

# LEGAL PROTECTION OF RIGHT UPON CUSTOMARY LAND OF *DESA PAKRAMAN* AT BALI BASED ON THE NATIONAL AGRARIA LAW

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## Abstract

Customary land in Bali which is called as tanah druwe desa is land the owned by custom communal and desa pakraman as a unity of Balinese customary law society that have been firmed based on Regional Regulation No.03 Year 2001 juncto Regional Regulation No.03 Year 2003, but the Stipulation of the conversion in UUPA gives opportunity especially to tanah druwe desa (conversion stipulation: the right upon druwe, the right upon druwe desa) is converted to be (individual) property right. Tanah druwe desa is customary communal land belongs to desa pakraman. Conversion stipulatio cause impact to the loss of tanah druwe desa as customary communal land. This cause conflict between customary law and national agraria law that cause tanah druwe desa in Bali is not protected.

Key words, desa pakraman and tanah druwe desa.

## 1. Introduction

Acknowledgement and respect to unities of customary law society and their traditional rights, arranged in Article 18 B subsection (2) of the Constitution of 1945. It is also included the acknowledgement upon the existence of the unity of customary law society and the right of ulayat on Article 3 UUPA. There are 2 (two) conditions in this acknowledgement those are the condition of the existence of customary law society where the right of ulayat is acknowledged as long as it is still exist according to the fact; the condition of implementation that is according to national and state interest based on the united of the nation and it must not allowed to be in contradiction with the Law and other higher regulations. This acknowledgement should also be followed by the acknowledgement to all customary law society's rights adhered to the right of ulayat. The rights of customary law society that is adhered to the right of ulayat are all have close relation to the land of ulayat, because those rights emerge/are upon the land of ulayat. Acknowledgement to the right of ulayat without being followed by the acknowledgement to the right of ulayat is a mislead acknowledgement because actually the acknowledgement is the denial, thus by Prof. Bakri. (Muhammad Bakri : 2011)

The unity of customary law society in Bali are called *desa pakraman* based on the Regional Regulation of Bali Province No. 3 Year 2001 juncto Regional Regulation of Bali Province No. 3 year 2003 (hereinafter referred to as Perda No.3 Year 2001 jo Perda No.3 Year 2003). The strong religion tie to *desa pakraman* is being formed in *Kahyangan Desa* or *Kahyangan Tiga*, which is considered as the inspiration giver, the strength and the place to beseech for the safety of *krama desa*. Customary land of *desa pakraman* is called the land of *druwe desa* that consists of some variation, those are:

1. The land of the village that is the land owned or controlled by *desa pakraman*, consist of:
  - a. Market Land, which is the land to be used for market place.
  - b. Open Land, which is the land to be used for square, whether for sport activities or other activities.
  - c. Cemetary land/*Setra*, which is the land to be used for cemetary or to bury human corpse.
  - d. Evidence Land, which are the agricultural lands (wet rice field, unirrigated agricultural field) which are given to the village's manager/officer/instrument.
2. The lands of *Laba Pura* are the land used for the purpose of Pura, consist of:
  - a. The land that is special for the pura building place.
  - b. The land that is purposed to fund pura necessity, for example to fund routine rituals and pura renovation cost.
3. Land of *Pekarangan Desa (PKD)* is the land owned by *desa pakraman* which is given to the villagers (*krama desa*) for a place to build residence. The duty adhered (*ayahan*) to the villagers dwell the land is the responsibility in the form of force or material which are given to *desa pakraman*.
4. Land of *Ayahan Desa (AyDs)* is the land owned by *desa pakraman* which the work is carried out to the villagers with the right to enjoy the duty as force and material that is given to *desa pakraman*. (I Made Suasthawa Dharmayuda: 1987)

Special for land of *laba pura*, based on the Decree of the Minister of Domestic Affairs No. SK. 556/DJA/1986 about Pura Appointment as religious legal entity that is able to have property's right upon the land so these lands of *laba pura* can be registered to be property's right in the name of Pura. Pura with its land of *palemahan* is one function unity that cannot be separated. So thus with the land of *druwe desa* and *desa pakraman* is one unity that cannot be separated.

