land, nature reserve land, ulayat grasslands and lands provided to adat officials (bent land as wages for village heads during his tenure). The land supply system is officially monitored by the customary head.
- (b). Extra-Communal Relations: Adat rights have the power to come out as a collection of restrictions to control communal land by outsiders. Outside parties can exploit the land after paying the customary money first for the use of these lands and afterwards continue to pay rent. They can use rights but cannot sell, inherit or be guaranteed. They are also prohibited by customary law from entering communal land.
- (c). The Duties of the Customary Leader: The customary leader assume a double duty, they come out are the authorities and their assistants can master the special rights under the customary rights of the customary law community and they protect the land titles that are used for the common good.
- (d). Customary Rights Function: The customary rights of indigenous and tribal peoples (CLC) are not only limited to land and water, but also include wild plants and animals.
- (e). Two Dimensions of Customary Regions: Two dimensions of customary areas can be explored in 2 different ways, (1) villages for housing and producing food, (2) maritime areas (sea).
- (f). Boundary on Customary Regions: Through the boundaries of customary law areas, customary areas are highly protected from the demands of other indigenous and tribal peoples, unclear boundaries on the other hand can be found in uninhabited areas.

UUPA in Article 3, which provides the basis for the recognition of customary rights by stating two conditions, namely the requirements regarding their existence and their implementation, does not provide further explanation regarding the criteria for determining the existence of such customary rights. However, by adhering to the conception originating from customary law, it would be fair if the criteria for determining the existence of customary rights are based on three elements that must be met simultaneously, namely: (1) the subject of customary rights, namely the CLC that meets certain characteristics, (2) objects of customary rights, namely territorial land which constitutes their "lebensraum", and (3) the existence of certain authority from the CLC to manage the land of its territory, including determining relationships relating to the supply, designation and utilization and preservation of its territory (Sumardjono (b), 2009: 64-65).

4. Individual Lands

This rights stipulated in Article 16 of the UUPA as the implementation of the State's Right to Control as stipulated in Article 2 UUPA of which authorizes the State to: (1) regulate and administer the allocation, use, supply and maintenance of the earth, water and space, (2) determine and regulate legal relations between people and the earth, water and space, (3) determine and regulate the legal relations between people and legal actions concerning the earth, water and space. The State has the right as Article 4 UUPA that on the basis of the state's right to control as referred to in Article 2 UUPA, there are various

kinds of rights to the surface of the earth, called land, which can be granted to and owned by people both alone and together with other people and legal entities.

Article 16 of the UUPA stated that such rights are land rights such as: Right of Ownership (“Hak Milik”), Cultivation Rights (“Hak Guna Usaha”), Building Rights (“Hak Guna Bangunan”), Usage Rights (“Hak Pakai”), Rental Rights (“Hak Sewa”), Land Clearing Rights (“Hak Membuka Tanah”), The Right to Collect Forest Products, and other rights that are not included in the rights mentioned above which will be determined by law and rights that are temporary.

B. Customary Law Community (CLC)

There are 4 composition of the people in the customary law community in Indonesia as "indigenous native", namely: (1) legal communities in the community and special forms, (2) the environment of kings, (3) traders as people outside the community, and (4) the composition of the "governor". First, to understand the form and composition of legal alliance among the people in the archipelago, then especially people must know the meaning of "territorial" (regional) and "genealogical" factors for the emergence and sustainability of society. Legal society, where the "territorial" factor, which is shared together is bound to a particular region, is rare and if there is, the situation is meaningless. For example the Gayo tribe, consisting of "clans" who live scattered or spread and are only bound to one another by "clan" relations. Then in its development such a situation changes. Among many tribes there is a sign that they are also bound by "clan" ties, regardless of whether they inhabit the same area or not (Ter Haar, 2017: 6-22).

Such a society might be a mere "territorial" society but not a legal community, although it might be important to look at it from another angle. Or if the term "not a legal community" is also not the case, it means it can also be called a legal community ("rechtsgemeenschaappen") but which is very backward social position as a legal community. For example there are actions to go out together and regularly only on the anniversary of fellow ancestors whose tombs are a sign of continuation for all of them (Ter Haar, 2017: 6-22).

