

## The Land Courts Establishment Concepts

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### Abstract

The concept of establishing a special court for land matters is part of legal development in the field of land. The urgency of its formation because of the land issue is massive and special. The problems arise due to the ambiguity of norms in articles 15 and 52 of the UUPA and the emergence of sectoral laws. Especially land tenure in the plantation and mining sectors as a trigger for occupation, overlapping land and regulations. The establishment of a land court as a reflection of the failure of the general court to apply the principles of the judiciary and the land agency in solving problems. Construction of the establishment of a land court in accordance with the Judicial Power Law and awaiting the passing of the Land Law. The land settlement process in the court which will be formed only applies an appeal. The position of the land court is part of the justice system and is in the general court sub-ordinate civil chamber.

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### 1. Background

Indonesia as a rule of law is normalized in Article 1 paragraph 3 of the 1945 Constitution of the Republic of Indonesia (hereinafter abbreviated as the UUD RI 1945) which upholds the principle to ensure justice, certainty, order and legal protection for its people. The vast and fertile territory of Indonesia, making land a central issue of the majority of the people's activities. For, the position of land implies a multidimensional meaning, namely: First, from the economic side, Second, political side Third, as cultural capital, Fourth, sacred lands because at the end of their life, everyone will return to the land.<sup>1</sup>

Therefore, the government is obliged to formulate legal products based on Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia as a philosophical basis of Act Number 5 of 1960 concerning Basic Principles of Agrarian Law also referred to as UUPA or *Undang-undang Pokok Agraria*. The norms formulated by the Act is the basis for all new agrarian laws programs as well as to harmonize the agrarian situation and philosophy of modern Indonesia<sup>2</sup> and the embodiment of political determination to dismantle the entire system, philosophy, and structure of the colonial pattern which become a mastering structure that guarantee the people's prosperity.<sup>3</sup>

Agrarian in the UUPA is broadly interpreted including the earth, water, and natural resources contained therein as normalized in Article 1 paragraph (2) of the UUPA, while the land is part of the earth's surface which is bounded, having two dimensions, length and width. The position of land as a legal object is a series of control of land, i.e., the right containing a series of authority, obligations and/or prohibitions for the holder of the right on the land entitled.<sup>4</sup>

The establishment of the UUPA as an effort to abolish colonial regulations, as contained in its preamble, it mandates by the phrase "By Revoking" *Agrarische Wet Stb* 1870 No.55, *Agrarische Besluit Stb* 1870 No.118, *Koninkelijk Besluit Stb* 1872 No.117 and Book II *Burgerlijk Wetboek* concerning earth, water and natural resources contained, except those provisions concerning hypotheses which still apply.<sup>5</sup>

This condition causes land polarization and economic exploitation by suppressing the existing social structure, allowing the legitimacy of the customary structure to the land tenure structure.<sup>6</sup> Moreover, the emergence of conflicting sectoral laws do not refer to the UUPA. This fact is the main cause of land issues in Indonesia in addition to overlapping land and regulations.

As the community grows without the increasing of land area, it triggers the emergence of land issues related to perceptions and interests. Which always appears and is actual time to time, along with population growth, development, and increasingly widespread access to various parties who obtain land as a main capital for various

<sup>1</sup> Heru Nugroho, *Mengugat Kekuasaan Negara*, Surakarta, Muhammadiyah University Press, 2001, p.237

<sup>2</sup> Karl J Pelzer, *Sengketa Agraria: Pengusaha Perkebunan Melawan Petani*, Jakarta: Pustaka Sinar Harapan, 1991, p.62

<sup>3</sup> Bernhard Limbong, *Hukum Agraria Nasional*, Margaretha Pustaka, Jakarta, 2012, p.32

<sup>4</sup> Urip Santoso, Op Cit, p. 10.

<sup>5</sup> Urip Santoso, *Hukum Agraria: Kajian Komprehensif*, Prenada Media Group, Jakarta, 2015, p.63.

<sup>6</sup> Lyon dalam SMP Tjondronegoro dan Gunawan Wiradi (Eds.), *Dua Abad Penguasaan Tanah : Pola Penguasaan Tanah Pertanian di Jawa Dari Masa ke Masa*, Jakarta: Penerbit PT. Gramedia, 1984 p. 169.

interests.<sup>1</sup> The need for land is increasing, in line with development policies by the government, thus the function of the land is adjusted to the level of diverse needs. According to Jhon Salindeho,<sup>2</sup> an increase of land use causes various types and forms of relations between humans and land, which at the same time cause developments of land law normatively, either written law or unwritten.