Article 19 subsection (1) UUPA determines "to assure the legal certainty by the government it is conducted the registration of land in all territories of the Republic of Indonesia according to the stipulations arranged by the Government Regulation (PP). This stipulation is followed-up by putting in effect the PP No.24 Year 1997 about the Land Registration. Article 9 PP No.24 Year 1997 arranged the land registration object that covers: a. land fields that are owned by property's right, right of tenure by long lease, building use right and right of use; b. land of management right; c. land of wakaf; d. property's right upon the flats unit; e. mortgage; f. state land. In this article there is no mention about land of ulayat as land registration object, so practically the land of ulayat cannot be registered including in land of *druwe desa*. Until today, type of land of *druwe desa* that can be registered is only the land of *laba pura*, whereas the other type of *druwe desa* land cannot be registered as customary communal land. The fact is that the land of *laba pura* is one of *druwe desa* land types. In one side, this stipulation indeed is able to safe a part of *druwe desa* land in the form of *laba pura* land, but on the other side it can emerge image as if *desa pakraman* is separated with its pura *kahyangan tiga*.

In Article II of the Stipulations of Conversion in UUPA, it determines:

- (1) The rights upon the land that gives authority as or similar to the right mentioned with the name as under, that is exist at the time when this Law started to prevail, are: the right of agrarisch eigendom, property, yasan, andarbeni, right upon *druwe*, right upon *druwe desa*, pesini, grant sultan, *landerijenbezitrecht*, *altijddurende erfpacht*, business right upon former private land and other rights with any other name that will be clarified furthermore by the Ministry of Agraria, since this Law started to prevail to be the property's right in article 20 subsection 1.

Main characteristic of property's right is that it can change and it can be changed to other party. Based on the conversion stipulation above, the main characteristic of the property's right is also valid to the right of land upon *druwe*/the right upon *druwe desa* land (in Bali: *druwe desa* land) which is actually the customary communal land.

Conversion stipulation in UUPA that gives possibility of customary lands, one of them is the land of *druwe desa* to be converted to be (personal) property's right, cause impact to the loss of the right to control over a part of customary lands as the right upon customary law society's land due to the continuous transfer through the conversion stipulation. *Desa pakraman* will face big risk, because the religious magic bond between the land and the villagers who dwell the customary land the *desa pakraman* in the form of *ayahan* to *desa pakraman* will be lost or detached, because the influence of individualization in the conversion stipulation.

This individualization pattern is seen in the stipulation that the lands that are converted into property's right based in article 20 subsection 1 UUPA. By the converted the land of *druwe desa* to be personal property's right land, *desa pakraman* is no longer has right of autonomy and finally it will be damage because the lost of *palemahan* (territory) element.

Article 9 subsection (5) Perda No.3 Year 2001 jo Perda No. 3 Year 2003 determine, the land of *desa pakraman* and or property's right of *desa pakraman* cannot be certified in the name of personal (individual). But, of course, this Perda power cannot defeat the rule in Law stipulation so from the regulation side that gives protection to the right of ulayat (*druwe desa* land) is not strong enough if it is compared to the regulation in Law that is nationally prevail, compared to sectoral regulation.

From above description it needs to be understood again the regulation in UUPA about the land of ulayat as customary communal land, although UUPA is determined as agraria main regulation, but it must be realized that law is a tool and it's not a goal according to Dominikus Rato's statement (Dominikus Rato:2011). Because it is a tool, then the law is not always be maintained and because it is a tool then the formulation of the law should always be sought according to the people's need. People's need always change and develop according to the change and development of the society, so the right, fair and useful law should follow the people's development, because it is not people for law but law for people.