C. Legal Protection for Customary Law Communities

In Article 3 of the UUPA it is stated that the implementation of customary rights and similar rights from the CLC, as long as in reality there must still be in accordance with national and State interests and higher legislation. In addition to the national and regional dimensions, from the global dimension, attention to the importance of respecting and protecting indigenous rights has been manifested by the commitment of the international community which includes various international conventions that began with The United Nations Charter in 1945 (Sumardjono (a), 2009 : 156-164).²

² There are:(a).The United Nations Charter (1945),(b).The Universal Declaration of Human Rights (1948),(c).The United Nations Convention on the Prevention and Punishment of the Crime Genocide(1951),(d).Recommendation 104:ILO Recommendation Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations In Independent Countries (1957),(e).Convention ILO 107: Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations In Independent Countries(1957),International Labor Organization (ILO),(f).The International Convention on the Elimination of All Forms of Racial Discrimination (1966), (g).The International Covenant on Civil and Political Rights (1966),(h).The International Covenant on Economic, Social and Cultural Rights (1966),(i).Convention 169:Convention Concerning Indigenous and Tribal Peoples in Independent Countries (1989), International Labor Organization (ILO), (j). Rio Declaration on Environment and Development (1992), (k). 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).

Legal protection for CLC, besides being regulated in the Second Amendment of the 1945 Constitution (2000) Article 18 B Paragraph (2) and Article 28 I Paragraph (3), is also regulated in TAP MPR No. IX / MPR / 2001 Concerning Agrarian Reform and Natural Resource Management (SDA), which in Article 4 states the principles in agrarian reform and management of natural resources (Sumardjono (a), 2009: 157-158): (1). Maintain and maintain the integrity of the Unitary State of the Republic of Indonesia; (2). Respect and uphold human rights; (3). Respect the rule of law by accommodating diversity in law unification; (4). Welfare of the people, especially through improving the quality of Indonesian human resources; (5). Developing democracy, legal compliance, transparency and optimizing people's participation; (6). Achieve justice including gender equality in the control, ownership, use, utilization and maintenance of agrarian resources / natural resources; (7). Maintaining sustainability that can provide optimal benefits, both for current generations and future generations, while still taking into account the power and supporting capacity of the environment; (8). Carry out social functions, sustainability and ecological functions in accordance with local socio-cultural conditions; (9). Increasing integration and coordination between development sectors and between regions in the implementation of agrarian reform and management of natural resources; (10). Recognize, respect and protect the rights of the MHA and national cultural diversity of agrarian resources / natural resources; (11). Strive for a balance of rights and obligations of the state, government (central, provincial, district/city, and village or equivalent), communities and individuals; (12). Carry out decentralization in the form of division of authority at the national, provincial, district/city, and village level or the equivalent, relating to the allocation and management of agrarian resources / natural resources.

D. Welfare State

The definition of a welfare state has been given by many experts from various disciplines. First, most generally accepted notions of the welfare state as a matter in which the Government plays a positive role in promoting social welfare. A prosperous country is also something that gives everyone full equality. A prosperous state must remove obstacles that prevent full equality and are a strong vision and drive in addition to the process of institutionalizing a prosperous state. Second, the welfare state is also interpreted as a minimum standard of social welfare. In many countries, the essence of a prosperous state lies in the minimum standards of protected Government: income, nutrition, health, housing and education. Third, the welfare state is related to the transfer of payments and the direct provision of social services. Fourth, a prosperous state is where every principle political community provides or tries to provide the needs of its members as desired by its members. Fifth, as a model for society (Nugraha, 2004: 44-50).

Safri Nugraha cites Briggs as providing a prosperous state as:

“...in which organised power is deliberately used (through politics and administration) in an effort to modify the play of the market forces in at least three directions – first, by guaranteeing individuals and families a minimum income irrespective of the market value of their property; second, by narrowing the extent of insecurity by enabling individuals and families to meet certain ‘social contingencies’ (for example, sickness, old age and unemployment) which otherwise lead to individual and family crises; and third, by ensuring that all citizens without distinction of status or class are offered the best standards available in relation to a certain agreed range of social services’.