Based on the above descriptions, the land issue is massive, complex and specific (categorized as characteristic of land issues). Therefore, the idea of establishing a special court for land based on illustrations of defense issues emerges as follows: in 2019 there were 279 agrarian conflicts covering 734,239.3 ha affecting 109,042 families spread in 420 villages, in all provinces in the country, while conflict areas are forestry of 274,317 ha, plantation 239,935 of ha, and mining of 164,490 ha. However, the biggest conflict trigger is the plantation sector, because the area of Palm Oil Cultivation Rights reaches 14.6 million ha, this extent is also proportional to the high agrarian conflicts that occur which do not only involve the population that face the capital and / or state instruments power.<sup>3</sup>

In fact, the existence of the Agrarian law, as part of the country's legal system, is having a fundamental weakness in law enforcement for land issues.<sup>4</sup> Weaknesses of the UUPA due to the absence of specific norms related to the resolution of land issues is categorized as a void norm. Likewise, in its derivatives, namely the Government Regulation in Lieu of Law Number 56 of 1960 Regarding the Determination of Agricultural Land Area, Government Regulation in Lieu of Law Number 51 of 1960 Regarding the Prohibition of Land Use without a Legitimate Permit or Authorized Permit or the in Government Regulation No. 10 of 1961 Regarding land registration, which there are no regulating norms.

The land issue is inseparable from the institutional system in its regulation, and the resolution is essentially inseparable from the framework of a legal system, that regulates the whole problems which synchronizes each other. The system is interpreted as a unit consisting of interrelated elements, which avoid the occurrence of a conflict in the system, and if a conflict occurs then it will be solved within the system itself.<sup>5</sup>

Certainty and justice are the goals of resolving land issues, as an effort to create public order<sup>6</sup>, for legal certainty is achieved when entire legal system runs and supports the achievement of legal certainty, especially the role of the authorized institutions.<sup>7</sup> In the history, land issues settlement has existed by the formation of the Landreform Court in 1962 to 1970, however it was removed by the Act number 21 of 1971 because it was too focused on violations of landreform, and the authorized judges were not competent as decision makers who prioritized justice.

The authorized institution is a land court institution established to protect the rights of citizens in the field of land, in line with Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia stating that the judicial power is an independent power to administer judicature to enforce law and justice as an objective, and to set rules for the community within the framework of the value of justice. Essentially the exercise of judicial power is used to guarantee two things, namely law enforcement and access to justice.

The special court establishment is significant because the settlement of land issues is focused on the administration and civil fields, even though essentially the land has its own specifications. According to Adji Samekto, the complexity of land issues in Indonesia is certainly different from other countries. This complexity cannot be solved simply by civil, criminal or state administration enforcement, because land is has special value. The land in Indonesia is related to the rights of indigenous people, related to claims of unilateral ownership, both by the community and the government. Therefore, it is necessary to establish a special court since it has a different character from other legal cases.<sup>8</sup>

The urgency of land court establishment is inseparable from the root of the land problem in Indonesia, as an interesting legal issue to be investigated; 1).The level of community land occupation into plantation land is getting higher; 2). There are overlapping regulations (the emergence of organic laws); 3). There are different perceptions and interests in land; 4). The level land issues settlement is still low; 5). The settlement process carried out by the land agency ineffective; 6). The court's decision has not provided certainty and justice; and 7). The process of land issues resolution does not reflect the principle of fast, simple and inexpensive.

The future land court establishment is an attempt to settle land issues, which do not focus on administrative

<sup>1</sup> Pahlefi, "Analisis Bentuk – Bentuk Sengketa Hukum atas Tanah Menurut Peraturan Perundang – Undangan di Bidang Agraria", *Majalah Hukum Forum Akademika*, Vol. 25, (Maret 2014), p. 137

<sup>2</sup> Jhon Salindeho, *Masalah Tanah Dalam Pembangunan*, Jakarta, Sinar Grafika, 1998. p. 170.

<sup>3</sup> Konsorsium Pembaharuan Agraria, *Urgensi Penyelesaian Konflik Agraria Struktural Dan Jalan Pembaruan Agraria Ke Depan*, Year End Notes of 2019 Konsorsium Pembaruan Agraria.