Based on the above background, the problems can be formulated as the following: (a) Why there is conflict between the customary law and national agraria law upon the *druwe desa* land in Bali that cause *druwe desa* land in Bali is not protected? (b) What is the formulation of legal protection to *druwe desa* land in Bali in order to give justice, utility, and certainty of law to *desa pakraman*?

## 2. Method of Research

The type of this research is the normative law research by studying positive norms in the prevailing positive legislation system related to the existence of *desa pakraman* in creating law certainty and legal

protection to *desa pakraman* upon its customary land.

This research uses the statute approach that is using the stipulations in related legislation to be made as reference in solving submitted law issue (Peter Machmud Marzuki: 2008), the case approach that is by studying the cases that already have permanent legal power, historical approach that is to comprehend the history and philosophy of UUPA and this approach is also used to find out the origin of *druwe desa* land in Bali.

Law materials that are used consist of the primary law materials that consist of law and regulation related to customary law society and right of ulayat those are the Constitution of 1945, UUPA, Village Law, Forestry Law, PP No.38 Year 1963, Permenag/KaBPN No.5 Year 1999, PP No.24 Year 1997, Perda No.3 Year 2001 *jo* Perda No.3 Year 2003, Verdicts of related Courts; secondary law materials consist of Law design, research results, books, working papers, internet articles, and tertiary law materials consist of relevant dictionary.

### 3. Result of Research

#### 3.1. Cause of Conflict between the Customary Law and National Agraria Law upon *Druwe Desa* Land in Bali that cause *Druwe Desa* Land in Bali is not protected

Article 67 subsection 2 of Law No.41 Year 1999 arrange about “the establishment of the existence and removal of customary law society is determined by Regional Regulation”. *Desa pakraman* as the unity of customary law society in Bali has been established as being arranged in the Regional Regulation No.03 Year 2001 *juncto* the Regional Regulation No.03 Year 2003 about *Desa Pakraman*. Article 1 subsection (4) states “*Desa Pakraman* is a unity of customary law society in Bali Province which has one unity of tradition and etiquette of social life of Hindu people passed by generation by generation in the bond of *kahyangan tiga* or *kahyangan desa* that has certain territory and own properties and has right to manage its own domestic”.

Based on the history of *desa pakraman* establishment, it can be stated that *desa pakraman* and its customary land (*druwe desa*) has very close relation that cannot be separated which happened almost in the same time, which means that before *desa pakraman* emerged, it was initiated by the deforesting as the pioneer the administration territory of *desa pakraman*, after the territory has been well-organized then the land is classified for the purpose, such as for the place to build *kahyangan tiga*. If it is observed from the law theories of land affairs and customary agraria, the characteristic and philosophy of the customary law alliance is religious magic in nature, so thus with *desa pakraman*, consider the land of *druwe desa* as permanent object that has soul and spirit accompanied by magical power as the control over the land that should be with great respect through religious ritual.

*Druwe desa* land cannot be changed to other party, in the sense that it cannot be used as commercial use because the land is owned by *desa pakraman*, but the conversion stipulation in UUPA gives opportunity to *druwe desa* land to be able to be changed. This is because *druwe desa* land can be registered to be property's right based on the conversion stipulation. Property's right mentioned in the article of conversion is personal property's right, whereas the *druwe desa* land is the property of *desa pakraman*. This statement is, of course, in contradiction with the prevailing of customary law to the *druwe desa* land, because *druwe desa* land cannot be changed including cannot be certified in the name of personal. This, of course, becomes the conflict in the implementation.

