Agrarian Law Enforcement and Settlement of Land Affairs Dispute in Judicature Process

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ABSTRACT

This dispute settlement option beyond the court had developed for other cases such as certain criminal cases in work force dispute or environmental or land affairs case, hence, solely, it was not applied to commercial cases only. Firstly, by filing accusation through reply. Secondly, it is determination stage from verification through judging. Thirdly, it is exercise state, i.e, judge implementation. Any such stage requires long relative time, expensive and complex. This research is a normative juridical research referring to the legal norms contained in the laws and regulations on Agrarian Law Enforcement And Settlement of Land Affairs Dispute In Judicature Process. Data obtained from normative juridical research is legal research using secondary data are official documents, books related to the object of research, research results in the form of reports, legislation and jurisprudence.Although any land affair dispute had occurred at any area, immediately, it may be solved by local officer and its results may be received by parties in dispute. Lately, this condition my create law renewal on land affairs preceded by development of land affairs policy, of course, it should be commenced by law development of land affairs as part of national law system. Complexity of agrarian law enforcement become serious problem, it is based on land function is very strategic to support activities of economy, social, technology and information progress. Hence, common will and commitment to seek out land affair disputes in Indonesia which had sacrificed so many people, either local government, law enforcement apparatus, colleges and all communities should be striven for, and it should precede resolution by negotiation, and provided that it may not be achieved, it should be striven by mediation, and when it may not be achieved so, then, the court is last end/alternative to be achieved. Hence, judge's award as *Ultimatum remedies* (last end) for land affair dispute and whomever should realize Court's rules which had had permanent legal power because its position as law in concrete case/matter.

Key word : Agrarian Law, Settlement of Land Affairs Dispute, In Judicature Process

1. INTRODUCTION

Land affairs dispute is that of vest interest on land. Currently, it may be hindered as result of highest requirement on land, meanwhile land plots are limited.[1] It requires reform inlandscaping and using land for community prosperity in terms of its law certainty specially. Hence, some efforts had been implemented by government, e.g by striving for settlement of land affairs dispute rapidly in order to hinder accumulation of land affairs dispute which may damage community such as land utilization in dispute.

Basically, dispute settlement option may be conducted by two (2) processes both by litigation before the court and then, it is developed by cooperation beyond the court.[2] Litigation process resulting in agreement in adverbial nature which had not been able to embrace common interests. Conversely, by beyond the court process it result in by agreement in 'win-win solution' nature,[3] it may be hindered from settlement process delay as result of procedural and administrative issues, comprehensive settlement in togetherness while

[1]) Gumawan Wiradi, *Masalah Pembaruan Agraria : Dampak Land Reform terhadap Perekonomian Negara, Minor Paper presented in series of discussion, celebration of 100th Anniversary of Bung Karno (First President of Republic of Indonesia)*, in Bogor, dated 4th May 2011, page.4

[2]) National Land Affairs Agency (BPN), *Reforma Agraria, Mandat Politik, Konstitusi dan Hukum Dalam Rangka Mewujudkan "Tanah Untuk Keadilan dan Kesejahteraan Rakyat"*, Jakarta, 2007, page.23

[3]) Felix MT Sitorus, *Lingkup Agraria Dalam Menuju Keadilan Agraria* : 70, 2002, page.11

keepinggood relationship.Subsequently, rules of such dispute settlement beyond the court was applied in Indonesia and Passed Laws No.30 of 1999 on Arbitrage and Dispute Settlement Alternative, it had provided with rules of dispute settlement option (PPS) amicably which may be attained by the parties to settle dispute or difference of opinion of their commercial case, whether by utilization of rules of consultation, negotiation, mediation, conciliation or evaluation of lawyers.[4]

This dispute settlement option beyond the court had developed for other cases such as certain criminal cases in work force dispute or environmental or land affairs case, hence, solely, it was not applied to commercial cases only.Economically, such dispute had forced the involved parties to expend cost.[5] More and more this dispute settlement option spend cost to settle land affairs dispute to finish it may not be compared to price of land object in dispute. Nevertheless, by part of parent or certain ethnic land is self estimation and should be hold firmly and maintain it to death.