<sup>4</sup> Husen Alting, 2010, *Menggugat Eksistensi dan Pemenuhan Hak Masyarakat Hukum Adat atas Tanah di Era Otonomi Daerah*, LepKhair, Jakarta, p. 31

<sup>5</sup> Sudikno Mertokusumo, *Pemantapan Sistem Peradilan*, Seminar Nasional Menyongsong Pembangunan Hukum Dalam Era 2000. Semarang, 12. 13 August 1996

<sup>6</sup> Teguh Prasetyo & Abdul Halim Barkatullah, *Filsafat, Teori dan Ilmu Hukum*, Jakarta : Raja Grafindo Persada, 2012, p. 107

<sup>7</sup> Elza Syarif, *Menuntaskan Sengketa Tanah Melalui Pengadilan Khusus Pertanahan*, Jakarta, Kepustakaan Populer Gramedia, 2012, p 371.

<sup>8</sup> detikcom, Adji Samekto, *Masalah Pertanahan Kompleks, Butuh Pengadilan Agraria*, Jumat, (30/10/2015). Accessed on September 20<sup>th</sup>, 2018

technicality which only considers formal truth by ignoring material truth. The court is expected to perform its ability to settle any land disputes as expected by the community.<sup>1</sup>

The establishment of land court is the reflection of "realm of ideas" which can be realized by an existing law that regulates the establishment of a land court, thus the existence of the Land Regulations should be immediately enacted since it contains the norms for the establishment of a land court. The land issues characteristics can be considered as a foundation for land special courts formulation by considering both formal and material truth. The construction of the court establishment is expected to be based on principles that cannot be separated from the philosophical level, by providing a sense of justice, certainty and expediency for those justice seeker based on the ideals of the Pancasila.

Based on the above considerations, analyzing the nature of special court of land establishment is significant based on the supporting principles, theories and philosophies. Thus, the land court can be established as an appropriate judicial institution for land issues settlement, which will be part of the Indonesian Judicial System in the future. For, this study is entitled "**THE LAND COURTS ESTABLISHMENT CONCEPTS**".

### Research Problems

Based on the above elaborations, the research problems are formulated as follows:

1. What is the Historical Basis for the Establishment of Land Court?
2. What is the substance of the Land Court Establishment Concept?
3. What is the Construction of the Land Court Concept Based on the Pancasila Legal Idea?

## 2. Research Methods

This study is a normative and doctrinal legal research. Normative is used due to the distinctive character of law science that lies in the method of research that is normative, jurisprudence.<sup>2</sup> Doctrinal research is used to analyze the principles of law (civil procedure law), legal literature, expert opinion (doctrine).<sup>3</sup>

Normative juridical research uses several approaches, namely the *historical approach*, the *statute approach*, the *conceptual approach*, the *comparative approach* and the *case approach*. The statute approach carried by reviewing all the rules and regulations which is related to legal issues of special court of land establishment such as HIR, RBg, UUPA (ius constitutum), as well as the draft of Statute of Civil Law as the ius constituendum.

This approach is consistent with the view of law as a norm, theorem, and rules that apply in society in accordance with the principles of law.<sup>4</sup> The analysis method of legal materials is covering legal concepts, legal norms, technical law concepts, law institutions, law figures, law functions and legal sources.<sup>5</sup>

## 3. Results and Discussion

### 3.1. Historical Basis of the Land Court Establishment Concepts

Regarding the agrarian records in Indonesia, the researcher will first describe the history of the emergence of agrarian arrangements, with the aim of establishing a legal product or land court institution that is expected to be comprehensive in the future. The word "history" according to the Indonesian dictionary means an event happened in the past<sup>6</sup>.

The land issue began since the colonial authorities intervened in the land in their colonies to fulfill certain interests. As has been widely expressed by legal experts that the birth of the 1870 Agrarian Law was essentially aimed to facilitate the private plantation companies to control large amounts of land.<sup>7</sup>

Principally, the law drafted in the era of President Sukarno's administration replaced the position of *Agrarische Wet* 1870 which was famous for the *domein verklaring* principle (all of the land in the colonies which the ownership could not be proven based on western legal evidence, was declared as a state-owned/ Dutch colonial land). The birth of the UUPA has long been aspired to change the entire Agrarian system and philosophy in Indonesia.