The sounds of Article II of Conversion Stipulations in UUPA are as the following:

- (1) The rights upon the land that give authority as or similar to the right mentioned in Article 20 subsection 1 as that is called with the name as under, which is exist from the prevailing of this Law, those are: the right of agrarisch eigendom, property, yasan, andarbeni, right upon *druwe*, right upon *druwe desa*, *pesini*, grant Sultan, *landerijenbezitrecht*, *altijddurende erfpacht*, business right upon former private land, and other rights with any other name that will be clarified furthermore by the Ministry of Agraria, since this Law started to prevail to be the property's right in article 20 subsection 1, except if the owner cannot fulfill the conditions as mentioned in article 21.

Positive value from the conversion stipulation is that it is able to more guarantee the law certainty of the land ownership, but the negative impact is that there is individualization to the ownership of customary lands that used to religious communal in nature. By the converting of *druwe desa* land to be (personal) property's right then along with the time it will create exclusive nature of the owner that cause no longer to be submitted to the stipulation of local customary law (*awig-awig desa pakraman*).

Land as territory (*palemahan*) element is one of essential elements of the alliance (*desa pakraman*), so if it should be converted, it should not lost the status of the land and subject of the right's holder, so there is harmonization between UUPA as national law and customary law as local law. According to Herman Soesangobeng, the word of “based” and “is” the customary law, it is intended in order that the registration nature in UUPA is able to adopt custom philosophy and principle obedient (Herman Soesangobeng: 2000).

In UUPA design it does not include the reason why it includes the names of rights upon the land mentioned in article II subsection (1) of the conversion stipulation (DPR RI:2011), but it can be analyzed that the conversion stipulations are determined to eliminate the rights of foreign concession and replace them with new rights/rights upon the land based on UUPA. If so, then the rights included in the conversion stipulations in UUPA by the framer of UUPA are considered as foreign concession rights formed by the colonial government, the framer of UUPA did not examine more the rights upon the land which one was the right of foreign concession and which one was the property's right of customary communal. Maybe there is opinion from the framer of UUPA that the right upon *druwe* or the right upon *druwe desa* is the right of foreign concession of colonial government, because at that time there were dualism of land affairs law by the prevailing of customary law and the western agraria law at the same time.

Article II of Conversion Stipulations of UUPA as agraria law politic that was intended to eliminate the rights upon the land due to law dualism that was prevailing at that time based on customary law and western law turns out to give extraordinary impact especially to the lands of *druwe desa* in Bali that is by the converting of the lands of *druwe desa* in Bali to be property's right then along with it also the *palemahan* (territory) of *desa pakraman* is lost, so *desa pakraman* with its *druwe desa* land will be destroyed/vanished.

From the above description it can be concluded that the cause of conflict between customary law and national agraria law is caused by Article II of conversion stipulations in UUPA so it causes *druwe desa* land in Bali is not protected, that can be described as the following:

1. There is stipulation of conversion that cause *druwe desa* land owned by *desa pakraman* communal to become (individual) property's right, so it causes the lost of communal nature to *druwe desa* land.
2. There is personal interest from the owner of *druwe desa* land who registered the *druwe desa* land to become property's right so the land that used to be owned by *desa pakraman* currently is become (personal) property's right land.
3. By the (personal) ownership upon the land then the owner has right to change the land he owned (Article 20 subsection 2 UUPA). By observing this case, it is seen that there is economical value to the mentioned land.
4. There is no involvement of *bendesa adat (desa pakraman)* upon the conversion registration, in this case it only involves the head of village (administrative village), whereas the land that is converted is the land of *druwe desa*.
5. The land of *druwe desa* cannot be registered in the name *desa pakraman* because although it is based on the Regulation of MK No.06/PMK/2005 Article 3 point b, that the unity of customary law society (*desa pakraman*) is the supplicant in the trial of Law to the Constitution of 1945 that can be interpreted that *desa pakraman* is the subject of law, but in UUPA, *desa pakraman* is not as the subject of law.
6. Even it is acknowledged, but the land of *druwe desa* (right of *ulayat*) is not the object of right in the land registration.

