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## **MEDIATION: THE ALTERNATIVE OF LAND DISPUTE RESOLUTION IN INDONESIA**

by

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### **ABSTRACT**

Land tenure security and land dispute settlement have become major important issue in developing countries, especially in the context of Indonesia. When Law Number 5 of 1960 (The Basic Agrarian Law) was established, it created a uniform system of land law and land rights. In 1999, The Minister of State for Agrarian Affairs/Head of The National Land Agency Regulation Number 1 of 1999 regarding Procedure of the Dispute Land Resolution and The Minister of State For Agrarian Affairs/Head of The National Land Agency Regulation Number 5 of 1999 regarding A Guideline for the Settlement of Communal Land Rights Problems of the Customary Law Community was released to protect the customary law communities and customary land and as a guideline for the resolution of customary land problems. The National Land Agency 2006 data listed 2,810 outstanding land disputes. Of this No. 1,065 were still in the trial process, 1,423 were pending trial and 322 were considered to have the potential for conflict. Outcomes for those in the trial process are still pending, while we have two ways to solve other land dispute cases, mediation or trial. Among current cases is the Meruya Selatan case between residents and developer PT Portanigra in mediation phase based on Law Number 30 of 1999 concerning on Arbitration and Alternative Dispute Resolution. The National Land Agency admits that there are lots of overlapping certificates of land ownership where mostly these occurred because a third party worked together with allegedly corrupt officials. These disputes are the result of a dysfunctional legal system and an unreliable land ownership database. Mediation in land disputes can be done through various institutions which is appointed as a mediator by the disputant. Basically, land dispute can be resolved through mediation by National Land Agency or mediation through Regional Government; even mediation through non government organization (NGOs). But, in the

Portanigra case, mediation can also be done through the Court which appoints a judge as a mediator.

**Keywords:** Mediation, Land Dispute

## **A. Introduction**

Land tenure security and land dispute settlement have become of major importance in developing countries, especially in the context of Indonesia of where the country is well-known for its land and abundant natural resources. Land is more than just another factor of production or an economic good: it embodies other values such as homeland, place of ancestry, basis for survival, and a prerequisite for individual freedom. It is also an object which is taxed and desired by government or interest groups; it is an instrument of power and dependency, a cause of conflict and war.

In the last four decades, land dispute phenomenon had emerged in Indonesia between societies and government, investors and societies, government and government, and societies itself, and increased progressively. Mostly, it emerged from some effects of land acquisition for industrial, infrastructure, housing, tourism, and in wide scale agricultural development interest. Outside of Java island, most of the land disputes happened between the customary/local community to defend their customary land rights and the investor who gets forest enterprise concession, mining (including mining of gas and oil), and agricultural business development with the Nucleus Agricultural Estate Smallholder pattern. Land reclaiming by society to unit and productive assets which have been built above the land, have happened in almost the entire Indonesian region. Some problems took place as a result of land tenure insecurity.

In 1999, the Minister of State for Agrarian Affairs/Head of the National Land Agency Regulation Number 1 of 1999 regarding Procedure of the Dispute Land Resolution was released and the Minister of State for Agrarian Affairs/Head of The National Land Agency Regulation Number 5 of 1999 regarding A Guideline for the Settlement of Communal Land Rights Problems of the Customary Law Community was also released to protect the customary law communities and customary land and as a guideline for the resolution of customary land problems. Realising the importance of such issues, the Parliament passed the Decree of the Peoples Assembly Number IX/MPR/2001 which is provides the legal frame for an integral reform of policies on land administration as well as other natural resources.<sup>1</sup> The Presidential Decree No. 34 of 2003 regarding National Policy in Land Affairs, issued on May 31, 2003 clearly stipulated the distribution of authorities of land affairs between the central and local government. There are nine functions given to the Regional Government which includes: issuance of location permit, provision of land for public interest, resolution of land

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<sup>1</sup> The Decree of the Peoples Assembly Number IX/MPR/2001 provides the frame for the integral reformation of policies on land and natural resources. Hence, the efforts and the political will of the government is needed to implement reformation of land policies and of the land administration system.

disputes, resolution of compensation for land allocated for development, land redistribution, determination and resolution of *ulayat* land problem, etc.

The emergence of various land cases cannot be released from the context of the government policy (New Order, at that moment) which having many characters of ad hoc, inconsistent, and ambivalent among one and another regulation, resulting in the land law structure to overlap with each other. Law Number 5 of 1960 regarding the Basic Agrarian Law which initially is an umbrella law for land policy in Indonesia becoming dysfunctional, and even as substantial becomes contradictive with the enactment of various regulations sector. i.e.: Law Number 5 of 1967 regarding Basic of Forestry was amended to Law Number 41 of 1999 regarding Forestry; Law Number 11 of 1967 regarding Basic of Mining; Law Number 44 of 1960 regarding Mining of Gas and Oil; Law Number 3 of 1972 regarding Transmigration was amended to Law Number 15 of 1997 regarding Transmigration; Law Number 11 of 1974 regarding Irrigation; Law Number 4 of 1982 regarding Basic Environment Management was amended to Law Number 23 of 1997 regarding Basic Environment Management; Law Number 16 of 1985 regarding Condominium, Law Number 5 of 1990 regarding Conservation of Natural Resources and Ecosystem; Law Number 24 of 1992 regarding Spatial Use Management was altered to Law Number 26 of 2007 regarding Spatial Use Management; Law Number 32 of 2004 regarding Regional Government; and Law Number 33 of 2004 regarding The Financial Balance Between Central and Regional Government.