One factor to struggle for land reform through the Act Number 5 of 1960 concerning Basic Principles of Agrarian Law (UUPA)<sup>8</sup> is the national spirit of the nation influenced by the dynamics of various ideologies and socio-political forces that contributed to the anti-colonialism movement.<sup>9</sup>

<sup>1</sup> Dian Rosita, *Konsep Ideal Peradilan Indonesia : Menciptakan Kesatuan Hukum Dan Meningkatkan Akses Masyarakat Pada Keadilan*, Jakarta: Lembaga Kajian dan Advokasi untuk Independensi Peradilan (LeIP), 2010. p.5-7

<sup>2</sup> Peter Mahmud Marzuki, *Penelitian Hukum*, Edisi Revisi, Cet. 13, PT. Kharisma Putra Utama, 2017, p. 136

<sup>3</sup> Ibid

<sup>4</sup> Soetandyo Wignjosoebroto, *Masalah Metodologi Dalam Penelitian Hukum Sehubungan Dengan Masalah Keragaman Pendekatan Konseptualnya*, Makalah pada Metodologi Penelitian, FH Undip, 1993, p. 30

<sup>5</sup> Philipus M. Hadjon, *Pengkajian Ilmu Hukum Dogmatik (Normatif)*, Makalah, Fakultas Hukum Unair, Surabaya, 1994, p. 3-4.

<sup>6</sup> Kamus Besar Bahasa Indonesia, Op Cit, p.794

<sup>7</sup> Simarmata, Rikardo, *Kapitalisme Perkebunan dan Konsep Kepemilikan Tanah oleh Negara*. Yogyakarta: Pustaka Pelajar, 2002, p.10

<sup>8</sup> Disetujui D.P.R.G.R. dalam rapat pleno terbuka ke-8 pada hari Rabu tanggal 14 September 1960, P.6/ 1960 Kutipan: State Gazette and Addition to State Gazette of 1960, republished

<sup>9</sup> Soetandyo Wignjosoebroto, *Dari Hukum Kolonial Ke Hukum Nasional : Dinamika Sosiopolitik Perkembangan Hukum Di Indonesia*, Rajawali Press, Jakarta, 1994, p. 159

The historical records show that the birth of the UUPA was the result of a feud from various interests during the Old Order era. Land reform is an agrarian political strategy which is motivated by a conflict of interests, especially those of landless farmers against the interests of landlords.<sup>1</sup> The enforcement of land law through the derivative of UUPA since its enactment in 1960 experiences implementation obstacle and is going far from the main goal to improve people's prosperity, the realization of freedom and legal certainty of land ownership, control, mutual benefits management for parties. However, the fact showed more pressure on the weak and sides with the owners of capital and the rulers who seek more profits from people's suffering. The implementation in the old order era was marked by a land registration program based on regulation No. 10 of 1961.<sup>2</sup>

Afterwards, the Act No. 2/1960 was fought for.<sup>3</sup> Implementation of the above laws and government regulations experienced severe obstacles due to lack of support from both the people and farmers' organizations, political parties, public figures and land reform committees.

The land redistribution program is also hampered by imperfect administrative weaknesses. Pros and cons of the implementation of these revolutionary laws and regulations have led to many actions, thus the Act No. 21 of 1964 concerning the Land Reform Act is issued. Referring those incidents, the implementation of the UUPA and the derivative regulations were failed to be implemented.<sup>4</sup>

The failure was due to delays in government practices in exercising the right to control the state, demands of the organization and the mass of farmers who distributed land immediately so that one-sided actions arose. The obstacles to the implementation of the UUPA are due to regime changes that try to place organizations motivating revolutionary movements in the struggle for land, especially to restore lands that were originally designated as excess land and therefore become objects of land levies by a number of landlords. In this era, it removed the ideals struggled by pro smallholder groups. In order the implementation was not realized, the new order regime issued a law that abolished the Land Reform Act and the Production Sharing Agreement Act.<sup>5</sup>

The sources of agrarian problems, including land issues, are caused more by the inconsistency of state public policies in the land sector that do not show partiality for marginal groups. Whereas in the land law, since Simpronius of 133 BC, the provisions of the *lex simpronius* has been effective i.e., the land law in order to prioritize ordinary people, that the law must help fools (*lex succurit ignorantibus*).<sup>6</sup>

Referring to the history of the UUPA, the formation of its derivatives and various land issues, it is urgent and relevant to establish a land court. The aim is to settle all land problems that occur by focusing on land issues that cause massive problems and harm the community.