### 3.2. Formulation of Legal Protection to *Druwe Desa* Land in Bali in order to Create Justice, Benefit and Certainty in Law

“An acknowledgement of right upon the land of customary law society will be significant if the stipulation is followed by the action of protection. In protection there is right that should be maintained and respected. Satjipto Rahardjo has opinion that right as the power given by law to someone with the intention to protect the mentioned person's interest” (Satjipto Rahardjo:1986).

Formulation of legal protection in this writing is the formulation or arrangement in the sense the formation of appropriate law and regulation that can give legal protection to the unity of customary law society along with its right of *ulayat*. The formation of the law and regulation is performed based on the principle of appropriate law and regulation formation based on the Law No.12 Year 2011 about the Formation of the Law and Regulation of Article 5 those are:

In forming the Law and Regulation it should be performed based on the principle of appropriate Law and Regulation, Article 5 Law No.12 Year 2011, which cover:

- a. The Principle of Goal Clarity is that every formation of law and regulation should have clear goal that will be reached.
- b. The Principle of Institutional or appropriate framer officer is that every kind of law and regulation should be made by state institution or the competent authorities of law and regulation framer. The law and regulation mentioned can be canceled or it is invalidate for the sake of law if it was made by uncompetent state institution or authorities.

- c. The Principle of Compatibility between the type, hierarchy, and burden materials is that in the formation of law and regulation it should really notice the appropriate content materials according to the type and hierarchy of the law and regulation.
- d. The Principle of Implementable is that every formation of law and regulation should figure the effectiveness of the mentioned law and regulation in the society, whether philosophically, sociologically, and in juridical.
- e. The Principle of Efficiency and Effectiveness is that every law and regulation was made because it is really being needed and useful in arranging the life in the society, in the nation and in the state.
- f. The Principle of Formula Clarity is that every law and regulation should meet technical requirements of law and regulation arrangement, the system, the choosing of word or term, and the clear law language and easy to be understood so it will not cause various interpretations in the implementation.
- g. The Principle of Openness is that in the formation of law and regulation from the planning, arranging, discussion, validation or decision and enactment is transparent and open in nature. Therefore, all of society stratum has wide opportunity to give input in the formation of law and regulation.

Article 6 of Law No.12 Year 2011 about the Formation of Law and Regulation determine about the content material of the law and regulation that should also reflect the following principles:

- (1) Content material of Law and Regulation include the principles of:
  - a. The Principle of protection  
That every content material of the law and regulation should function to give protection to create the peace in the society.
  - b. The Principle of humanity  
That every content material of the law and regulation should reflect the protection and respect to human rights and also dignity and value of every Indonesian citizen proportionally.
  - c. The Principle of nationalism  
That every content material of the law and regulation should reflect the characteristic and nature of the complex Indonesian people by keeping the principle of the Unitary State of the Republic of Indonesia.
  - d. The Principle of kinship  
That every content material of the law and regulation should reflect discussion to reach agreement in every decision making.
  - e. The Principle of Archipelago  
That every content material of the law and regulation should always notice the importance of all areas of Indonesia and the content material of the law and regulation made at regional level is a part of national law system based on Pancasila and the Constitution of the Republic of Indonesia State Year 1945.
  - f. The Principle of Bhineka Tunggal Ika  
That every content material of the law and regulation should notice the complex of the people, religions, ethnic groups and classes, regional special condition and the culture in the life in the society, in the nation and in the state.
  - g. The Principle of Justice  
That every content material of the law and regulation should reflect justice proportionally to every citizen.
  - h. The Principle of Equality in law and government  
That every content material of the law and regulation should not accommodate the things which have nature to discriminate based on the background, between other religion, ethnic group, race, class, gender, or social status.
  - i. The Principle of Orderliness and Certainty of Law  
That every content material of the law and regulation should be able to create orderliness in the society through the assurance of law certainty.
  - j. The Principle of Balance, Compatibility, and Harmony  
That every content material of the law and regulation should reflect the balance, compatibility, and harmony, between the individual interest, the society and the nation and state interest.