Safri Nugraha also quoted Kaufmann, who tried to classify the dominant perception of the welfare state as follows:

- 1) *A state that provides economic security and social services for certain categories (or all) of its citizens;*
- 2) *A state that takes care of a substantial redistribution of resources from the wealthier to the poor;*
- 3) *A state that has instituted social rights as part of citizenship;*
- 4) *A state that aims at security for all and equality among its citizens;*
- 5) *A state that it is assumed explicitly responsible for the basic well-being of all its members.*

Thus many welfare states involve Government activities, the concept of a prosperous state has developed extensively everywhere. Many applications have been tried by countries in the implementation of a prosperous state. During the late 1980s, a strong belief in checking the strength of wealthy nations and strengthening the existing private sector emerged in many countries. An illustration of how people in these countries believe that (Nugraha, 2004: 44-50): *Unless the welfare state is tempered and the role of private sector is strengthened, poverty and dependency will increase, not diminish, and the role of government will grow increasingly intrusive and produce further unforeseen negative consequences.*

III. Research Methods

Legal research is different from other social science research (Sudikno, 2001: 28-29). Law is the science of law practice so that law and law practice are interrelated and support one another. The goal or object of legal research is law or the norm. Researching essentially means searching, what is sought in legal research is the norm or *das sollen*, not events in the sense of fact (*‘das sein’*). The definition of the norm here includes the principle of law, legal norm in the sense of value, concrete legal rules and legal system. Therefore, legal research in the sense of examining the method or norm is called normative legal research.

The research method used in this study (Soerjono, 2013: 51),³ is legal research (Peter Mahmud, 2010: 29).⁴ Legal research that does not address the dichotomy of legal research as normative and sociological research (Christina L. Kunz, 1996: 2-4).⁵ This legal research uses the type of legal research activities that is applied research (Peter Mahmud, 2010: 31):⁶ *Applied research is original work, which is undertaken to acquire new knowledge with a specific practical application in view. Its aim to determine possible uses for findings of basic research or to determine new methods or ways of achieving some specific and predetermined objective.* In legal research there are four types of legal research, namely, *doctrinal research, reform-oriented research, theoretical research, dan fundamental research.* This legal research uses this type of research *reform-oriented research: research which intensively evaluates the adequacy of existing rules and which recommends changes to any rules found wanting.*

³ Methodology means: " ... the process, principles, and procedures by which we approach problem and seek answers. ...".

⁴ Definition of legal research, as cited from Morris L. Cohen: "Legal Research is the process of finding the law that governs activities in human society". Furthermore stated that: "It involves locating both the rules which are enforced by the states and commentaries which explain or analyze these rules".

⁵ Kunz explains the legal research as one of several steps in resolving the problem of the clients of the lawyers in law office. It is the central of ethical obligation of which in line with the intention of the clients that is "service to the legal system". Incompetent legal research can have serious consequences for these lawyers. Failure to understand the law can lead to disciplinary action. Inappropriate research can also result in malpractice responsibilities to clients.

⁶ Besides the type of "applied research", there are several other types of legal research activities, namely: "pure basic research", "strategic basic research", and "experimental development".

The nature of this research is qualitative normative juridical (Creswell, 2002: 1-3). To answer the legal issues in this study, a legal study was conducted. Legal research is an activity of know-how in legal science, legal research is carried out to solve the legal issues faced (Peter Mahmud, 2010: 60). Normative juridical research methods are also called library legal research is legal research conducted by examining library materials or secondary data (Soerjono Soekanto and Sri Mamudji, 2013: 13). This secondary data includes primary, secondary and tertiary legal materials. To obtain research results that can be scientifically justified, the writing of this study uses the theory of corrective justice.