Entirely, the laws have equal position and make land as the same object. Collision in practice is not avoidable as a result of different law usages and interpretations by the government officials in different sectors. Differences between the laws above-mentioned not only given the bureaucrats an opportunity to interpret differently, but also make the law substantially not integrated.<sup>2</sup>

According to Maria S.W. Sumardjono, basically, land problems can be divided into 5 types:<sup>3</sup>

- 1) Cultivating land problems in the forestry, plantation, housing area project from neglect.
- 2) Land problems concerning violating land reform regulations.
- 3) The effect of land acquisition for development interest.
- 4) Civil dispute concerning land problems.
- 5) Problems concerning customary land rights.

From the juridical practice aspect, Boedi Harsono states that: the land problems are able to be disputed as follows:<sup>4</sup>

- 1) Dispute concerning which is such a plot of land
- 2) Dispute concerning a plot of land boundary
- 3) Dispute concerning a plot of land width
- 4) Dispute concerning the land status (State land or private land)

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<sup>2</sup> Arie Sukanti Hutagalung, "The Land Dispute Resolution according to the applicable Law", *Journal of Business Law*, Volume XVIII, Jakarta – Indonesia, (March, 2002), page. 51.

<sup>3</sup> Maria SW. Sumardjono, "The Land Implication and Resolution according to the Law", A paper was presented to the *Land Conflict Settlement Conference*, Sigma Conferences, Jakarta – Indonesia, (March 26, 1996), page.7.

<sup>4</sup> Boedi Harsono, "The Land Dispute Resolution according to rules in Basic Agrarian Law", A paper was presented to the *Basic Agrarian Law XXXVI Anniversary Conference*, The State Minister of Agrarian Affairs/Head of the National Land Agency Office, Jakarta – Indonesia, (October 22, 1996).

- 5) Dispute concerning the owner's land rights
- 6) Dispute concerning the encumbering rights
- 7) Dispute concerning the conveyance land rights
- 8) Dispute concerning indicator of location and decision of its width to the government or private project
- 9) Dispute concerning the release/liberation of land rights
- 10) Dispute concerning the land clearing
- 11) Dispute concerning payment of compensation/indemnity, allowance or other reward
- 12) Dispute concerning the annulment of land rights
- 13) Dispute concerning the expropriation of land rights
- 14) Dispute concerning the granted land rights
- 15) Dispute concerning the issued certificate of title
- 16) Dispute concerning proof of any rights or law action and other disputes.

According to the State Minister for Agrarian Affairs/Head of the National Land Agency Regulation Number 1 of 1999 regarding Procedure of Land Dispute Resolution, article 1 states that:

“Land dispute is a difference of opinion with regard to:

- a) The authentication of land rights;
- b) Grant of land rights;
- c) Registration of land rights including conveyance and publication of rights to title; between interested parties and between interested parties with institutions in the National Land Agency environment.”

The aim of this paper is to provide an overview of mediation as one of the alternative of land dispute resolution in Indonesia.

## **B. Land Tenure**

Land law structures and the land tenure systems and constitute important things. Land policy regulated on article 33 paragraph 3 of the Indonesian Constitution 1945 was extremely influential in framing the basic assumptions of the land law of 1960. It states: “Land, water and airspace including the natural resources therein, under the control of the state, to be used for the people's prosperity”. Since September 24 of 1960 when Law Number 5 of 1960 regarding the Basic Agrarian Law was established, it created a uniform system of land law and land rights and created a National Land Law based on customary law, and utilisation of customary law norms, concepts, principles, systems and institutions. The National Land Law has a religious communalistic principle.<sup>5</sup> The customary law in Indonesia, known as “*Hukum Adat*”, plays a significant role in the Indonesian Agrarian Law. The Basic Agrarian Law is the land law that sets forth the principles of land usage in Indonesia. Land tenure is governed under Law Number 5 of 1960.

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<sup>5</sup> Boedi Harsono, *The Indonesia Land Law, A History of Basic Agrarian Law Formation, Contents and It Implementation*, (Jakarta: Djambatan, 2003), page. 176

Indonesian Land Law is quite different from the laws that apply in the most Western or developed countries. The Land Law in both countries recognized two types of land ownership. The first type is “land held in perpetuity,” commonly referred to as “Freehold Land.” (Freehold Title) The second is “land held for a term of years,” commonly referred to “Leasehold Land” (Leasehold Title). In general, land status in Indonesia can be divided into two groups’ i.e. state land and private land. Private land is either registered or not (yet), and State land is defined as land without any right attached to it. Not all rights are written down. Where the title is subject to customary laws, it is usually not written down since customary law is unwritten law. Thus, there are two main types of land tenure: certificated land and uncertificated land. Certificated land has been mapped and recorded with the local office of the National Land Agency whereas uncertificated land is held under unwritten Customary Land Law applicable in the particular location.<sup>6</sup>

Law Number 5 of 1960 regulates rights over land ownership. There are 4 (four) main Indonesian Land Titles issued by the National Land Agency and may be classified into primary titles, i.e., those normally derived directly from the State, and secondary titles, i.e., those granted by the holder of a primary title.<sup>7</sup> There are presently four types of basic tenure (primary titles):

- a. Ownership Rights Title (articles 20-27)
- b. Exploitation Rights Title (articles 28 - 34)
- c. Building Rights Title (articles 35-40)
- d. Use Rights Title (articles 41-43).