The principles above used in the formulation of legal protection are as the manual in the formation of proper law and regulation, so by referring to the principles mentioned above it can be expected that the appropriate law and regulation will be created and optimally goal can be reached in order to give protection to *druwe desa* land in Bali so justice, benefit, and certainty of law can be created.

There are several things that need to be noticed in formulating legal protection to *druwe desa* land in Bali, among others:

- 1. To revise Article II of Conversion Stipulation in UUPA

The lands in the conversion stipulation have difference in ownership right, which are the personal property's right and the customary communal property's right. In this case there is difference in opinion, where the lands of customary communal property's right are being the part to be registered to be personal property's right, especially for the land of right upon *druwe* or right upon *druwe desa* which in Bali are the lands belong to customary communal of *desa pakraman*. By the conversion stipulation it causes the change of land owned by customary communal to be the land owned by personal.

If it is related to *desa pakraman* the communal property's right can be said as customary property's right or in this case *druwe desa*. Communal property's right is the right of control upon the land controlled whether directly or indirectly by the customary law society (*desa pakraman*) which its use and management is arranged for the interest of its subjects (common interest). The authority of this arrangement means that *desa pakraman* can lead the arrangement for the allocation of *druwe desa* lands which located in palemahan of related *desa pakraman* according to their functions, such as part that allocated for *laba pura*, for banjar and banjar territory, for market place, for *setra* (cemetery), for place to build house (*pekarangan desa* land), for agricultural land (*ayahan desa* land). Authority to manage by *desa pakraman* related to *druwe desa* furthermore to be expressed in *awig-awig desa pakraman*. Duty as *ayahan* adhered to *druwe desa* land can be made as standard to determine whether the lands controlled individually by *krama desa* are the *druwe desa* lands or not.

The right of *ulayat* cannot be transferred or detached. But the fact is that the customary lands especially *druwe desa* land in Bali can be converted into property's right, when the *druwe desa* lands already have legal certainty such as certificate, the ownership right merged to be personal ownership right, it is no longer the communal property's right. This thing that later becomes the trigger and developed to be interminable agraria conflict.

## 2. Registration of land upon *druwe desa* land

Article 19 subsection (1) UUPA determine that to assure the legal certainty by the government the land registration is conducted at all territory of the Republic of Indonesia according to the stipulations arranged by Government Regulation. As the implementation of Article 19 subsection (1) of UUPA, PP No.10 Year 1960 is put into effect about the Land Registration, which is now has been replaced with PP No.24 Year 1997.

The certainty of right's subject and object are really needed in law traffic about rights upon the land. Article 9 of PP No.24 Year 1997, there is nothing to mention about land of *ulayat* as the object of land registration. Land registration objects cover: a) Land fields that owned by property's right, right of tenure by long lease, building use right, and right of use; b) land of management right; c) wakaf land; d) property's right upon flats unit; e) mortgage; f) state land.

In Article 24 of subsection (1) of PP No.24 Year 1997 in the implementation of land registration for the first time in term of new right verification. In the explanation of this article, in term that written evidence is not complete or no more exist then the verification of ownership can be carried out by witness's information or official statement which the truth is reliable. Regarding the mentioned official statement is that it is related to the unit of land registration administration territory which is the village or administrative village. In that case the mentioned official statement is asked to the head of village (in Bali: the administrative village).

Special for *desa pakraman*, headed by *bendesa adat* (the head of *desa pakraman*) as *prajuru desa pakraman* who knows more about the history of the lands owned by custom in his *desa pakraman* territory, because the person who appointed as *bendesa adat* is the related *krama desa pakraman*. With limited knowledge about the history of *druwe desa* land it will emerge conflict upon the official statement issued by the head of village to the lands owned by custom that have been converted, it could be caused by the head of village that is not definitely the subject of village (*krama desa*) of *desa pakraman*.