Philosophical understanding of corrective justice from Aristoteles (Hans Kelsen, 1957: 110): *“Corrective justice is that which supplies a corrective principle in private transactions... those which are voluntary and those which are settling disputes and inflicting punishments upon delinquents”*. In this circumstances, specifically in analyzing the transfer of Customary Land to the private party. According to Aristotle, corrective justice is carried out by the judge in deciding cases of transactions that are voluntary or involuntary. In the difference of voluntary or involuntary transactions Aristotle explains as the difference between civil law and criminal law: *“Examples of voluntary transactions are: selling, buying, lending at interest, pledging, lending without interest, depositing, letting for hire, - these transactions being termed voluntary because they are voluntarily entered upon”* (Hans Kelsen, 1957: 128). He also explains: *“Of involuntary transactions some are furtive, for instance, theft, adultery, poisoning, procuring, enticement of slaves, assassination, false witness. Other are violent, for instance, assault, imprisonment, murder, robbery with violence, maiming, abusive language, contumelious treatment. All these acts are crimes which are punishable under positive law”* (Hans Kelsen, 1957: 128-129).

Aristotle explained that corrective justice is equal, but equality in this case is not based on geometry but based on arithmetic proportions. It was explained that: *“It is not equality of two ratios. It is equality of two things, especially of two losses or two gains. A typical example is barter, which may stand for any voluntary transaction. Corrective justice requires that the service and counter service constituting the barter should be equal. The loss of one party by doing a service to the other party (“doing a service” comprising also making a gift to other party) shall be equal to the loss of the latter by doing a return service (“doing a return service” comprising also giving a return gift); and vice versa: the gain of one party in receiving service from the other should be equal to gain of the latter by receiving a return service from the former”* (Hans Kelsen, 1957: 128-129).

The rationalization or concretisation of the idea of justice can be contained in a Stabilization and Renegotiation clause in the contract or in the form of a law. In the agreement to transfer Customary Land rights or the use of Customary Land and legislation related to Customary Land rights, the mechanism can be applied in the legal system and sub-legal system of the transfer or utilization of the Customary Land rights of the CLC. The research began by reviewing and analyzing the Ulayat Land based on the UUPA. Furthermore, an analysis was carried out on Regulation 5 of 1999. Then this study continued with analyzing the legal protection of CLC. In analyzing the problem, the writing of this study uses a conceptual approach and a statutory approach (Johnny Ibrahim, 2006: 299-322).⁷

⁷ Explained, the concept (English: concept, Latin: conceptus) of concipere - which means to understand, accept, capture - is a combination of the words together and fast - catch, tame. The concept has many meanings. Concepts in the relevant sense are abstract elements that represent classes of phenomena in a field of study that sometimes refer to universal things abstracted from particular things. One logical function of the concept is to bring up, objects that attract attention from the point of view of the practical and the angle of knowledge in the mind and certain attributes. Thanks to this function, concepts successfully combine words with certain objects. This incorporation makes it possible to determine the exact meaning of words and use them in thought processes.

IV. Discussion

A. Reclaiming of Customary Land

In the case of the Ancestral-land problem, the United Nations Commission stated that the "Indigenous Law Community" ("ILC") must be given a clear legal status of land for their present needs and future development (Commission on Human Rights, 5 April 1994).⁸ Issues that arise regarding the release of the Customary Land. Inequality of perception between the executive, judicial and bureaucratic bureaucracy in the consistency of compensation compensation results in the reclaiming of Customary Land. Efforts should be made to ensure that all legal acts of relinquishment of customary land rights are carried out with those who own the land according to the applicable Customary Law, accompanied by written evidence of the relinquishment of the land witnessed well by all parties who according to Customary Law have a legal relationship with the Customary Land, or by the authorized agency.