### 3.2. The Substance of The Land Court Establishment Concept

The Land problems is massive and has harmed rights of the people, but the settlement is always protracted and causes even greater problems. It is due to the mastery and management of land objects is not accordance with the applicable regulations that violates human rights. However, laws and regulations have an important substance in the regulation and implementation of the rules.

Regarding to the UUPA, there are only two articles that regulate the resolution of land issues in the criminal corridor, whereas the land is not only criminal but including civil and public elements. The derivatives of the UUPA do not explicitly regulate the resolution of land issues due to many sectorial laws and regulations. By these conditions, the researchers concluded the need for the establishment of a land court.

The urgency<sup>7</sup> of special court establishment for land issues cannot be separated from the unresolved land issues, it is necessary to have a concrete step by the existence of a judicial institution that can settle based on existing judicial principles. In the current position the most important point is whether or not the law is able to answer and meet the needs of substantive justice for the people who have been victims.

The first substance is the level of occupation of community land or customary land that triggers land problems because the government policy opens the investment climate in the plantation sector, which has led to economic inequality because it results in economic dualism,<sup>8</sup> namely the existence of a plantation economic system controlled by export-oriented colonials and the existence of traditional agriculture from colonized people. Ease for plantation investors to control land with the Cultivation Rights Title, which the area sometimes exceeds the

<sup>1</sup> Noer Fauzi, *Petani dan Penguasa : Dinamika Perjalanan Politik Agraria di Indonesia*, Kerjasama Insist Press, KPA, Pustaka Pelajar, Yogyakarta, 1999, p. 141.

<sup>2</sup> Government Regulation No.10 of 1961 on ...how to know and provide legal certainty regarding land ownership.

<sup>3</sup> Act No. 2 of 1960 on Profit Sharing Agreements

<sup>4</sup> Noer Fauzi, *Op.Cit.*, p. 124

<sup>5</sup> Act No. 2 of 1960 is to supervise the customs of profit sharing. This sharing help increase labor recruitment. However, the increasing number of landlords, and the imbalance of land tenure and ownerships causes alarming results comparisons. See Justus M. van der Kroef, *Land Tenure and Social Structure in Rural Java, Approaches to Community Development*, Volume 25, Bab IX, 1960, in Sudiono MP Tjondronegoro & Gunawan Wiradi, *Dua Abad Penguasaan tanah: Pola Penguasaan Tanah Pertanian di Jawa dari Masa ke Masa*, Yayasan Obor Indonesia dan PT Gramedia, Jakarta, 1984

<sup>6</sup> Achmad Sodiki, Achmad. *Politik Hukum Agraria*, Konstitusi Press, Jakarta, 2013. p. 45

<sup>7</sup> *urgensi/ur-gen-si/urgensi/ n keharusan yang mendesak; hal sangat penting*, <https://kbbi.web.id/urgensi>, accessed on August 20<sup>th</sup>, 2019.

<sup>8</sup> J.H. Boeke, *Economics and Economic Policy of Dual Societies*. Harieem, H.D. Tjeenk Willink, 1953, p.34



requirements of the law, and the land granted takes the rights to land owned by other legal subjects.

Claims to return people's rights to plantation land, because the land was taken by the plantation party by "seizing", or paying small compensation, so that the claim was followed by occupation of land by the community (including plundering).<sup>1</sup> The government policy to open the plantation investment climate is not wrong, however the implementation of the policy is problematic since it denies the UUPA as normalized in Article 28 paragraph (1) *The right of exploitation is the right to cultivate the land directly controlled by the State for period of time as mentioned in article 29, for agricultural, fisheries or animal husbandry companies.*

Land rights exertion in the status of land use rights only covers these three business fields, however by the emergence of sectorial laws, namely Plantation, the norm is ignored, thus the plantation sector which requires large area often occupies or overlaps lands under others' land rights. The granting of Cultivation Rights Title for the plantation sector provides the greatest proportion of the occurrence of land issues. This ignorance of UUPA norms effects on the goal to prosper the people.