In the course of dispute, land as dispute object usually, it is in status quo condition, so that, it may not be exploited. As a result, land source quality decreases finally, it may damages interests of parties and benefit principle of land may not be achieved.[6]

2. THEORY

In order to settle land affair dispute, then, it is better to use mediation ways, hence, win-win solution among parties in dispute may be achieved. Mediation is any process of settling land affairs dispute more rapidly and cheaply and also it may give a larger justice access to parties in finding satisfied dispute settlement while giving sense of justice. Mediation integrated to proceeding process before the court rather, it may become effective to solve problems of case accumulation in the court and also it will both strengthen and maximize function of non judicial institution to settle dispute unless proceeding process in adjudicative (judged) nature.[7]

Individual who (feel) damaged by others and will recover his/her right, it should be exerted by prevailing procedures, either by litigation (before the court)or Alternative Dispute Resolution (ADR) and it may not be implemented by self way (eigerichting).[8] Before the court, case resolution/settlement commenced by filing accusation to the authorized court, dispute resolution by law in this court conducted by three (3) stages. Firstly, by filing accusation through reply. Secondly, it is determination stage from verification through judging. Thirdly, it is exercise state, i.e, judge implementation. Any such stage requires long relative time, expensive and complex.

In progress, indictment will more be rapid, secrecy, efficiency and effectiveness and also for keeping relationship sustainability between the parties in dispute, as long as it may not be responded by litigation (court) institution, hence, it has so many critics. Operationally, judicature is evaluated slow going, expensive, waste energy, time, money and win-win solution.[9]Hence, alternative dispute resolution had obtained positive response, specially in business world which wish efficiency, secrecy and sustainability of cooperation, informal, settlement which more stress justice sense.Such alternative is mediation prior to file case to the court.

Indonesia, in case of mediation institution is more progress than otherpreviously. Law of Commercial Procedure, I,e HIR (het Herziene reglement), Article 130 and R.Bg (Rechtsregment Buitengewesten), article 154 for instance, it had regulated reconciliation institution where judge who hear it should reconcile the parties in dispute prior to examine by adjudication. Additionally, by Court Supreme had been issued SEMA No.1 of 2002 on empowerment of reconciliation institution in article 130 of HIR/154 of r.Bg. meanwhile in terms of mediation or dispute resolution alterna\tive (APS) beyond the court, it had been regulated by article 6 of Laws No.30 of 1999 on

[4]) Ibid

[5]) Herry Bernstejn, et,al, *Kebangkitan Studi Reforma Agraria di Abad 21, STPN, 2008.*

[6]) Boedi Harsono, *Hukum Agraria Indonesia, Sejarah Pembentukan Undang-undang Pokok Agraria, Isi dan Pelaksanaannya*, Djambatan, Jakarta, 1999, page.5

[7])Reksodiputro, Mardjono, *Resolution Legal Instituion and Alternative Dispute, Hasil Penelitian yang disajikan pada Seminar Nasional Menyongsong Penggunaan Hukum Era 2000*, Semarang 13 Agustus 1996.

[8]) Meriam Darus Badrulzaman, *Kompilasi Hukum Perkotaan*, Bandung, PT. Citra Aditya Bakti, 2001, page. 28

[9]) Joni Emirzon, *Alternative Penyelesaian Sengketa Diluar Pengadilan Negosiasi, Mediasi, Konsiliasi Arbitrase*, PT. Gramedia Pustaka Umum, Jakarta, 2001, page.91

dispute resolution by arbitrage. Largely, institution of APS may be found at some sectors such as Laws on Life Environment, Growth, Consumer Protection and others.

3. RESEARCH METHODE

This research is a normative juridical research referring to the legal norms contained in the laws and regulations onAgrarian Law EnforcementAnd Settlement of Land Affairs DisputeIn Judicature Process.Data obtained from normative juridical research is legal research using secondary data are official documents, books related to the object of research, research results in the form of reports, legislation and jurisprudence.