All primary titles are granted by the government and they are certificated and registered with the National Land Agency to obtain the certificate of ownership proof being issued (legal proof of ownership). System of land registration in Indonesia is the Registration of Titles, and publication system in Indonesia is “Negative tend to Positive” system. It means that land registration regulation (Government Regulation Number 24 of 1997 regarding Land Registration) is based on negative publication (i.e. deed of sale), but also contains elements of positive systems (i.e. title systems). The negative publication systems essentially protect the land certificate holder if the physical and juridical data are correct (the principle of “Nemo Plus Yuris”).<sup>8</sup> All registered land certificates and also deeds of sale (of immovable property) determine priority between conflicting interests, providing the holder who obtained the land and to control the land physically. Thus, the certificate holder is protected by law. However, the Indonesian land registration system does not guarantee the validity of a land title, even though in the course of the registration of the land the respective Land Office will closely examine all of the land documents before agreeing to register the title. This means that the Government Regulation recognises and accepts the registration of the title (as evidenced by the land certificate of land title) as a strong evidence of the land right concerned, except if proven to the contrary by another party. The land certificate is the strongest evidence, unless

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<sup>6</sup> Djoko Walijatun and Chris Grant, “Land Registration Reform In Indonesia”, the National Land Agency-Indonesia, Jakarta - Indonesia, August, 1996. Djoko Walijatun, "Land Registration in Indonesia", a paper was presented to the Asia-Pacific Land Tax Workshop, Jakarta - Indonesia, 1996.

<sup>7</sup> Primary land titles are those normally obtained directly from the State, although the holder of Ownership Rights Title can grant certain inferior titles such as Building Rights Title and Use Rights Title.

<sup>8</sup> Boedi Harsono, *op.cit.*, page 480 & 82.

proven otherwise. In addition, the holder of the certificate who has held such a certificate for 5 (five) years as of its issuance in good faith cannot be claimed against by a third party.<sup>9</sup>

### C. Definition of Mediation

Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution does not stipulate specifically the definition of mediation, but based on expert opinion, mediation shall mean as follows:

1. Diane Parrish: "Mediation is a process in which a neutral third person known as a mediator, facilitates communication between disputing parties, enabling them to reach a mutually acceptable agreement that reflects both parties' needs and interests".<sup>10</sup>
2. Kimberlee K. Kovach: "Facilitates negotiation, it is a process by which a neutral third party, the mediator, assists disputing parties in reaching a mutually satisfactory resolution."<sup>11</sup>
3. Mark E. Roszkowski: "Mediation is relatively an informal process in which a neutral third party, the mediator, helps to resolve a dispute. In many respects, therefore, mediation can be considered as structured negotiation in which the mediator facilitates the process."<sup>12</sup>
4. A. Grant: "Mediation is the name given to a confidential process whereby parties to a dispute invite a neutral individual to facilitate negotiations between them with a view to achieving a resolution of their dispute."<sup>13</sup>

According to article 6 paragraph 3, Law Number 30 of 1999: "In the case of dispute or difference of opinion as meant in paragraph (2) (in direct meeting) unresolved, then based on the written agreement between parties, the dispute or difference of opinion can be settled through the assistance of one or more experts or through a mediator."

Mediation, a form of Alternative Dispute Resolution (ADR), also refers to appropriate dispute resolution, and aims to assist two (or more) disputants in reaching an agreement. Whether an agreement results or not, and whatever the contents of that agreement, if any, the parties themselves determine, rather than accept something imposed by a third party. The disputes may involve states, organisations, communities, individuals or other representatives with a vested interest in the outcome. Mediators use appropriate techniques and/or skills to open and/or improve dialogues between disputants, aiming to help the parties reach an agreement (with concrete effects) on the disputed matter. Normally, all parties must view the mediator as impartial.

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<sup>9</sup> Article 32 paragraph 2 of Government Regulation No. 24 of 1997 regarding Land Registration, state that the certificate holder is protected if he/she or legal entity obtained the land in good faith and has active possession. After five years from the issuance of the certificate, the holder is secure against other claims. If a third party does not contest the certificate within a 5 year period then the certificate, is deemed uncontestable and absolute (*Rechtsverwerking* institution)

<sup>10</sup> Diane Parrish, "Avoiding lawsuits through Mediation", Canyon News, January 29, 2006.

<sup>11</sup> Kimberlee K. Kovach, *Mediation Principles and Practise*, (St. Paul: Publishing Co, 1994), page. 16.

<sup>12</sup> Mark E. Roszkowski, *Business Law, Principle, Cases and Policy*, quoted by Gunawan Wijaya dan Ahmad Yani, *A Series of Business Law: Arbitration Law*, (Jakarta: Rajagrafindo Co, 2000), page. 33.

<sup>13</sup> Grant, A. "Mediation", (On-line) <http://www.rics.org/RICSWEB/Actions/ShowArticleLink.aspx>

Referring to the above mentioned, basically mediation is “a process of negotiations facilitated by a third person(s) who assist(s) disputants to pursue a mutually agreeable settlement of their dispute.”<sup>14</sup> The characteristics of mediation are a short period of time needed, structures, task-oriented, and as an intervention method that involves all parties in an active manner. The disputing parties appoint a third party as mediator who assists in achieving issues that both can agree upon. The success of the mediation is determined by the good intentions of both parties to jointly achieve a way out that both agreed upon. The positive points here are a short period of time needed, less costs spent, and a simple procedure. The disputing parties will feel more powerful as compared to a court settlement, since they themselves determine the outcome. Besides, in the mediation, the parties involved will be more conducive to other values than only legal factors. The negative side is that mediation results cannot be verified by the court, and hence, its effectiveness solely depends on the obedience of the parties to adhere to the mutually agreed solution.