The second substance is overlapping regulations. It occurs due to the existence of legislation that does not refer to the UUPA. Therefore, it is significant to consider the ways to unite the legislation in one law that covers the whole things. Overlapping may be a burden to resolve land issues, because it should settle conflicts and disputes that have been categorized as "extra-ordinary" conflicts and disputes due to their impact.<sup>2</sup>

It is due to denial of the UUPA as a legal protection governing agrarian or land issues, many organic laws do not refer to or even do not mention in the consideration. By the issuance of Presidential Decree No. 34 of 2003 concerning National Policy in the Field of Land, as described in Article 1 letter a, it stated: *"In realizing intact and integrated conception, policies and national land system, and the implementation of TAP MPR RI Number IX/MPR/2001 concerning Agrarian Reform and Natural Resource Management"*. The National Land Board is taking steps to accelerate the law drafting on the Improvement of the UUPA and the Draft on Land Rights and other laws and regulations in the land sector.

The priority to improve UUPA by establishing the Land Law is based on the Decree of the People Consultative Council of the Republic of Indonesia IX/MPR/2001 as a legal basis, especially in relation to the phrase *"...in the context of synchronizing policies among sectors"*. Thus it is necessary to understand that the drafting of the Land Law is a "bridge" to minimize the disconnection of sectorial laws related to the land sector, in addition to complementing and describing matters that have not been regulated by the UUPA and to emphasize various interpretations that deviate from the philosophy and principle the basic principles outlined by the UUPA.

The third substance is weak level of land issues resolution, because land issue is considered "extra-ordinary", thus competence law up-holders are needed, namely the judges. The majority of cases, a permanent legal force (*inkracht van gewijsde*) cannot be executed, because similar land issues may have several other decisions that have permanent legal force. Ironically the decisions are contradictory, it occurs due to the absence of accurate data in the court or law upholder, and the judge competence do not meet the qualifications to settle the issue.

There are several basis to consider for the land court establishment, namely: Land issues are specific that require special handling and knowledge on Land. Agrarian disputes are indeed a specific form of dispute that requires special knowledge. When the dispute is submitted to the court to be examined, and decided in order to obtain justice, it is necessary to have a judge who master the agrarian law. "Judges who decide agrarian disputes at this time, both in general courts and state administrative courts basically have general legal knowledge".

Every legal consideration of a judge's decision often does not refer to national land law that prioritizes civil law and administrative law. It certainly cause differences, because in carrying out the duties, the BPN (*Badan Pertanahan Nasional*, or the National Land Board) refers to the national land law and its implementing regulations.

A large number of land disputes cases that occurred in Indonesia could not be completely settled by the national judiciary. It results in protracted land disputes, and the absence of legal certainty over the status of land ownership. An *inkracht* decision (permanent legal force) of a case can take years. It requires more time and energy of the apparatus in litigating which can disrupt the operation of land services to the people. Thus, the principle of simple, fast and inexpensive is not realized.

Land disputes settlement faced by the National Land Board has some weaknesses as the following:<sup>3</sup>

- a) A difficult execution mechanism. If one party is not willing to implement the agreement contents that has occurred in mediation process, then the other party cannot force the opponent to implement it. Therefore, the case is submitted to the court, in which the case requires more time to settle;
- b) The mediation process depends on the good will of the parties to resolve the problem. It means that the disputing parties must be willing to accept and implement the agreements that occur through mediation;
- c) If a legal counselor or lawyer is not involved in mediation process, it is possible that some important

<sup>1</sup> J. Sembiring, *Konflik Tanah Perkebunan Di Indonesia*, 2006, hlm 262-278 . Jurnal Hukum No. 2 Vol 13 May 2006;

<sup>2</sup> Land Law Academic Drafting, 2018, p.15

<sup>3</sup> Arie Hutagalung, *Tebaran Pemikiran Seputar Masalah Hukum Tanah*. Jakarta: Lembaga Pembedayaan Hukum Indonesia, 2005, p. 369.

legal facts will not be conveyed to the mediator that results biased agreement.

### 3.3. Construction of the Land Court Concept Based on the Pancasila Legal Idea

The land issues in Indonesia is complex, because it is multi-faceted in which there are aspects of public law as the domain of state administrative justice, criminal justice, and aspects of civil law as the domain of general justice and religious justice. With the complex nature of the problem, there are many legal issues arise, mainly related to conflicts of justice competence and the prolonged process of dispute settlement. Under these conditions, the land issues is considered to be "a long way of problem solving".