4. DISCUSSION

In order to minimize land affair dispute, then, it is required comprehensive strategy to anticipate and reduce dispute numbers in field of land affairs, hence, it is necessary to realize some following strategies.[10]Public Administration Strategy, it highly required comprehensive/ holistic (multi discipline) professional which may not be assigned to product oriented professional, change of organizational structure by sectors , it is not based on product (commodity) but that of process. It will minimize product based sector interests which have impact of minister policy, really, it is product of any deputy which of tupoxy is product not process requiring multi discipline professional. Currently, it is not different with format in colleges with faculty departments, is this administration format for all ministries throughout Indonesia? Is this administrative reform? How with land affairs specially?Judicative, to solve overlapping regulations and recommendation of regulation umbrella of State land affairs it may be established Committee of State Land Affairs (KPN) as regulation implementation of State authority against its land, currently, it is hold by governmental authority and by sectors only.

Legislative (DPR) together with President hold obligation to regulate all policies related with State Authority, State Budget (APBN) are right, RPTPN (Plan of State Developmental Land Procurement) when it was not hold by legislative, even executive submit it to sectors who hold it (administrative-BPN, dominantly land controlling – forestry). There is a question – whether or not forestry is commodity sectors? Why control state lands and all sectors refer to it, if will not be said that it is overlapped with forestry department control which of authority by state really. Hence, there is a question where democracy control by people without State authority/power(executive together with legislative pertaining to land affairs, why budget is able?)

As to concept for settling land affair dispute it may be divided into three (3) issues relate each other.[11]

a. Concept of Welfare State as Guidance of Settling Land Affair Dispute in Indonesia. In the beginning of Indonesia state establishment, there was nationality awareness that people prosperity solely, it may be manifested by governmental intervention. Preamble, articles and body of Constitution 1945 indicated that the way to manifest prosperity for Indonesia nation is making state role through is performance as 'director' and policy and regulation maker based on Pancasila (Five State Philosophies) as ideology and state foundations. [12]

Principally, law of Indonesia land affairs as part of existing one based on concept of Welfare State. It was indicated by fourth amendment of Article 33 paragraphs (1-4) of Constitution 1945. Community or people may be said welfare provided that they experience increasing of proper and prestigious life quality by main stressing the fulfillment of food, clothing, housing, health, educational and job opportunity needs. UUPA (Main Laws on Agrarian) manifests missions/ objectives contained in those two regulations above it by regulating some rules in terms of base principle of land controlling along with rights structure. For instance, Article 7 of UUPA stipulate prohibition most excessive land controlling, Article 10 of UUPA instruct agricultural land owners to cultivate his/her land plots actively in order to prevent from extortion, Article 17 of UUPA regulating minimal and maximal area volume of land ownership by any family or legal entity in order to create equality of land ownership/controlling and others.

[10]) A.P. Perlindungan, 1998, *Pendaftaran Tanah di Indonesia*, Bandung, Mandar Maju, page.82

[11]) Efendi Perangin, 1983, *Hukum Agraria di Indonesia, Suatu Telaah dari Sudut Pandang Praktis Hukum*, Jakarta, CV Rajawali, page.72

[12]) Darji Darmodiharjo and Sidharta, *Pokok-pokok Filsafat Hukum, Apa dan Bagaimana Filsafat Hukum Indonesia*, Gramedia Pustaka Utama, Jakarta, 2002, page.56

b. Jurisprudence Sociological Concept as Guidance ofSettling Land Affair Dispute in Indonesia. It refers to consideration that law is a tool of social engineering.[13]It means that law as social engineering is judicial award. Max Weber thought on law role to implement changes for community, more deeply it is studied by sociologists (jurisprudence sociology) by Roscoe Pound in 1912 specially.[14]Roscoe Pound contended that sociologism lawyers to more calculate social facts existing at his/her works, is it law commitment, interpretation or application of such self regulations. More smartly, lawyers should be able to calculate social facts to be absorbed in laws and then, it may become its application target. Hence, Roscoe Pound suggested the attention more be directed to real effects from institution and law doctrines, because of law reality is laid on its application. In order that law may fulfill community requirements, the most current social condition to be observed. Shortly, by accommodating last progress from social facts in meaning of requirements, interests and community aspirations, law function as social engineering will more be transformative.

c. Law as Renewal Facility and Community Development

Law concept as renewal facility and community development based on concept of law as tool of social engineering had grown at jurisprudence sociologist which of invention pioneered among them by Roscoe Pound, Eugen Ehrlich, Benyamin Cardozo, Kantorowics, and Gurvitch. In this law concept as renewal facility, stressing of law words more trend to regulations in which good law is accordance with real law in community. It means the wished law isone reflecting real values in local community. It means that only living/real law as focus.