The issue of the release of customary land by the CLC to a Legal Entity that is accommodated by Regulation 5 of 1999,⁹ has an impact on the conflict between the CLC and large companies and even multinational companies. So that it needs further study of the regulation because there is no mechanism of control over unbalanced contracts between the CLC and large companies that have an adverse effect on the CLC.¹⁰ Besides that there are also conditions of ownership of information that is not balanced ("Asymmetric Information") between the CLC and large and multinational companies over the condition of Natural Resources in the Customary Land area.¹¹

⁸ The Commission stated that: "Indigenous communities, peoples and nations are those who, having a historical continuity with pre-invasion and pre-colonial societies that developed in their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems. This historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors: (a) Occupation of Ancestral lands, or at least of part of them; (b) Common ancestry with the original occupants of these lands; (c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.); (d) Language (whether used as the only language, as the mother tongue, as the habitual means of communication at home or in the family, or as the main, preferred or habitual, general or normal language); (e) Residence in certain parts of the country, or in regions of the world; (f) Other relevant factors." The Commission also stated that: A provision covering some of the elements of this article is contained in article 16 of ILO Convention No. 169. In article 16, paragraph 4, the ILO text refers to cases where indigenous peoples do not return to their lands. In such cases, indigenous and tribal peoples are to be provided with "lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be compensated under appropriate guarantees".

⁹ In Article 4 of Regulation 5 of 1999, it is stated that the release of customary land to the Government, Legal Entity or Individual is not a citizen of the CLC by granting rights from the State in accordance with the UUPA by the CLC or CLC residents with the applicable Customary Law procedures.

¹⁰ Referring to Atiyah's view (in Atiyah PS, *An Introduction to the Law of Contract*, 5th Ed., Oxford University Press Inc., New York, 1995, p. 35) it is said that contracts have three basic objectives: (1) enforcing a promise and protecting reasonable expectations that arise from it, (2) prevent enrichment or efforts to enrich themselves carried out unfairly or improperly, (3) "to prevent certain kinds of harm. Besides that, Herlien Budiono added from the three objectives that the other essence of the contract objective is derived from the principle of harmony (harmony) in Customary Law, namely: (4) the fourth goal of the contract is to strike a balance between one's own interests and those of the opposing parties.

¹¹ Stated that the Doctrine *Asymmetric Information*, is: "*Consider a dynamic contract between a principal and an agent, where initially the productivity of the agent is not known to the principal. In any separating equilibrium, productivity of the agent will be known to the principal after the first period. For the 'bad' type of agent, separation of involves a distortion leading to a lower utility in every period of the contract than would be the case if his true type was known. If the true type is really the bad type, the distortion can be removed after the first period when the agent's type is known for sure. Hence if renegotiation is possible, it will take place – the contract is not robust against renegotiation. Moreover, since both parties want to renegotiate, it is difficult to see how the legal system can prevent this happening. Papers such as Dewatripont (1989) turn the focus on contracts which are renegotiation-proof, that is contracts where there is never an incentive to renegotiation. With comprehensive contracting this is possible, because any incentive to renegotiate later could have been foreseen at the time of agreeing the original contract. As is*

Thus the main problem of conflict between CLC and Legal Entity (especially large multinational companies) is the perception of inequality between the Executive, Judiciary and Legislative institutions in particular in the consistency of compensation that results in the re-claim of Customary Land. Then there is no basis for a multi-dimensional approach (anthropology, sociology and others besides the juridical approach). This means that formal juridical approaches such as the implementation of Regulation 5 of 1999 above do not achieve effective results. From this problem, the writer proposes the idea of forming the CLC representative in the Regional Representative Council so that the CLC can obtain the existence and protection of Natural Resources of which available in Customary Land owned by CLC.

Then the transaction which is a legal act of the two parties over by B. Ter Haar bzn divided into two groups (Ter Haar, 2017: 82-114).¹² First, the action sequence whose object are the land. This transaction is an element of legal action is the simultaneous transfer of rights to land with cash payments ("cash" - "contingent handling") (Iwan Erar Joesoef, Veteran Law Review Volume 1 No 1, 2018).¹³ In this case, assistance from "community leaders" or "customary leaders" ("leaders of CLC") is needed so that when or when a transaction is made, it is stated before the leader of CLC. Partial payments must be seen as cash (full) and the rest of the payment is considered an ordinary money loan. Examples are: (a) Land Pawn, Land Selling, (b) Land Lease by payment of rent in advance, (c) Granting of land to outsiders of ILC by transferring ownership rights to the King, Judge, leader of the community (leader of CLC) to get protection, as a fine or gift or as a sign of taking the child ("adoptie taken"), (d) Grant (related to inheritance law). These agreements in Indonesia are always made in a letter ("deed") signed or thumbprint of the parties under its name, signed by the customary leader (leader of CLC) where the land is located, also by other community officials, heirs, owners the land side by side, and those present as witnesses to add certainty.