## 3. Position of customary village (*desa pakraman*) in Law No.6 Year 2014 about Village

In Law No.6 Year 2014, the customary village has the function of government, village financing, village development and it gets facilitation and building from the Regency/city government. In such position, the village and customary village get the same treatment both from the government and the local government.

The Village (article 1 of subsection (1) No.6 Year 2014) is the village and customary village or that is called with other name, hereinafter referred to as village is the unity of law society that has borders of territory that has authority to arrange and manage the government affairs, the interest of local people based on people's initiative, right of origin and/or traditional right that is acknowledged and respected in NKRI government system.

Customary village is a unity of customary law society that historically has territory borders and culture identity which is formed based upon the territory that has authority to arrange and manage the interest of the village people based on the right of origin.

By referring to Article 6 Law No.6 Year 2014 it gives raise to new conflict in the implementation of administrative village and *desa pakraman* in Bali that have been run in harmonious all this time. This article required to choose one of the villages to be registered, and this cause new polemic because for registering one of villages in Bali should be based by considering various aspects, and it is not easy to choose one of them because both of these villages have different role in their government aspect.

According to Pasek Diantha who stated that there is fatal mistake in the academic script of Village's Draft of Law. It stated that all this time especially in Bali there is dualism/conflict between *desa pakraman* (customary village) and administrative village, so to avoid the overlapping it has be chose one of the village's type.

According to I Nyoman Sirtha, the customary village (*desa pakraman*) is an autonomous traditional institution based on genuine values of Indonesian nation and has religious social type. The customary village (*desa pakraman*) has power to determine its own law stipulations which is known as term of *awig-awig desa*. Hence, in *desa pakraman* it is found various rules which were formed and obeyed together by the village people.

#### 4. The Government of the Constitution of 1945 to the Acknowledgement of the Unity of Customary Law Society is arranged in the form of Law

The acknowledgement and respect to the unity of customary law society along with its traditional rights based on the Constitution of 1945 is arranged in Law, but from the stipulation in Article 18B subsection (2) of the Constitution of 1945 it raises 2 (two) opinions, because all this time the valid one is the arrangement about the unity of customary law society along with its traditional rights which are spread in some law and regulations such as UUPA, Forestry Law, and Village Law. Until this time the unity of customary law society along with its traditional rights that includes in it are the arrangement about right of ulayat which has not have special Law yet for the arrangement.

The Verdict of MK No.35/PUU-X-2012, according to Dr. Saafroedin Bahar whom in this verdict was as supplicant expert has opinion that although this material trial is addressed to Forestry Law, but theme of respect, protection, development and fulfilling the right of the unity of customary law society are also included in part of international law, human rights. This verdict can be made as material in arranging the Draft of Law of acknowledgement and protection of customary society.

Until today the Law commanded by Article 18B of subsection (2) of the Constitution of 1945 has not yet been formed, the regulation about the unity of customary law society spread in various law and regulations with the reason of urgent necessity in order to fill in the void of law to guarantee the existence of legal certainty cause lots of law and regulations that exist before the mentioned Law was formed. Various conflicts that happened to the unity of customary law society along with its traditional rights, make it clear that the customary law society needs the certainty of right that is special in nature (not overlap with other rights), where the customary law society can preserve, use, arrange, and manage the custom, tradition, culture and its natural properties in the environment of its customary territory, and those rights cannot be transferred to other party outside the customary law society.

The trial to the Forestry Law proved that problem appeared regarding the matters of the relation between the state forest and customary forest, but this matter indirectly regarding the status and acknowledgement to the existence of the unity of customary law society along with its constitutional rights as the whole by NKRI.