When law concept as renewal facility and community development related with judicial practices which settle land affair dispute in Indonesia currently, it may be said that judicature through its award reasonably, it is media for creating orders for land affairs.[15] Hence, enforcement of justice and economy democracy principles should be accompanied with care to poor/weak community, national potency acquisition either as consumers, entrepreneurs or even workers without discriminating ethnic, religion, and gender to obtain opportunity, protection and rights either in order to increase life standard or even to play active role for some economy activities including to exploit and maintain landplots as any natural richness of Indonesia.

In order to exploit and utilize land as any agrarian resources fairly, transparently, and productively, existence of traditional rights and local community should be concerned.[16] Additionally, completion of data in terms of existence, total area volume of land along with its controlling system it should be complete and up to date, so that, it will be created harmony and balance landscape. Although any land affair dispute had occurred at any area, immediately, it may be solved by local officer and its results may be received by parties in dispute. Lately, this condition my create law renewal on land affairs preceded by development of land affairs policy, of course, it should be commenced by law development of land affairs as part of national law system. Nevertheless, reasonably, such development remain based on basic principles existing at UUPA as main rules of national land affairs law.[17]

Mediation As Alternative Solution For Settling Land Affair Disputein order to settle land affair dispute, then, it is better to use mediation ways, hence, win-win solution among parties in dispute may be achieved. Mediation is any process of settling land affairs dispute more rapidly and cheaply and also it may give a larger justice access to parties in finding satisfied dispute settlement while giving sense of justice. Mediation integrated to proceeding process before the court rather, it may become effective to solve problems of case accumulation in the court and also it will both strengthen and maximize function of non judicial institution to settle dispute unless proceeding process in adjudicative (judged) nature.[18] Individual who

[13]) Soetjipto Rahardjo, *Ilmu Hukum*, Alumni, Bandung, 1986, page.48

[14]) Lili Rasyidi and Ira Rasjidi, *Dasar –dasar Filsafat dan Teori Hukum, Citra Aditya Bakti, Bandung, 2001, page.82*

[15]) Henri Lie.A.Weng, 1970, *Hukum Perdata dan Hukum Benda*, Yogyakarta Liberty, page.63

[16]) Soerodjo, 2003, *Proses Pendaftaran Tanah*, Jakarta, Rineka Cipta, page.71

[17]) Supriadi, 2007, *Hukum Agraria*, Jakarta, Sinar Grafika, page.43

[18])Reksodiputro, Mardjono, *Resolution Legal Instituion and*

(feel) damaged by others and will recover his/her right, it should be exerted by prevailing procedures, either by litigation (before the court)or Alternative Dispute Resolution (ADR) and it may not be implemented by self way (eigerichting).[19]. Before the court, case resolution/settlement commenced by filing accusation to the authorized court, dispute resolution by law in this court conducted by three (3) stages. Firstly, by filing accusation through reply. Secondly, it is determination stage from verification through judging. Thirdly, it is exercise state, i.e, judge implementation. Any such stage requires long relative time, expensive and complex.

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Court Supreme of RI also issued Court Supreme Regulation No.2 of 2003 on Mediation Procedure before the court to oblige the parties in commercial dispute in order to obtain mediation process previously, i.e by negotiation among parties in dispute by assistance of third party being neutral and have not authority to judge (mediator).[21] Related with such case, Court Supreme oblige use of mediation service as effort for maximizing reconciliation as had been regulated in Article 130 of HIR and article 154 of Rbg. Court Supreme Regulation No.2 of 2003 provide with options for parties in dispute to use mediator service available at District Court or use mediator service beyond the court. Hence, the passage of Court Supreme of RI no.2 of 2003, it had opened opportunity for whomever who hold mediator function to run it either as full or part time profession.