What does the mediator do? The mediator is an impartial, neutral intermediary who helps people to resolve their dispute themselves, by creating and executing a legally binding agreement. Mediators use a variety of techniques to help parties explore their underlying interests, develop creative solutions and negotiate mutually satisfactory solutions. The mediator does not impose terms on the parties, but rather facilitates communications, allowing the parties to discover what works best for them.<sup>15</sup> The mediator’s tasks are amongst others:

1. To determine whether it is appropriate for the case to be handled through mediation and whether the disputing parties are ready to participate;
2. To explain the mediation process and the role of the mediator;
3. To assist the parties in exchanging information and perform bargaining;
4. To assist the parties in the determining and planning of the agreement.

Is mediation appropriate to be utilised for the settlement of land disputes? Although some of the opinion says that the choice of mediation is determined by the will of the parties to settle their dispute, in the US or Britain, the practice of mediation is more appropriate to be applied in cases where both parties still expect their relationship to continue, or where both parties are equally strong on legal grounds, or when a short time span is sought, or when it is suspected that no satisfactory judicial outcome will be produced by a court settlement.<sup>16</sup>

Mediation as one of Alternative Dispute Resolution is becoming more common in many areas. Disputants may use mediation in a variety of disputes, such as commercial, legal, diplomatic, labour, environmental, land rights, customary land rights, workplace relations, community and business sectors, family matters, etc., which are all areas where mediation can resolve conflicts and help to develop ongoing solutions without the need for formal litigation and court proceedings. However, more formal forms of mediation are also being developed in Indonesia.

#### **D. Mediation : The Alternative of Land Dispute Resolution**

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<sup>14</sup> Maria SW. Sumardjono, *op.cit.*, page.7.

<sup>15</sup> Diane Parrish, *op.cit.*

<sup>16</sup> *Op.cit.*

The land disputes can be solved through 3 (three) methods, which consist of:

1. Direct dispute solving by the disputing parties through deliberations.
2. Solving of dispute through the court by submitting the case to the public court whether taking civil law or criminal law, if the dispute is about illegal use of land that is prohibited by Law Number 51/Prp/1960 regarding Prohibition to Use of Land Without Permit of the Owner or Its Legal Representative, or through the State Administrative Court. Generally, all disputes can be submitted to court, whether in the scope of the public court as well as State Administrative Court.<sup>17</sup>
3. Solving of dispute through Arbitration and Alternative Dispute Resolution. On August 12, 1999, Indonesia promulgated new comprehensive law concerning Arbitration and Alternative Dispute Resolution, Law Number 30 of 1999. With the enactment of Law Number 30 of 1999 regarding Arbitration and Alternative Dispute Resolution, legal assurance exists to accommodate the resolution of civil cases outside the public court through arbitration, consultation, negotiation, mediation, consolidation or through the assessment of experts. Are the parties to litigation or arbitration required to consider or submit to any alternative dispute resolution before or during proceedings? The parties are not required to consider or submit to any form of alternative dispute resolution before or during the proceedings. However, the arbitrator or the judge at the commencement of the hearing will ask the parties whether they wish to settle the dispute amicably through a mediation process. Possibly for Indonesia, where deliberations to reach consensus is a common procedure in land dispute cases, which in the broadest sense of the word are of a civil nature, that are not related to administrative and criminal aspects, and where the parties prefer it, an arbitration method can be applied. It may be useful to mention here that efforts exerted by the National Human Rights Commission to assist in solving some land dispute cases, were arbitration methods.

### **1. Mediation through the National Land Agency**

Under the State Minister for Agrarian Affairs/Head of the National Land Agency, Regulation Number 1 of 1999 regarding Procedure of the Dispute Land Resolution is the basis for legal settlements in cases of land disputes. This policy is an anticipative and responsive effort to the latest phenomena in the society, which requires efficient and free of charge services on ways to settle land disputes. In this regard, the National Land Agency and the Province Land Office and the Regency/Municipal Land Office (Local Offices) have formed working teams of which the working procedures cover formal juridical matters and material juridical research. Efforts are also made for a possible role of the National Land Agency to act as mediator, in accordance with current regulations of the statutory law, based on the principle of justice.

Land cases had emerged because there are claims/complaints/objections from society (individual or legal entities) which contain the truth and lawsuit against the decision of the State Administrative in land sector which have been decided by the State Administrative Official in the National Land Agency, and also this decision of the the State Administrative Official has been harming their rights over the land. With existence of the

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<sup>17</sup> Arie Sukanti Hutagalung, *op.cit.*, page. 53.



claim, they wish to get a solution by the administration which is called ‘the correction at moment's notice’ from the State Administrative Official. The competence to correct a decision of the State Administrative Official in land sector (Certificate of Title/Decree of Grant for Land Rights) is on the Head of the National Land Agency. Land cases covering some problems, for example, regarding problems of land status, land ownership, acquirement evidence that become base granted of land rights, etc.

After accepting documents of complaints from the society, the official functionary to settle this problem will conduct research and data/documents collection. This research result may conclude that the complaints can be processed furthermore or not. If the data submitted to the National Land Agency directly is still incomplete or unclear, then the National Land Agency will ask explanation accompanied with data and also suggestion to the Head of Province Land Office and the Head of Regency/Municipal Land Office where the disputed land is. When all of the data have been fulfilled, so hereinafter the National Land Agency will do a research again to those problems, consist of procedure, authority and the law enforcement aspect.

