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RESOLUTION OF LAND DISPUTES IN A PERSPECTIVE OF INDONESIA'S LAND LAW REFORMATION

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Abstract: *Land disputes are steadily escalating currently. One of the main reasons is the inevitably growth of population and hence increasingly higher needs of land, while the availability of land is of course stable (finite).*

This condition brings on some crises and frictions among communities and triggers uncontrollable amounts of land disputes. To make matters worse, the land disputes are now of high complexity. That is in line with the dimensions of land which now include not only legal dimension but also administrative, economic, politic, social, cultural, and even magic-religious ones. For the nation, land has a strategic dimension. Moreover, the incompleteness of regulations on the institutions and authorities in land dispute resolutions also open opportunities for land speculators or land mafia gangs. These may obstruct the development and impede prospective investors from entering into our nation, particularly for direct investments.

Today, there are two institutions with competence of resolving land disputes in Indonesia, namely general courts and public administrative courts. Therefore, their decisions are often incompatible or contradictory against one another even for the same case. The existing condition is very unsupportive to communities and to the survival of development in Indonesia. Therefore, it needs to study soon the issues in land dispute resolutions so as to eliminate or at least to minimize the occurrences of land disputes in our nation.

The focus of this research was on how are the effective measures of resolving land disputes as seen from institutional and competence aspects. The method used in this research was a juridical-normative method with a legal historic and legal comparative approach. From the results of study and analysis it could be concluded that, in short term, the competence of law enforcers, particularly the judges of district courts and public administrative courts, should be improved; in long term, it needs to establish an independent, specialized court with an authority to deal with land disputes on an ad hoc basis where all judges should be of high competence in the field of land laws and such court should be provided for in the new Bill of Land Law; besides, the resolutions of land disputes outside a court, such as arbitration, should be developed.

Keywords: *Land dispute resolution, in perspective, National land law reformation*

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A. INTRODUCTION

Given the large amount and high complexity of the land disputes, it cannot be always achieved a solution in a relatively short time period. Therefore, it is reasonable to draw on the experiences of those who were related to any dispute resolutions in attempt to seek the best solutions for all parties. From the existing condition, the author tried to investigate the following: What is the perspective of land dispute resolutions in a framework of national land law reformation?

The discussion of land dispute resolutions nationally begins with a description of the types of disputes. It is followed by the discussions on the measures of resolutions that have been undertaken so far and then the constraints encountered and the alternative solutions.

B. LAND DISPUTE

Land dispute is a conflict between two parties or more where any party perceives as being or is actually damaged by other party related to the utilization or possession of a land that may be resolved by either an amicable way or by a court. According to National Land Agency, a land dispute is a disagreement over: a. the validity of a right; b. a grant of a land right; and c. a registration of a land right.

Seen from its substance, a land dispute includes the issues relating to:

1. Usage and/or utilization and possession of a land right;
2. Validity of a land right;
3. The procedures of granting a land right; and
4. Registration of a land right including a transfer and issuance of an evidence of its land right ownership.

Furthermore, seen from the disputants, there are some parties, namely:

1. Individual(s) against other individual(s)
2. Individual(s) against legal person(s)
3. Private legal person(s) against other private legal person(s)
4. Individual(s) against public legal person(s) (central government/regional government/BUMN/BUMD);
5. Private legal person(s) against public legal person(s)
6. Public legal person(s) against other public legal person(s)
7. Individual(s) against both private and public legal person(s)

1. *Sarjita (2005), Techniques and Strategies of Land Dispute Resolutions, Tugujogja Pustaka, Yogyakarta.* Pg. 9.

C. LAND ISSUES THAT RAISE LAND DISPUTES

Agrarian reformation[2] is one of the public demands during the 1997-1998 economic crisis, because the access of people to land then had apparently been clogged resulting from the development in the *Orde Baru* (New Order) era that pursued merely economic growth. It is one of the triggers of public unrest which eventually provoked land conflicts.

From diverse opinions on the roots of problems above, essentially the conflicts of land affairs that turn into land disputes in Indonesia resulted from:

1. The less orderliness of the land administration in the past.
2. Unbalanced land possession and ownership structures.
3. Negative publication system of land registration.
4. Increases in needs of lands, so the prices of lands become uncontrollable because of the immoral act of land mafia.
5. Overlapping legislations, both horizontally and vertically, as well as the regulated substances.
6. The still many abandoned lands.
7. The less carefulness of notaries and Land Deed Issuing Officers in doing their duties.
8. There is no yet a unity of perceptions or interpretations between law enforcers, particularly judges, on applicable land legislations.
9. The law enforcers have no yet a commitment to implementing prevailing legislations consequently and consistently.