## 4. Conclusion

### 4.1. This research result concludes the following:

1. a) Form of State strengthening to *desa pakraman* as the unity of customary law society in Bali is arranged in article 67 of subsection 2 of Law No.41 Year 1999 about Forestry that mentioned "the strengthening of the existence and the eliminating of customary law society as mentioned in subsection 1 is determined with Regional Regulation. The existence of *desa pakraman* as the unity of customary law society in Bali has been strengthened in Perda No.03 Year 2001 juncto Perda No.03 Year 2003 about *Desa Pakraman*.
- b) The cause of conflict between the customary law and national agraria law that cause *druwe desa* land in Bali is not protected is the Article II of Conversion Stipulations of UUPA. The conversion stipulations which are the political product of agraria law that was intended to

eliminate the rights upon the land due to dualism in law which was valid at that time that is based on customary law and western law turns out to give extraordinary impact especially to *druwe desa* lands in Bali. On the conversion stipulation, *druwe desa* land which is the customary communal property's right is converted to be property's right, based on the stipulation of article 20 of subsection 1 of UUPA, where the explanation of the stipulation about property's right that can change and can be transferred. It causes a difference in opinion between the customary law and national agraria law. In customary law, the customary communal property's right cannot be transferred (for commercial use). By the converting of *druwe desa* lands in Bali to be property's right, at the same time the *palemahan* (territory) of *desa pakraman* will also be lost, so *desa pakraman* with its *druwe desa* land will be vanished/lost.

2. Formulation of legal protection to *druwe desa* land in Bali that should be able to create the sense of justice, benefit and legal certainty is to formulate or arrange in the sense that the formation of appropriate law and regulation can give legal protection to the unity of customary law society along with its right of ulayat. In the formation of law and regulation based on the principle of appropriate law and regulation formation based on the Law No.12 Year 2011 about the Formation of Law and Regulation of Article 5 and Article 6. Article 5 covers: a. clarity of goal; b. the appropriate institution or framer officer; c. compatibility between the type, hierarchy, and content material; d. implementable; e. efficiency and effectiveness; f. clarity of formula; and g. Openness. Article 6 is about the content material of law and regulation that should also reflect the principles of: a. Protection; b. Humanity; c. Nationalism; d. Kinship; e. Archipelago; f. Bhinneka tunggal ika; g. Justice; h. Equality in law and government; i. Orderliness and legal certainty, and/or j. Balance, compatibility, and harmony. In order that *druwe desa* land as customary communal property's right which is the part of the right of ulayat can be accommodated in the land affairs regulation, the stipulation of Article 16 of subsection 1 point h of UUPA can be used as reference. This article gives space to the emerging of right upon new land which is not be mentioned in Article 16 of subsection 1 point a to g of UUPA with the condition to be determined by the law. Therefore, it can submit the right upon new land in order to be able to give legal protection to *desa pakraman* and to the unity of customary law society. The right upon this new land should be able to represent the right of ulayat as the customary communal right of customary law society, so the lands owned by the customary communal will get legal protection and legal certainty and also to have proof of ownership in the form of certificate.

#### 4.2. Recommendation

In the writing of this dissertation it can be recommended the following:

1. It needs to form the Law of the Unity of Customary Law Society immediately so it can affirmed and strengthened the existence of the unity of customary law society as the subject of law and ulayat land as the object of law which in its formation or creation can be suggested to be done in participative in the sense that it involves people openly so the content can be aspirational and can describe people's common desire and the scope cannot be interpreted mistakenly in unilateral through derivative regulation of the government. Hence, it can give legal protection that can create the sense of justice, benefit, and legal certainty.
2. It needs to identify and make inventory from *desa pakraman* upon the land of *druwe desa* so there will be valid data about location, borders and the control of *druwe desa* land from *krama desa*.
3. To give suggestion to the land affairs office that the lands which are intended to be converted are obliged to attach official statement about the existence of the mentioned land from the head of *desa pakraman* (*kelihan desa pakraman/bendesa adat*) to be known that the land that wants to be converted is not the land owned by customary communal.

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