In order to ensure public interest, individual or legal entities who are entitled on the claimed land to obtain protection by law, if it's considered necessary, after the Head of Regency/Municipal Land Office does research, and based on his faith that it must be put in a “status quo”, the disputed land can be blocked. That decision is put in writing by the Head of the National Land Agency Handbill dated January 14 of 1992 Number 110-150 regarding Repeal of Minister of Home Affairs Instruction Number 16 of 1984. With the availability of such Handbill, then the Head of Regency/Municipal Land Office in order to declare a “status quo” or blocking a disputed land, can only be done for lands with “Conservatoir Beslag” (CB) decree from court.<sup>18</sup>

Therefore, it can be concluded that if the Head of Regency/Municipal Land Office is going to declare a “status quo” over the decision of the State Administrative Official in land sector (certificate of title, decree of grant for land rights), he should act carefully and pay attention to general good governance principles for serving public interest and pay attention to the lawsuits, such as: carefulness, correctness, openness, and equity principles.

Due to the case that is registered on the National Land Agency to be settled, it will be better if the disputants can meet and discuss their issues through deliberations to reach consensus (through Mediation). In this process, the National Land Agency is often asked to be a mediator for solving the land dispute with mutual discussion and respect for each other. If the mediation creates an agreement, it must be put in writing, in the form of a notice to the parties to lawsuits, an agenda meeting, and the written agreement as a proof of their consensus, and if necessary, to be made in an act witnessed by Notary, so that it has the strength of perfect verification (a legally binding agreement).

The cancellation of the decision of the State Administrative Official can be done if there's a fault in law/administration. The legal basis for such cancellations are:

- 1) Law Number 5 of 1960 regarding Basic Agrarian Law.

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<sup>18</sup> compare with a Regulation of The Minister of State For Agrarian Affairs/Head of The National Land Agency Number 3 of 1997, article 126.

- 2) Government Regulation Number 24 of 1997 regarding Land Registration.
- 3) Presidential Decree Number 34 of 2003 regarding National Policy of Land Sector.
- 4) Minister of State for Agrarian Affairs/Head of the National Land Agency Regulation Number 3 of 1999 regarding Authority Delegation and the Annulment of Grant of Land Rights Decree.

In practice, an individual or the legal entities, which feel unsatisfied can state an objection to the Head of the National Land Agency. The other way is by giving their objection to the Head of Regency/Municipal Land Office, and then proceed to the Head of Province Land Office.<sup>19</sup>

## **2. Mediation through the Regional Government**

The Regional Government has a significant role as a mediator in the dispute of customary land rights or the *Ulayat* Rights based on the State Minister for Agrarian Affairs/Head of the National Land Agency Regulation Number 5 of 1999 regarding A Guideline for the Settlement of Communal Land Rights Problems of the Customary Law Community.

Land ownership is diverse across Indonesia because of the cultural differences of the people who are living in different islands and even characterised by language diversity. Those systems resulted in different ways to access land in the society. Some are likely to have private ownership and the others are communal ownership. For instance, in communal societies (*Adat* communities) outside Java Island, land was acquired by occupying the area and hence, they claimed it as communal possession. They based the ownership on genealogical or on territorial relationships formalised by unwritten law<sup>20</sup>. *Adat* communities are communities that live in accordance with the tradition of their ancestors in a specific *adat* region, possessing rights over that land as well as its natural resources, living a socio-cultural life controlled by *adat* law and possessing an *adat* institution which sustains the community's life.

Law Number 5 of 1960 regarding the Basic Agrarian Law does not contain definitions of *Adat* and *Hak Ulayat* (*Ulayat* rights). Further, the Basic Agrarian Law also explicitly recognises the *Ulayat* Rights,<sup>21</sup> but stipulates that the right must be adjusted to conform to the national interests of the state based on national unity (article 3).

According to the opinion of Boedi Harsono who mentioned that “*Ulayat* Rights” was the name provided by the law and by the legal society for the relationship that existed between an *adat* law community and a certain particular region, this region providing an everlasting “lebensraum” for those community members.<sup>22</sup> From the legal point of view, *Ulayat*

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<sup>19</sup> Fia S. Aji, “Land Dispute Resolution in Indonesia”, the Gorontalo Land Office Province-National Land Agency, Gorontalo - Indonesia, September 22, 2007.

<sup>20</sup> Boedi Harsono, *op.cit.*, page 183.

<sup>21</sup> Commonly is referred to the *adat* community's rights/customary communal rights.

<sup>22</sup> Boedi Harsono, *op.cit.*, page. 192.

Rights are a series of rights and obligations of an *adat* community regarding a particular region, that is, their *Ulayat*, which being this community's "lebensraum" to utilise its natural resources, including the land that exists in this *Ulayat* region. Amongst the *adat* law community, two types of land are known, namely:

1. *Ulayat* land being possessed and managed by the community;
2. Privately owned land of an *adat* law community member.

Recognition of '*adat*' or customary land rights and customary systems of tenure, which are explicitly acknowledged in article 5 states that "the Indonesian land law is *adat* law (customary law), if it is not in contrary with the spirit and the provisions of the Basic Agrarian Law and other laws." So, the legal status of communal land rights indicated by *adat* in Indonesia set forth in the Basic Agrarian Law 1960 article 5 may be summarised as follows:

- a) *adat* law must not be contrary to national interests;
- b) *adat* law must not be contrary to Indonesian socialism;
- c) *adat* law must not be contrary to the principles of Agrarian Law or other government law.

All of the lands are under the control of the State. The position of communal land to date is below that of public and state interests.