The understanding on the diverse roots of problems can be made as a basis in any attempt of resolving the land disputes that occur.

D. THEORY FRAMEWORK

In researching the nasional land law development theoretically, it can not be separated from the law theory of development proposed by Mochtar Kusumaatmadja. This approach is a scientific legal approach and at once as a phylosophycal legal approach which becomes a central point in verifying national land law concepts especially in land dispute resolution. According to the law theory of development, law must have a function as an instrument of people's reformation. The law theory of development is a transformation from the law theory from Roescoe Pound. Yet it is more important that the law must be able

2. *Darwin Ginting (2010), Law of Land Property Right in Agribusiness, Unpad Press, Bandung.* Pg. 120.

to make a human being as a subject of law not as a nom living subject. That is exactly used the law as an instrument to reform the mindset of civilized people. To support the law theory of development, it is used rechts politiek theorien in the reference of anglo-saxon known as a legal policy theory which is related with national land law politics.

E. RESEARCH METHODE

The writing of this paper used statute approach methodology. The statute approach was carried out by studying on ontologism principle leading a statute, a philosophical foundation of statute rule. Than it used the primary sources of outhorities and the secondary sources of outhorities. And it also used a library research which was done to get : firsh, the primary sources of outhorities connecting with principle rules and statute rules which manage national land law especially in resolving land disputes. Through the primary sources of outhorities, it will be found law policy forms particularly in relating with land dispute resolution patterns which are in accordance with the need of people (society) and era demand.

Second, the secondary sources outhorities give a description of the primary sources of outhorities such as the result of previous research, scientific work from law experts and non law expert which have a connetion with this research. Third, the tertiary sources of authorities which give a direction and description to the primary sources of authorities.

Processing and analyzing the data used descriptive dualitative so that at the end, it can sytimize land dispute resolution patterns in accordance with a new paradigm in national land law development.

F. LEGAL BASIS OF RESOLVING LAND DISPUTES

In general, the resolution of land settlement has been provided for in procedural laws (formal laws). Therefore, the disputants, government, Arbitration Board, and judicial agencies should comply with, apply, and refer them in resolving land disputes, including the principles and material law provisions, that is, as stipulated in Law Number 5 of 1960 on Basic Regulations of Agrarian Fundamentals.[3]

The primary principle to consider in resolving a land dispute is land possession and ownership principle. The principles that prevail as the basis of land possession and ownership and land protection that the national land law provides to the

3. Arie S. Hutagalung (tahun), *Dissemination of Thoughts about Land Law Issues*, …[penerbit], … [kota]. pg. 377.

holder of land rights as stated in the explanation of the 1945 Constitution are as follows:[4]

1. Any land possession and utilization by anyone and for whatever need should be based on the right of land provided by the national land law.
2. Land possession and utilization without a legal basis of right are not allowed, and even threatened with a criminal sanction (Law No. 51/Prp of 1960) on a prohibition of utilizing a land without a permit from those who has a right or his or her authorized representative.
3. Land possession and utilization based on a right provided by the national land law is protected by law.
4. Under a normal condition, an acquisition of land by anyone and for whatever need (including projects for public interest) should be made in an amicable way to reach a mutual agreement on the compensation as a right of the land owner.
5. Related to the point above, under a normal condition, an acquisition of a needed land should not be made by force in any form and by the acquirer against the will of the holder of the land right to give up his or her own and or to accept a compensation.

TAP MPR (General Assembly Declaration) Number IX/MPR/2001 contains a guidance on the importance of dealing with land issues by resolving land disputes relating to agrarian resources that have appeared so far and as well as anticipating any disputes in the future in order to secure the successful implementation of law enforcement on a basis of the principles as intended in Article 6 paragraph (1) letter d and paragraph (2) letter e of the declaration.

G. RESOLUTION OF LAND DISPUTES

In juridical terms, land issues are not simple to solve. This is because land issues involve some different agencies directly or indirectly related to any claims/ disputes brought before a court. Therefore, a unity of understanding on concepts is required for the existence of a unity of perceptions that may produce solid, fair decisions for those who seek a justice.