Second are the transaction of which the object are not the land. This transaction is an agreement related to land where land is an important factor but the object is not land. In this case need not be done in a "light" before the Leader of the CLC but fairly among the parties, rarely made "identity documents" ("deed") on the agreement, the applicable period of the agreement within one year of harvest, the agreement can be made by anyone (owner land, pawn buyers, land tenants on annual sales, revenue collectors). There is a difference between the "agreement to work the land for wages" and the "part agreement for planting results", where in the agreement for part of the planting, the land owner does not intervene again with the tiller, the land owner surrenders fully to the party working on, can also be promised to hand over rice seeds, cattle to cultivate the land, then the land owner will receive his share (one-half, one-third or another portion) from the crop yield obtained by the tiller.

shown in Dewatripont (1989), Hart and Tirole (1988), Laffont and Tirole (1987, 1990) the possibility of renegotiation slows down the speed of revelation. Essentially this is caused by a trade-off between speedy revelation and the damaging incentive to renegotiation".

¹² Regarding the agreements in legal action of the two parties (two sides), in general it can be said that if small communities (CLC) have not existed or disappeared, then the individual rights (individual) on land are directly controlled by the law of the King's environment -Raja or by the Governor - where the agreements were first subject to regulations which may be issued by the legislators ("wetgever") for the first time.

¹³ The implementation of the conception of Customary Law such as "Terang, Riil dan Tunai" (real, cash and carry transfers) under Indonesian Positive Law still faces many problems. The legal problem is the UUPA do not give the definition clearly of the Customary Law conception of "Light, Real and Cash" (real, cash and carry transfers). As the case in the Court of the first degree at Jombang (Eastern Java) in 2014, where the Judge canceled the purchasing agreement of the right of ownership of the deed issued by the Land Deed Officer (PPAT) due to invalid agreement. The acceptance agreement as a result of the payment of the transaction using the current account (current account) payment, of which the seller does not withdraw the payment at the receiving bank at the time of maturity. The other legal problem is, pass the maturity day, the payment was not in full payment (Rp.200,000,000) but only a part of the agreed payment (Rp.125,000,000). See Iwan Erar Joesoef, "The Existence of Adat Law Related to Land Right Transaction after Unification of Indonesian Agrarian Law: The Problem of Legal Transplants ". Veteran Law Review Volume 1 No. 1, November 2018, Issued by Faculty of Law University of National Development "Veteran" Jakarta.

B. Government Policies

In Indonesian legal politics towards "Tanah Ulayat" or "Tanah Adat" ("Customary Land ") in Article 3 UUPA does not provide an important definition that can be used to formulate material. This gives a problem of interpretation which is likely to cause the absence of legal certainty in its implementation (Sukirno, 2018: 143-145). The absence of a definition of Customary Land in positive law based on UUPA has an impact on various laws and regulations implementing UUPA that will be made with the sectoral definition of Customary Land itself. Then after Indonesia's reforms in 1998, at the insistence of Non-Governmental Organizations ("NGOs") who were worried about conflicts over ancestral lands, the government then issued Regulation 5 of 1999 (Sukirno, 2018: 140-143).¹⁴

The Political Law of the Government in Articles 2, 3 and 5 of UUPA that subordinates this to the extreme by treating all land that is not certified to be under the direct authority of the state or "Right to Controlled by the State" (RCS) – "Hak Menguasai Negara" ("HMN") (Aslan Noor, 2006: 99).¹⁵ So in relation to Customary Lands there are three arguments in that context, namely: (1) the customary rights of the occupants are not included in the list of customary rights which are converted into rights which are guaranteed rights according to positive law UUPA, (2) by not being registered and obtaining a formal certificate according to UUPA means that any rights that have ever existed are lost due to lack of registration efforts or due to abolition, (3) as stipulated in Article 8 of the Minister of Agrarian Regulation No. 2 of 1962 that the transfer of ownership of customary lands without authorization from the village head or customary head would result in the new owner only receiving usage rights for five years, after which the land would be transferred to the state (Sukirno, 2018: 9).