As a consequence of those two articles of the Basic Agrarian Law, an *adat* community may not prevent the government from granting the right to use the land for development plans. In other words, the *adat* community may continue to exercise its "*Ulayat* Rights" so long as the government does not dispose of the land itself. Once the government plans to dispose of the land, for example, to undertake extensive forest exploitation in order to boost economic growth, increase food production and encourage transmigration, then "*Ulayat* Rights" must yield to the national interests of the state. Hence, the Basic Agrarian Law not only recognised "*Ulayat* land", but it also overrode the pre-existing traditional tenure arrangement based on *adat* law (customary law) which then, further, paved the way for the modification and abolition of the *adat* rights.<sup>23</sup>

If there is any dispute of customary land rights or *Ulayat* Rights occur, hence the government has attempted to recognise the existence of customary land provided that the following criteria exist:

- a. The land is under the ownership of a recognised *adat* community;
- b. The boundaries are defined and understood; and
- c. The community is recognised and functioning as such under *adat*/customary law principles.

The root of the problem is that most of the existing implementing regulations of the Basic Agrarian Law failed to elaborate, and are even contradictory to the *adat* principles.

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<sup>23</sup> Soeryo Adiwibowo, *Dongi-dongi - Culmination of a Multi-dimensional Ecological Crisis: A Political Ecology Perspective*, Inaugural - Dissertation zur Erlangung des akademischen Grades eines Doktors der Agrarwissenschaften (Dr. agr.) des Fachbereichs Ökologische Agrarwissenschaften der Universität Kassel vorgelegt von Soeryo Adiwibowo, Juli, 2005

In 1999, one of the efforts of the central government to overcome Agrarian issues is the issuance of a new regulation by the State Minister for Agrarian Affairs/Head of the National Land Agency specifically instructing to district level governments (Regional Governments) how to deal with *Ulayat* Rights claims, namely the State Minister for Agrarian Affairs/Head of the National Land Agency Regulation Number 5 of 1999 regarding A Guideline for the Settlement of Communal Land Rights Problems of the Customary Law Community to be used in the Regional Autonomy era. Law Number 32 of 2004 regarding Regional Government allows regions to manage national resources available in their territory. These guidelines based on the Principle Agrarian Law have become the operational guidelines in the field of land affairs as well as the settlement of financial issues related to communal land.<sup>24</sup>

These guidelines are very important because of the increasing land disputes based on communal land rights claim. The guidelines state that the communal land right is recognised as still in existence upon fulfilling following requirements (article 1):

- (a) Communal land right is recognised by customary law and is owned by a certain customary community over a certain territory;
- (b) Certain territory constitutes the environment of community members to obtain the benefits of natural resources, including land; and there are still uninterrupted hereditary physical and spiritual relationships between the customary community and the relevant territory.

The regulation has a clearer approach to *Ulayat* Rights than the Basic Agrarian Law. Article 1 paragraph 1 defines *Ulayat* Rights: “*Ulayat* Rights and similar *adat* law community constructs, are rights that according to *adat* law are enjoyed by a specified *adat* law community to a specified territory that is the everyday environment of its members to exploit the profits of its natural resources, including land, in the aforementioned territory, for the benefit of their survival and daily needs, which are made clear by physical and spiritual relations of descent between the aforementioned *adat* law community and the said territory.”

Thus, those eligible for *Ulayat* Rights are *adat* law communities. Article 1 paragraph 3 defines these as: “*Adat* law community is a group of people united by an *adat* law structure as equal members of that legal community through a communal place of residence or through descent.”

Conditions are named under which the continued existence of *Ulayat* Rights can be said to exist in article 2 paragraph 2:

- (a) A group of people encountered who still feel united through *adat* law structure as equal members of a specified community, who recognise the rules of the said community and apply these in daily life;

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<sup>24</sup> L.I. Nasoetion, ‘Keynote Speech’, in *Compilation Book of Papers and Workshop Formulation of Communal Customary (Ulayat) Land Rights in the West Sumatra Province*, organized by the Regional Office of West Sumatra Province cooperate with the National Land Agency, Padang – Indonesia, October 23-24, 2000, page.15.

- (b) Specified *Ulayat* land encountered which is the daily environment of the members of the said law community and the area where the necessities for their daily lives are obtained; and
- (c) An *adat* law structure encountered regarding the administration, authority and usage of the *Ulayat* land that is in effect and observed by the members of the said law community.

Next, claims are limited. Article 3 states that *Ulayat* Rights cannot be claimed when the land is owned or used by others in accordance with other Basic Agrarian Law-derived rights, or when the land has been disowned by the government. Regarding the authority and temporal dimension of *Ulayat* claims, article 4 declares that authority over *Ulayat* lands is not only held by *adat* leaders, but also by the national, state or other legal entities. Moreover, if the community desires so, the *adat* leaders must register *Ulayat* land under individual rights such as recognised in the Basic Agrarian Law, thus, effectively replacing their *Ulayat* with national land rights.

Yet, the regulation concerns future arrangements for continued *Ulayat* Rights as well. It is possible for an *adat* law community to temporarily hand over rights to land to the state, which may then issue a temporary right of usage to third parties (chapter 2, article 2.2). When the usage period agreed between parties has ended, permission has to be sought from the *adat* community before the land usage may be continued. Permission only from the state is insufficient. Nor may the state give out rights to *Ulayat* lands for a longer period of time than what the *adat* law community has agreed to (chapter 2, article 4.3).

Regional Governments (local district governments) are instructed to conduct research on the claims of *Ulayat* Rights by participating the customary law experts, customary law community, non government organisations and the agencies which are related to natural resources (chapter 3, article 5.1) using the conditions set out in article 2, and to draw up a regional/district regulation to formally record the (non-) existence of *Ulayat* Rights (chapter 3, article 6). If *Ulayat* land is encountered, a map must be drawn up to define its area (chapter 3, article 5.2).