Therefore, the application of criminal law and criminal sanction should be made as a last resort (*ultimum remedium*).

4. Arie S. Hutagalung, *op. cit.* pg. 378.

1. Resolution of Disputes by Court

Land disputes have since long ago been a complex legal issue and have a range of dimensions and thus cannot be resolved quickly.[5] For lands have not only juridical dimension, but also economic, political, social, and religious-magic ones, and even for a nation they have a strategic dimension.[6] Today, in fact, the economic dimension cannot be controlled by the nation due probably to the apparently so powerful land mafia. It had been a concern of Bung Hatta,[7] former Vice President of Republic of Indonesia and one of the duo Indonesia independence announcers, when he suggested that land should not be made as a commodity (should not be made as an object of trade and sold merely for moneys) and it is the essence of Article 13 of UUPA, that is, both land monopoly and speculation are forbidden. From the condition it can be seen that the resolution of land disputes has a diverse aspects and therefore is complex, and thus it needs a strong competence and a superior national insight.

A resolution of land dispute by court is often time consuming. The long time of legal processes is because a trial usually involves no less than 3 or 4 stages.

First, at district court level, now a trial shall theoretically be made in a relatively short time, given a guidance from Supreme Court asserting that a legal case should be limited to no longer than 6 (six) mounts. However, in practice, it may take mounts, if not years.[8]

Second, at appeal court, like at the district court, legal cases are often going so long. In addition, hearings by the courts are often haunted by an assumption that the court more prioritizes its self interests, or well known as judicature mafia.[9]

Third, at Supreme Court trials are often delayed. As Sudargo Gautama puts it, a trial takes years, usually no less than 3 (three) years, to decide at a cassation level. This is because of a very long queue line of cassation cases that wait to decide.[10]

Fourth, at judicial review level, the time needed may reach 8-9 years before its decision can be executed by the concerned district court.[11]

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5. Irawan Soerodjo (2003), *Legal Certainty of Land Right in Indonesia*, Arkola, Surabaya. pg. 25.
6. Darwin Ginting (2009), *Legal Certainty on Land Rights for Investment in Agribusiness Investment in Indonesia*, Unpad Press, Bandung. pg. 69.
7. *Mohammad Hatta (2005), National Land Law in Perspective of Unitary State, Media Abadi, Yogyakarta.* pg. 53.
8. *Sudargo Gautama (1999), New Law of Arbitration, Citra Aditya Bakti, Bandung,* pg. 43.
9. *Ibid*, pg. 44.
10. Ibid., pg. 45.
11. Ibid., pg. 45.

Thus far, the decisions that courts made on land have not yet been able to settle issues because the decisions could not be executed or implemented. Therefore, a court decision should be easily executable.

The justice system in Indonesia recognizes the existence of 4 (four) branches of court under Supreme Court as one of the peaks of judicial power, namely:[12]

a. General court (private and public)
b. Religion court
c. Military Court
d. Public Administrative Court

In terms of the competences of general courts, according to Law Number 8 of 2004 on an amendment of Law Number 2 of 1986 on General court, the competences of a general court are as stipulated in Articles 2, 6, 50, and 51. Moreover, the competences of General Court in resolving land disputes can be seen in two jurisprudences of decisions made by Supreme Court of Republic of Indonesia Number 701 K/Pdt/1997 date of March 1999 and Number 1816 K/Pdt/1989 date of 22 October 1992.[13]

The competences of public administrative courts in resolving land disputes can be seen in the provisions of Law Number 9 of 2004 on an Amendment of Law Number 5 of 1986 on Public Administrative Court, Article 2, Article 5 paragraph (1), Article 50, and Article 51. Other competences can be seen in two jurisprudences, namely, Decisions of Republic of Indonesia Supreme Court Number 84 K/TUN/1999 date of 14 December 2000 and Number 1687 K/Pdt/1998 date of 29 September 1999.[14]

Moreover, the competences of Religion Court according to Law Number 3 of 2006 on an Amendment of Law Number 7 of 1989 on Religion Court, in accordance with Article 2, Article 3 paragraph (1), Article 49 paragraph (1), and Article 51, and a jurisprudence, that is, Decision of Republic of Indonesia Supreme Court Number 57 K/AG/1999 date of 27 April, 2000.[15]

As a consequence of the differences in both jurisprudences and competences of each branch of the courts, there may (or even frequently) occur a single legal case with some different mutually related subjects of disputes. For example, an aspect