The establishment of land special court issues has been a lively discussion, especially after it was published in the Land Law originated from the initiative of the House of Representatives Commission II. It is necessary to understand the character of land issues, to see a complete illustration of the problems that have arisen in resolving land issues, because these problems may become obstacle to various sectors development. Therefore, the government initiates a land court establishment in the Land Law arrangement, as normalized in article 73 of the Land Law. The inclusion of the establishment of land court in the Legal Drafting provides an opportunity for the establishment of a judicial institution. However, it has substantial weaknesses i.e., one court that try all land cases in terms of civil, public and criminal sides is impossible, because it effects on the Indonesian justice system.

As stipulated in Act No. 4 of 2004, special court position is no longer placed in the elucidation section of the Act but has been included in the torso section. As articulated in Article 15, namely: "(1) *Special courts can only be established in one of the judicial environments referred to in Article 10 which is regulated by the law*".

The position of the land court in the general court environment, will bear various consequences, namely: 1). to increase the responsibility of the general justice environment; 2). avoid the target of effectiveness and efficiency of the cases settlement based on the specialization of the judge; and 3). the involvement of land ad hoc judges needs to be considered.

However, a logical juridical argument of the researchers is when the land court becomes a part of the justice system in Indonesia that effect some changes in the system, it will disrupt the established system. Thus, to place a special court of land in the sub-coordinates of the civil chamber of the general court is a solution, because the land problems tend to resolve land issues related to "rights".

The plan to establish a land court is based on three main arguments, namely: First, a recognition of the concept of Land Law due to the complexity of land issues. Secondly, the idea of establishing a land court is not intended to trace the existence of a land reform court, but to perfect, even expand the scale of its settlement; Third, the land court was formed because of the inability of the general court to provide a sense of justice to the community, and therefore the land court must be under the general court environment.

Some experts have different opinions on the establishment of the land court, as opined by Maria S.W. Sumardjono stating that a special court on land issues establishment is not needed, because civil disputes relating to land can be resolved through the general court while if the disputing parties were persons or private legal entities and the government, then the cases is settled by the state administrative court.<sup>1</sup>

Likewise, Hamdan Zoelva<sup>2</sup> stated that the establishment of a special court is not the only way to guarantee professionalism and the length of case settlement. To achieve this purpose, a special court must not be established, but only to appoint an ad hoc judges bby considering these steps; first, permanent ad hoc judges appointed based on certain period of time from other profession of the judge; second, non-permanent (temporal) ad-hoc judges as needed to handle certain cases.

However, the researchers do not support Maria S.W. Sumardjono because the mediation process carried out by the land agency shows many weaknesses, it is possible to be denied by the parties, because the agreement made did not have a certainty. Likewise, the researcher do not agree with Hamdan Zoelva because by including ad hoc judges in the general court will also change their functions and duties as stipulated by the Law on Judicial Power, especially if ad hoc judges are temporarily presented. Thus, it would be better to establish a land court with the authority inherited to the judicial institution.

The land issues that will be handled by the special court for land issues should be limited. *Ratio legis* of the connectivity and limitations are: 1). The important factors of land courts: Land issues are specific problems and require special handling and knowledge about the cases. When the dispute is submitted to the court, it is necessary to have a judge who master the agrarian/land law to obtain justice; 2). A large number of land problems in Indonesia have not been completely settled by the General Courts, and A large number of Land Issues that occur cannot be completely resolved by the national judiciary. It causes 1 a prolonged and disputes and result in the absence of legal certainty over the status of land ownership; and 3). Alternatif Penyelesaian Sengketa (hereinafter abbreviated as APS) or is known as Alternative dispute resolution) outside the court still carried many weaknesses in the resolution of land disputes faced by the BPN.

<sup>1</sup> Sumardjono, Maria S.W. (IV), *Kebijakan Pertanahan : Antara Regulasi dan Implementasi*, Kompas Media Nusantara, Jakarta, 2001. p. 197

<sup>2</sup> Zoelva, Hamdan. *Aspek Konstitusionalitas Pengadilan Khusus di Indonesia*, dalam Putih Hitam Pengadilan Khusus, Sekretariat Jenderal Komisi Yudisial Republik Indonesia, Jakarta, 2013. p. 178

Through the land court, the judiciary can play a greater role in supporting economic development, thus it can ultimately improve the prosperity of the Indonesian people. The decisions issued by the special court for land provide more legal certainty and justice and are more beneficial to the parties of the dispute, the public and the State by still referring to the principle of resolution of low cost and a short time settlement.