However, customary land rights claim towards certain plots of land, is not recognised if such plot is already legally obtained by other persons, namely through purchases or releasing it from rights and interests covering it by government agencies, legal entities or individuals in accordance with the applicable provisions and procedures (article 3).

The second item affecting the Agrarian issue and the method of land dispute settlement is the authority delegated to the Regional Heads as a result of regional autonomy. Since January 1, 2001, the Regional Heads are authorised to manage the natural resources available in their territory. The community members may direct negotiations with the companies under the auspices of the Law Aid Organisation or request the mediation of the Regional Government.

Development often becomes the main source of *adat* community poverty, and also a continuous source of dispute to the government as well as private enterprises. *Adat* communities even become the main victims of forest ecology damages as a result of these

concession systems. They were then relocated as a result of the government granting Exploitation Rights to plantation companies, however, not all of them happened like that because there are many land disputes that have been solved through mediation by the Regional Government as a mediator.

Now let us have a look at one of the land dispute case in the fields of palm oil plantation management and forest concession in South Sumatra, where there are many companies engaging in these fields. The pattern of land dispute settlement in South Sumatra mediated by the Regional Government has been settled.<sup>25</sup> The Regional Government (Provincial and Municipal/Regency Government) has supported the settlement of land disputes and delegated authority to the Mayor/Regents. The Governor authorised the Regents to form a special team to handle such cases or request the Heads of Sub-District (*Camat*) to investigate land dispute cases. The team's duty, for example, in Muara Enim Regency - the South Sumatra Province covers the following matters:

- 1) Examines the validity of the demand letters;
- 2) Conducts a societal approach to the community filing demands to the government;
- 3) Creates an inventory of the legal subjects and objects of the dispute;
- 4) Prevents third-party intervention;
- 5) Witnesses the agreement to solve problems; and
- 6) Reports to the Muara Enim Regional Government Head/Regent after completing each task.

Most of the communities' demands in South Sumatra include:

- 1) Compensation for trees and crops (the amount granted as compensation for trees and crops varies depending on the cases and circumstances);
- 2) Provision of employment opportunities; and
- 3) The return of forcefully occupied lands.

### **3. Mediation Through a Judge Who is Appointed as Mediator**

The National Land Agency 2006 data listed 2,810 outstanding land disputes. Of this number, 1,065 were still in the trial process, 1,423 were pending trial and 322 were considered to have the potential for conflict.<sup>26</sup> Outcomes for those in the trial process are still pending, while we have two ways to solve other land dispute cases, mediation or trial. Among current cases is the Meruya Selatan case between residents and the developer, PT Portanigra, (Limited Liability Company) in mediation phase based on Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution and the State Minister for Agrarian Affairs/Head of the National Land Agency Regulation Number 1 of 1999 regarding Procedure of the Land Dispute Resolution.

A plot of land is often claimed by more than one owner and the National Land Agency admits that there are lots of overlapping certificates of land ownership, and mostly these occurred because a third party worked together with allegedly corrupt officials. During

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<sup>25</sup> Muntaqo, F. *Research Report: Perspective of Existence Communal Customary (Ulayat) Rights in the Autonomy Era Implementation (Case Study of the Communal Customary (Ulayat) Rights in the Muara Enim Regency of the South Sumatra Province)*, Research Institution, Indonesia-Sriwijaya University, 2000.

<sup>26</sup> "Agency silent over land dispute cases", *The Jakarta Post*, June 6, 2007.

investigations of land disputes, the land office had found a lot of manipulated land certificates – papers that could easily be obtained with the help of corrupt officials working with small companies in the printing business hub of Central Jakarta.<sup>27</sup> These disputes are the result of a dysfunctional legal system and an unreliable land ownership database. The main problem is the lack of land based information system and only a small part of the land in Indonesian territory has been registered. A recent major case is the dispute over 43.9 hectares of land in Meruya Selatan, West Jakarta, as follows:

The Supreme Court ruled that the private company, Portanigra, is entitled to 78 hectares of land in the area, including the 43.9 hectares, where more than 21,000 residents have been living for the past three decades. The verdict led residents to file a lawsuit against the company. They alleged that the company falsified documents.

The land case of West Jakarta - Meruya Selatan began in April 2007, when residents of Meruya Selatan were surprised with the existence of the plan on executing the land for the width of 78 hectares in Meruya South by the District Court of West Jakarta in April 9, 2007 and signed by West Jakarta Head of District Court, Haryanto, SH and according to West Jakarta District Court decision Number 364/PDT/G/1996/PN.JKT.BAR on April 24, 1997 and Jakarta High Court Number 598/PDT/1997/PT.DKI on October 29, 1997. The execution was pursuant to the decision of Supreme Court Number 570 K/Pdt/199 of 31 March 2000 and Number 2.863 K/G/Pdt/199 of 26 June 2001 winning PT Potanigra in a land ownership dispute with the Meruya Selatan residents, H. Juhri - Yatim Tunggono - Yahya Bin H. The three men were brokers who sold 78 hectares of Meruya Selatan land to Portanigra in 1972 and 1973. However, the brokers later documents forgery and sold the purchased land to, among others, the city administration (regional government), which resold it to the current residents. The brokers have been convicted of fraud and forgery. The city administration knew that the land was owned by Portanigra as its representatives were present when the land sale documents were signed.<sup>28</sup>

A decision in the Supreme Court states that a letter from West Jakarta District Court has been released to execute the land on May 21, 2007. Meanwhile, the West Jakarta District Court does not know which land to execute. If the execution is done, there are 5,563 families or around 21,760 people who will be homeless and lose their lands. They are the residents from Meruya Residence, DKI housing complex, West Jakarta official housing complex, DPR II housing complex, Mawar housing complex, DPA housing complex, BRI housing complex, Unilever housing complex, Green Villa housing complex and Intercon Taman Kebon Jeruk housing complex. The societies want the Meruya land execution to be denied or cancelled by the Supreme Court. They also appraised that PT Portanigra is illegal as law subject on the Meruya Selatan land transaction.