12. *Paulus Effendi Lotulung* (), *Implementation of Court Decisions, [publisher], [city].* pg. 1.
13. *Muchsin* (), *Legal Aspect of Land Right Dispute. Workshop on "Strategy of Handling and Resolution of Land Disputes" held by National Land Agency, Batam.* pg. 15.
14. *Ibid*, pgs. 14-17.
15. *Ibid*, pgs. 17-20.

of it belong to a jurisdiction of general (private) court, and other aspect of it belong to public administrative court, e.g., in land field, even though both aspects are found in the same legal case, or in two closely related legal cases.[16]

If both types of disputes to be examined and tried separately and also decided separately by the two branches of different courts, then there would be probably two different, contradictory decisions, although in practice there are also two different mutually supporting decisions.[17]

2. Resolution of Land Disputes Outside a Court

Normatively, the resolutions of disputes in Indonesia's legal system take two forms, namely, in a court and outside a judicial institution. The latter is based on Law Number 30 of 1999.

The benefits and effectiveness of a resolution outside a judicial institution for disputants are as follows:[18]

1. It (resolution) prioritizes substantive things over technical-juridical ones;
2. It would be really satisfying both parties;
3. Implicit and covert things may be resolved completely;
4. It offers opportunities and makes it possible for other parties to be involved in such dispute resolution;
5. The process of dispute resolution is flexible;
6. The model of dispute resolution is determined according to the nature of the dispute and voluntarily selected.
7. The parties may play a greater role in resolving their dispute.

In theory, some different forms of dispute resolution outside a court are recognized, including ones provided for in Law Number 30 of 1999, namely:[19]

a. Negotiation

Negotiation is one of the methods of resolving a dispute widely used in settling any issue or dispute between the parties. It has been a fact of life. Everyone conducts negotiations to get what he or she want from others.[20]

16. *Paulus Effendi Lotulung, Implementation of Court Decision, op.cit. program. 1.*
17. *Ibid.* pg. 2.
18. *Siswanto, Investigation…,* op. cit. pgs. 15-16.
19. Gu*nawan Wijaya, Alternative Dispute Resolutions, Raja Grafindo Persada, Jakarta.* pg. 77.
20. *Suyud Margono (2000), ADR and Arbitration, Ghalia Indonesia, Jakarta.* pg. 49.

b. Conciliation

Conciliation can be defined as an effort to bring together the disputants to settle the issues between the parties by a negotiation.

The end results of a conciliation process are all embodied in a form of an agreement between them.[21]

c. Mediation

Mediation is a dispute resolution by engaging a third party as a mediator. In literature there are many definitions of mediation offered by experts.

d. Arbitration

In Law Number 4 of 2004 on Judicial Brach of Power, the existence of arbitrage is provided for in the explanation of Article 3 paragraph (1) stating that "This provision does not set aside any chance of resolving a dispute outside a legal court through conciliation or arbitration". Thus, the resolution of disputes outside a court on a basis of conciliation or through arbitration remains allowed. However, a decision of arbitration has only an executorial force after receiving an *esksequatur* or an order to execute by a court.

The term or arbitration is derived from *arbitrare* (Latin), *aribitrage* (The Netherlands/France), *schiedpruch* German), meaning a power of settling something in accordance with a policy or conciliation by an arbiter or adjudicator.[22]

Based on the definitions above, basically it can be concluded that the elements of arbitration are as follows:

1. A method of resolving a dispute privately or outside a court.
2. On a basis of a written agreement by the parties.
3. As an anticipation of any potential of existing dispute.
4. Involving a third party (arbiter or referee) with a competence to make an award.
5. The award is final and binding in nature.

Furthermore, she put out that: "The establishment of a land arbitration is more directed to create a land arbitration serving to curb the occurrence of disputes around any differences in perceptions and expectations between the holder of a land right and other party that needs the land by some compensation as an exchange for the land right". In addition, an idea of establishing a land arbitration arises

21. *Gunawan Wijaya, Alternative …,* Op. cit. pg. 3.

22. *See Technical Instruction Number 05/JUKNIS/D V/2007 on Mechanism of the Implementation Mediation*.

as an alternative for a time-consuming, expensive, occasionally non-executable dispute resolution by a court.