Thus there are problems in interpreting RCS in the Politics of Indonesian Land Law Article 2 UUPA which is a derivation of Article 33 paragraph (3) of the Indonesian Constitution 1945, where in the implementation of RCS is only limited to state control which is not continued with the aim of state control to be used as much as possible for the prosperity of the people. This incomplete interpretation of RCS has resulted in the "nationalization" of natural resources with all its implications, including denying or negating CLC's rights over natural resources. Maria SW Sumardjono suggested that a review of Article 33 paragraph (3) of the 1945 Indonesian Constitution needs to be improved so that the implementation of the provisions would be more for "people centric" rather than "states centric". This means that the implementation of RCS should not limit the existence of Customary Lands, because the relationship between the state and CLC is an equal relationship. The limitation is only permitted if it violates the rights of others or is determined by the law and its implementation must not be separated from its purpose, namely to the maximum extent possible for the prosperity of the people.¹⁶

¹⁴In Regulation 5 of 1999 the Customary Law is defined as: "Customary Lands and similar to that of the customary law community (hereinafter referred to as ulayat rights), is an authority which according to customary law belongs to certain customary law communities over certain areas which constitute the environment its citizens to take advantage of natural resources, including land, in the area, for their survival and livelihood, arising from a hereditary and internal relationship that is hereditary and uninterrupted between the customary law community and the area concerned ". Regulation 5 of 1999 was revoked by the Government in 2015 but in 2016 was declared valid again.

¹⁵Notonagoro's legal expert provides an understanding of the right to control the state (HMN) in Article 33 paragraph (3) of the 1945 Constitution, that the terms must be controlled and used, used as a purpose rather than controlled, although the conjunction and, so it seems, two things which has nothing to do in a causal relationship. While understanding is mastered, it does not mean that it is owned, but to the state as the organization of the highest authority given authority (Article 2 paragraph 2 UUPA / 1960). The meaning of being controlled by the state is not limited to the regulation, management, and supervision of the use of individual rights, but the state has an obligation to participate actively in the achievement of people's welfare-cited Notonagoro, *Politik Hukum dan Pembangunan Agraria di Indonesia ("Political Law and Agrarian Development in Indonesia")*, Jakarta: Pancuran Tujuh, 1974, page 79.

¹⁶In the fourth Amendment of the 1945 Constitution to Article 33 it is mentioned: (1) The economy is arranged as a joint effort based on the principle of family affairs, (2) Production branches which are important for the state and which control the livelihoods of the people are controlled by the state, (3) The earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people, (4) The national economy is organized based on economic democracy with the principles of togetherness, efficiency, fairness, sustainability, environmental awareness,

Returning to Article 1 of UUPA which states that the highest hierarchical control over land rights in Indonesia is the Indonesian Nation's Rights. It was the Indonesian people who in 1945 during the independence of the Indonesian people, gave power to the State to be regulated, managed and distributed to the Indonesian people in the form of land rights for the greatest prosperity of the people. Thus, the original land in Indonesia belonged to the Indonesian people, both individual and communal or collective lands such as communal land, both public and civil. Although the land is individual, the individual understanding in this case is the individual in the conception of customary law (individuals who have a communal or public nature).

In line with this conception, Van Vollenhoven stated that customary land or customary land cannot be traded. This he explained in the "beschikkingrecht" legal theory was the highest law regarding land in Dutch civil law and constitutional law, which covered the entire archipelago in Indonesia. In his theory, Van Vollenhoven gave 6 characteristics of Indonesian land law and agrarian law, one of which is that land belonging to the CLC should not be sold off to another party forever¹⁷ (Soesanggobeng, 2012: 166-168).