Property developer, PT Portanigra, sued by hundreds of residents from Meruya Selatan in West Jakarta, has agreed to hand over 15 hectares of disputed land because it was aware that both the company and the residents were victims of document forgery. According to the West Jakarta District Court, the company would release its claims to the land claimed by 1,285 residents who had filed a lawsuit against it. Another 4,000 residents also claimed

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<sup>27</sup> Anissa S. Febrina, "Land Disputes Abound With No End in Site", *The Jakarta Post*, June 19, 2007.

<sup>28</sup> Lln, "Portanigra To Hand Over Land Titles To Residents", *The Jakarta Post*, November 9, 2007.

ownership over the disputed land. As a settlement is yet to be reached between Portanigra and these residents, they face possible eviction by the company. The city administration was aware that the land belonged to Portanigra when it was sold to the residents. Portanigra will cooperate with the residents and ask the administration to pay for the losses which the residents have suffered.

Advocate team of Meruya Selatan residents and the Jakarta Government filed the lawsuit together, and the material issue of the lawsuit is refusing the Supreme Court decision by showing the legal land ownership documents of the Meruya Selatan residents. There are 6,500 legal land certificates, and “*girik*” is not included in it.

Moreover, the reinvestigation of the civil case by H. Djunaedi and H. Juhri as the advocates is rejected by the Supreme Court. The data has 89 differences and the Supreme Court decision is signed by two different people. Another proof stated that H. Juhri bin Haji Geni never sold the land to the society or the Jakarta Government.

It is impossible for PT Portanigra to have the lands with ownership status because the transaction is cancelled based on article 26 section (2) Law Number 5 of 1960. In this case, several problems are questionable, such as if there is any land transaction in 1972-1973 by PT Portanigra, the land lawsuit must be under the buyer’s control and not how the problem has appeared now. Meanwhile, the land lawsuit has spread into 4,428 land areas with ownership status, 1,908 areas with building function status, and 90 areas with using status.<sup>29</sup>

According to Boedi Harsono’s statement, PT Portanigra is not the land owner because the company has no requirement as the buyer according to the National Land Law (Law Number 5 of 1960) and has no legal relationship with the land. The Jakarta Government and Meruya Selatan residents must get legal covering from the “*Rechtsverwerking*” institution.<sup>30</sup>

The disputed land of Meruya Selatan has been seen through international point of view and it made the Indonesian President, Susilo Bambang Yudhoyono, to form an investigation team. The President has sent one of his advocates, Adnan Buyung Nasution, to learn the case and said that PT Portanigra cannot execute the land due to the uncertain and unclear borderline.<sup>31</sup>

Currently, the dispute over the land of Meruya Selatan has been continued and judge chief in the District Court of West Jakarta - Hesnu Purwanto has appointed M. Tarid Palimari as

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<sup>29</sup> Udin, “News View”, *Jakarta News*, August 1, 2007.

<sup>30</sup> Wawan. “News View”, *Jakarta News*, November 15, 2007. Article 32 paragraph 2 of Government Regulation No. 24 of 1997 regarding Land Registration. Boedi Harsono, “Cases of Land Acquisition in the Court’s Decision (A Juridical Perspective)”, A paper was presented to *the National Conference* organized by Faculty of Law–Trisakti University cooperate with The National Land Agency, December 3, 1994.

<sup>31</sup> Udin, “News View”, *Jakarta News*, Jakarta, July 29, 2007



a mediator, who is also a judge in the District Court of West Jakarta. The court trial is delayed, while waiting for the result of the mediation.<sup>32</sup>

## **E. Conclusions**

Mediation service is important because it help the law to remain relevant to the needs of the community. Mediation provides people with a range of additional dispute resolution options to choose from. Most importantly, mediation helps people to solve their problems and move forward with their lives in the quickest, cheapest and most effective way possible. There is growing awareness that many disputes can - and should - be resolved outside the formal court environment. It is now widely accepted that mediation can bring about a lasting resolution to most disputes without cost, delay, expense and acrimony of court battles. There is also a growing acknowledgment that, in addition to resolving disputes, mediation can help parties to manage their future relationships in a positive way.

Basically, land disputes can be resolved through mediation by the National Land Agency based on the State Minister for Agrarian Affairs/Head of the National Land Agency Regulation Number 1 of 1999 regarding Procedure of the Dispute Land Resolution; or mediation through the Regional Government based on the State Minister for Agrarian Affairs/Head of the National Land Agency Regulation Number 5 of 1999 regarding A Guideline for the Settlement of Communal Land Rights Problems of the Customary Law Community; and even mediation through non-government organisations (NGOs). But, in the Portanigra case, mediation can also be done through the court which appoints a judge as a mediator chosen by the Head of Court. Although a judge was appointed as a mediator, he must remain impartial and independent towards the parties. Maintaining neutrality towards the parties is one of the mediator's responsibility in assisting disputants to resolve their conflict. Therefore, it can be concluded that mediation in land disputes can be done through various institutions which are appointed as a mediator by the disputant.

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<sup>32</sup> Rudy Prasetyo. “Meruya Case is being Continued to Mediation”, *Tempo Interactive*, Jakarta, May 28, 2007.

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