H. PROSPECT OF LAND DISPUTE RESOLUTION

The proposition of various concepts of thoughts and ideas on the establishment of an agency of resolving land disputes outside a court is because till now there are still some gaps as a weakness of the land dispute resolution in the nation. For one of the barriers in resolving a land dispute by a court is difficulty in implementing a court's decision in case there are some decisions of private, criminal, and public administrative courts till cassations and even judicial reviews that are inconsistent one another on the same dispute objects. Other reasons are that the process is time consuming and that the justice seekers have to pay a high cost. Still other factor that makes it difficult to get a fair decision is the judicial mafia that has penetrated our judicial system. The condition is inseparable from the land issues that are of high complexity. Therefore, in the future, it needs to think of a prospect of creating a land ad-hock mechanism the judge panel of which should consists of ad-hoc jusges and career judges, such as commercial tribunal or corruption crime tribunal. The ad-hoc judges should be composed of those judges who are familiar with land laws, so that hopefully they are competent in making accurate decisions in accordance with the demand of legislations and with the mandates of reformation in land law as declared in TAP MPR No. IX of 2001.

The resolution of land disputes outside a court shall be a solution of resolution on a basis of applicable normative provisions by steadily paying the protection and fulfillment of the community's land right into account.

Relating to the description above, the author agree with Mas Achmad Santosa who identifies 5 key factors that indicate that alternative dispute resolutions are needed in Indonesia, namely:

1. They (alternative dispute resolutions) may support efficient and effective dispute resolutions.
2. They may meet the demand of communities on an efficient mechanism that can satisfy a sense of justice.
3. They enhance the criticality of people accompanied by active role in developmental processes. They also enhance the criticality of people in line with the development of legislation that give some access to community to participate in policy making.
4. They are a right of people to participate and have a sense of necessity of developing conflict resolution to accommodate any difference of opinions that may arise from the community participation.

5. They develop a healthy competitive climate for a judicial institution. The presence of ADR institution and quasi-court, if they are facultative in nature, will generate a selection process indicating the level of community confidence.

Alternative dispute resolutions are facultative in nature and thus can not be forced by one disputant to another. However, as a form of agreement, any agreement that the parties have achieved in resolving their dispute by a forum outside a court should be honored by the parties.

The scope of ADR or dispute objects that may be resolved by an arbitration according to Article 66 of Law Number 30 of 1999 is defined widely. Of course, the objects of the dispute fall into a scope of commercial law. Meanwhile, Priyatna Abdurrasyd puts out that in principle every issue that may be resolved by an amicable way, as long as it is not forbidden by law, may be resolved by arbitration as well. This is in line with Article 5 paragraph (2) stipulating that the disputes that can not be resolved by arbitration are ones that according to legislations cannot be resolved by an amicable way. Moreover Priyatna Abdurrasyid suggests that land issues (land, sea, air transportations) fall into types of disputes that may be resolved by arbitration.

I. CONCLUSION

In the future, it needs to change the paradigm of land law development the operational basis of which should be the utilization of land as a part of agrarian resource. The new paradigm should be based on 3 (three) main pillars, namely, honoring and protecting human rights, respecting the sustainable principle of community's productive asset, and enforcing good, clean governance principles.

In considering the new paradigm, different measures may be undertaken to resolve or at least minimize land disputes. The alternatives that may be pursued simultaneously are as follows:

1. In legislation area, it needs:
    a. to bring about synchronization and harmonization in diverse provisions of land laws, including the legislations by sectors, such as the preparation of Agrarian Bill as an effort to support national land law reformation.
    b. A commitment of law enforcers to enforcing legislations in land affairs area consequently and consistently.
    c. An unity of perception and interpretation of law enforcers on the legislations in land affairs area.

2. In institutional area, it needs the divisions of roles, duties, and responsibilities in managing agrarian resources, inter-sector, and between central and regional governments, accompanied by increased coordination.
3. In land dispute resolution area,
   a. In short term, it needs to improve the competence of law enforcers, particularly judges at district courts and Public Administrative Courts, particularly in Land Law area.
   b. In the future, it needs to create specialized, independent courts which deal with land disputes, one of which is to create a mechanism for ad-hoc and career judges, such as in commercial and corruption crime courts, where the ad-hoc judges are composed of those judges with competence in Land Law area.
   c. In the future, it needs to develop a mechanism of resolving land disputes outside a court, because such institution is superior over land dispute resolution by a court. For example, the processes of trial and awarding are relatively short and its decisions are final and binding in nature so that it defies any remedies, as intended in Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution.

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