Procedural law applied to the present either Article 130 of HIR or article 154 of Rbg had encouraged the parties in dispute to attain mediation process to be intensified by combining mediation process into proceeding procedure at District Court in line with legislation while considering authority of Court Supreme to regulate judicial procedure having not been set forth by regulations sufficiently, then, for sake of certainty, courtesy, and fluency of reconciliation processes of parties in solving any commercial matter, those two regulations above to be foundations. Hence, Court Supreme had passed PERMA No.1 of 2008 on Mediation Procedure before the court thereby.

Chapter I of such PERMA (Court Supreme Regulation) clarifies general provisions on enactment of such PERMA. Herein there are six (6) articles which of article 1 is clarification in terms of term definition contained in mediation. Article 2 clarify scope andeffectiveness of PERMA in which it is applied only for mediation related with matter process before the court.Article 3 clarify summon cost for parties to be born by plaintiff and when agreement may be achieved successfully, it will be born by both parties agreement. Article 4 clarify matter type to be mediated is all commercial matters unless dispute by commercial court procedure,

Alternative Dispute, Hasil Penelitian yang disajikan pada Seminar Nasional Menyongsong Penggunaan Hukum Era 2000, Semarang 13 Agustus 1996.

[19]) Meriam Darus Badrulzaman, *Kompilasi Hukum Perkotaan*, Bandung, PT. Citra Aditya Bakti, 2001, page. 28

[20]) Joni Emirzon, *Alternative Penyelesaian Sengketa Diluar Pengadilan Negosiasi, Mediasi, Konsiliasi Arbitrase*, PT. Gramedia Pustaka Umum, Jakarta, 2001, page.91

[21] Riduan Syahrani, *Seluk-beluk dan Azas-azas Hukum Perdata*, Bandung, PT. Alumni, 2004, page.75

industrial relationship court, objection on award of consumer Dispute Resolution Agency and objection on Committee of Business Competition Agency. Article 5 on Mediator Certification in which mediator should hold mediator certificate upon attending training implemented by Court Supreme. Article 6 clarify mediation process is closed unless otherwise the parties determine.

Chapter II clarify pre mediation stage which of Article 7 clarify on obligation of judge who examine matters and attorney.Article 8 clarify the parties right in electing mediator.Article 9 clarify that court provided with at least five (5) mediator names to parties in dispute. Article 10 clarify mediator honor/fee in which if judge mediator will not be charged but for not judge mediator will be born jointly or by agreement of parties. Article 11 clarify the tern of mediator election. Article 12 clarify that the parties should run mediation process by good will.

Chapter III of PERMA No.1 of 2008 is mediation process stages. Article 13 clarify submission of matter resume and time for such mediation process. Article 14 clarify authority of mediator to declare that any mediation process had failed, one of each is when any party or his/her attorney had not attended mediation for twice consecutively. Article 15 clarify duties of a mediator in handling mediation process. Article 16 clarify that for certain condition, mediator may call one or more experts in any certain expertise. Article 17 clarify the achievement of agreement for any mediation process and subsequently, in Article 18 clarify the failure of achieving agreement objective in mediation process. Article 19 clarify separation of mediation and litigation.

Chapter IV of PERMA No.1 of 2008 describe place of mediation performance as referred to in Article 20. In Chapter V had been clarified reconciliation at cessation/appeal level and judicial review clarified again at Article 21 and Article 22. Chapter VI described agreement beyond the court and it was clarified Article 24 and Article 22. Chapter VI described agreement beyond the court as clarified in Article 23. Chapter VII described guidelines in terms of mediator behavior and incentive as clarified in Article 26. Court Supreme Regulation No.2 of 2003 it had no longer been applied and in Article 27 had been clarified that it was effective since the enactment on 31st July 2008.

The plus value of mediation resolution is pertaining to its cost being not heavier, shorter and simpler specially.[22] Whereas its weakness is what had been agreed by parties in dispute through mediation really it was violated by any of them thereby. When the parties had not met agreement through mediation, the court is final way to be achieved. Hence,judges's award is*Ultimum remedium (*final alternative) in land affairs dispute.