C. Conflict of Customary Land and Constitutional Court Decision

The Customary Land conflict data from the National Human Rights Commission stated that the agency had received 700-800 cases of land conflicts between the company and the local community until the end of 2011. Data from the Archipelago Indigenous Peoples Alainsi (AMAN) states that until the end of 2011 there were at least 530 violent conflicts in indigenous peoples' territories. Data from Sawit Watch states that it has handled 663 cases of disputes between oil palm plantation companies and the community. With regard to these conflicts the Indonesian Constitutional Court has issued a ruling namely in Decision of the Constitutional Court No. 35 / PUU-X / 2012 which decides that the existence of customary forests is no longer included as part of state forests.

The Constitutional Court has in some decisions interpreted CLC as a public right, which is different from the character of private rights in the realm of civil law. The state is not in a position to have natural resources, but is present to formulate policies, make arrangements, conduct arrangements, conduct management, and conduct oversight. So the State must pay attention to existing rights both individual rights and collective rights owned by the CLC (communal rights), CLC rights and other constitutional rights owned by the community and guaranteed by the constitution (Tody Sasmitha, Haryo Budhiawan, Sukayadi, 2014: 71). Therefore, for conflicts over ulayat land disputes that have been transferred to the private sector, the government must facilitate their resolution based on corrective justice through a judicial process based on positive Indonesian law. As for the use of customary land in the form of long-

independence, and by maintaining balance of progress and national economic unity, (5) Further provisions regarding the implementation of this article are regulated in the law.

¹⁷The six special characteristics or characteristics as identification of the Indonesian Land Law and Customary Land (beschikkingrecht), are: (1). The legal community with its leaders and citizens (de rechtsgemeenschap zelf en haar leden) can freely use and cultivate all forest land (woestgeblevend grond) that has not been controlled by someone in the legal community environment (beschikkingkring) to open it (ontginnen), establish a village (*een gehuchtstichten*), hunting (jagen), collecting forest products (producten zamelen), herding and grazing (weiden); (2). Foreigners (vreemden) can only do things like this in number 1, after obtaining permission from the legal community, because each violation is declared as an adat delict called 'thief utan'; (3). Every stranger, but sometimes even members of the legal community, are required to pay an income (recognitie), to be able to collect and enjoy the results of land in the customary law community; (4). The customary law community (de rechtsgemeenschap) is responsible for any violations of the law (aansprakelijk voor enkele bepaalde delicten) that occur within the jurisdiction of the legal community (beschikkingkring), the perpetrators cannot be held accountable because they are unknown (niet op een dader te verhalen); (5). Customary law communities still have the right to control and supervise agricultural land (bouwvelden) within their legal community; (6). Indigenous and tribal peoples' land must not be sold to another party for ever. This sixth trait is emphasized by Van Vollenhoven as the most important trait, by saying - (this is the point).

term agreements or leases, the rationalization or concretisation of the idea of justice can be stated in a Stabilization and Renegotiation clause in the contract or in the form of a law.

Conclusion

In the positive law of Indonesian land, it has been stipulated in Article 1 of the UUPA that the entire territory of Indonesia is the homeland of all Indonesian people who are united as the Indonesian nation, and the relationship between the Indonesian people and the earth, water and space is eternal. This is in line with Van Vollenhoven's "beschikkingrecht" theory which states that customary land law is the highest law regarding land in Dutch civil and constitutional law, which covers the entire archipelago in Indonesia. So that the Land of Ulayat cannot be traded or transferred to other parties forever.

The government in its position as the holder of the Indonesian nation's power (RCS) is not in a position to have natural resources, but is present to formulate policies, make arrangements, conduct arrangements, conduct management, and conduct supervision. The government must pay attention to the existing rights both individual rights and collective rights owned by the CLC (communal rights), CLC rights and other constitutional rights owned by the community and guaranteed by the constitution. So that the meaning of Article 3 of the UUPA in which the State recognizes the existence of the rights of the CLC including Customary Land, as long as in reality there must still be reinterpreted that the State guarantees and preserves the existence of the rights of the CLC including the Customary Land for the greatest prosperity of the people.

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