Therefore, it is necessary to have an action plan by the government in establishing a land court, namely: 1). Short-term action plans are: i). Identification of the implementation of special courts for land in several other countries; and ii). Organization and Procedures for the Special Court for Land (organizational design, (structure, human resources and technical implementation of judicial proceedings); and 2). The action plan in the medium term: it needs to be completed with the preparation of the Land Court Law as a legal protection for the establishment and implementation of a land court.

Regarding the complexity of land issues, and the limited capacity and institutional response available, thus it is relevant to present special court for agrarian matters. It is the time to pioneer the establishment of a land court under the general court within the Supreme Court environment. This court is supported with the presence of educated judges and apparatus who are specially trained to handle complex and multidimensional agrarian cases.

#### 4. Closings

##### 4.1. Conclusion

The results of this research are presented in the following conclusions:

1. The land issues means inaccurate perceptions, interests and development policies that harm some part or all of the rights taken over which is merely based on formal evidence. Basically article 15 of the UUPA has regulated, but the void norms occurred related to the phrase maintaining the land and the imposition of criminal sanctions as normalized in Article 52. The emergence of massive and specific land issues is due to the large number of sectorial laws that are inconsistent with the norm of UUPA. It is due to the lack of the legislators to form clear and distinct norms, leading the possibility of multiple interpretations that may create a *contrario* for the disputing parties and the parties attorneys.
2. The land issues settlement is still protracted both by the general court which has not been able to implement the principle of justice, and by the land agency that have some weaknesses even though various regulations have been issued. If the resolution still apply these two mechanisms, the land issue will never be settled, because the problem is massive and specific that additional principles are needed to support the function of judges in resolving land issues.
3. The construction of special land court regulation is inseparable from the norms contained in Article 24 of the 1945 Constitution and the Judicial Power Law, in addition, it also requires a law which leads to establishment of a land court, as has been stipulated in article 73 of the Land Law. The position of the land court in the sub-ordinate of the general court of civil chambers in the Province. The establishment of a land court will be more effective and efficient because the process is bounded by time and legal appeal. The Justice purpose by the establishment of a Land Court based on Pancasila is due to religious genius in the process. However, not all types of land issues will be resolved in this court, but it only for limited issues.

##### 4.2. Recommendations

Based on the above conclusion, some recommendations and suggestions are proposed as follows:

1. Land issues arise due to different perceptions and interests, but in substance they occur because the UUPA is not placed as a *genus/lex generalist* of regulations that normalize the rights. To control and oversee the process of issuing permits in the plantation and mining sectors as the biggest contributors to land issues.
2. The establishment of land court is not only based on the principles of justice that have been applied, but other principles are needed to support the special court to perform its functions to provide justice with legal certainty. Then it is necessary to:
  - a. Adding some principles to be used by the judges of Land Court to research, examine and decide the land issues by upholding justice in accordance with the legal objectives.
  - b. Rearranging land institutions management on providing licenses and supervision of control, management and maintenance of land rights as the aim of agrarian reform, thus it can be integrated with the land special court to create acceleration of land issues settlement.
  - c. Codifying laws and regulations related to land issues, as an effort to avoid conflicts, vagueness and vacuum of norms. As well as the formation of legislation or the enactment of the Land Law as the basis for the establishment of a special court for land issues.
3. In principle, in resolving land issues, it is necessary to form a special court for land matters, concerning the laws and regulations to support the establishment of special court existed. Thus the establishment of a special court for land has been in accordance with the ideals of the Pancasila law, Article 1

paragraph 3 of the 1945 Constitution of the Republic of Indonesia and the Judicial Power Law. And as an effort to reform land law as the direction of national law development. For, the researcher suggests:

- a. The establishment of a special court for land has become an important agenda and the government priority to deal with the increasingly massive land problems.
- b. The establishment of the Land Court effects on the efficiency and acceleration in resolving land problems, and it implement the principle of fast, simple, and inexpensive.
- c. Law enforcement of land focused as a form of implementation of Pancasila-based law enforcement that prioritizes the public interest, thus land justice seekers are able to obtain legal certainty

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