Judge's award is any statement by judge(s) as state officer(s) having been authorized for it, it is stated before the court and aimed at terminating or resolving any case or dispute among parties. So called 'award' is not spoken only, but, also being written and spoken before the court thereby. Award spoken before the court (uitspraak) should not be different with being written (vonnis).[23]

Court Supreme by circular letter No.5/1959 dated 20th April 1959 and No.1/1962 dated 7th March 1962 instructed among them that when statement of award, its concepts should be completed. The mean of this circular letter is in order to prevent obstacle when solving matter, but also it may be prevented the distinction among in written and verbally, then, the valid one as had been spoken in which any award is valid upon spoken.

Any award before the court is aimed at solving any problem or dispute as well as decide its rights or law. When the parties in dispute bring and trust their dispute to the court or Judge to be tried or examine, then, it contains meaning that such parties in dispute will adhere to award having been judged. It should be respected by both parties. Any party may not commit contradiction with such award. So that, judge's award has final and binding power for both parties (article 1917 of BW). The binding or engagement of both parties with such award will result in some theories to bring about foundation of binding power of judge' award.

In theory of materiel law the binding power of judge's award so called '*gezag van gewijsde'* usually, it had had materiel law character as result of change of commercial authority and obligation : *to decide*, *delete* and revise.[24] In view of such award only bind the parties and not third party, seemingly, such theory is not right. Whereas according to law theory of award procedure it is not resource of

[22]) Eddy Ruchiyat, *Politik Pertanahan Nasional Sampai Orde Reformasi*, Bandung, PT. Alumni, 2004.

[23]) Wiryono Prodjodikoro, *Hukum Atjara Perdata di Indonesia*, Djakarta, Penerbit 'Sumur', Bandung, 1977, page.23

[24]) Oemar Seno Aji, *Peradilan Bebas Negara Hukum*, Jakarta, Erlangga, 1980, page.31

materiel law, i.e, the deletion or creation of authority and procession obligation. Based on law theory of verification in which award is what's proof had been judged, hence, it has binding power because according to this theory, opponent verification against content of any award had obtained legal power may not be allowed certainly.

The engagement of parties with award it may have either positive or negative meaning. Positively, it is what had been judged among parties applied as right positive. What had been ruled by judge should be supposed right or *res judicato pro variate habetur*. Whereas in negative meaning, i.e, judge may not rule a case had ever been judged among same parties previously, and in terms of same matter subject (*nebis in idem*).[25]

Any award will obtain certain or permanent one (*krach van gewijsde)* when any law means no longer had been provided. Included law means is *perlawanan, banding dan kasasi*. Then, by obtaining certain law power, such award no longer may be revised although by superior instance unless by special law means, i.e, *civil request or cessation/appeal* by third party. Article 1917, paragraph (1) BW sound, that binding power of such award is limited to principal rules (*onderwerp van het vonnis*).[26] Binding power of such award had not covered application in terms of event. When any judge in any award had constaired any certain event based on certain proofs, then, in other dispute it may be conflicted.

It had been described above that basically, judge's award is only binding the parties (article 1917 of BW), i.e, it is not only plaintiff and accused, but also third party who participate in any dispute among them either by intervention or release (*verijwaring)* ways or them represented in process. Against third party it will have binding power. But, he/she may appeal against rules which had had certain legal power (article 378 of Rv). In this case it should be noted that it is only third party who had been damaged by such rules which may appeal.

Any award is meant to resolve any problem or dispute as well as setout its rights and obligation. Solely, it is not meant to setout only rights and legality, so that, it may not be found in whatever case or matter unexceptionally, including for land affair dispute. Hence, the parties should realize judge's award which had had legal power as one in applied concrete matter/case. It is application of judge's award as *Ultimatum remedies* (last end) for land affair dispute.

IV. Conclusion

Complexity of agrarian law enforcement become serious problem, it is based on land function is very strategic to support activities of economy, social, technology and information progress. Hence, common will and commitment to seek out land affair disputes in Indonesia which had sacrificed so many people, either local government, law enforcement apparatus, colleges and all communities should be striven for, and it should precede resolution by negotiation, and provided that it may not be achieved, it should be striven by mediation, and when it may not be achieved so, then, the court is last end/alternative to be achieved. Hence, judge's award as *Ultimatum remedies* (last end) for land affair dispute and whomever should realize Court's rules which had had permanent legal power because its position as law in concrete case/matter.

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