HGU & HAM

Land Use Rights and Human Rights

National Commissin Human Rights and
Sawit Watch

Foreword

WHAT is the relationship between Land Use Rights (HGU) and Human Rights (HAM)? Land Use Rights is the right to manage land granted by the State to companies on state's land for 30 years, while human rights is the fundamental rights that must be fulfilled and complied by the State. The former granted by the state to companies and the latter must be fulfilled by the state. The two rights are discussed in this book titled 'HGU and HAM'. There are two scenarios related to the relations between the two rights; first they are mutually supportive (synergic) which is expected by the National Human Rights Commission (*Komnas HAM*). Second, the two rights compete to beat each other. I observe that in the practice of granting HGUs by the State, the aspects of human rights receive less consideration and are even ignored. This book serves as initial evidence for the thesis.

The most interesting thing discussed in this book is the granting of HGUs by the State (ed- the Government) during which several economic and social rights and the rights of customary communities are crushed and beat. This can be found in the conclusion drawn by the writer of this book, among others as follows:

1. The policies of nationalization and conversion of western people rights in the early period of the country's independence did not take into consideration agreements made on land use between a customary community and Dutch plantation entrepreneur

who afterward obtained *erfach* right from the Dutch colonial government.
2. Conversion of *Erfpach* right to HGU, caused acquisition of people's land by the State.
3. Acquisition of communal lands in the early years of independence also did not respect the customary law so that it created legal and social conflicts.
4. The process of releasing rights to communal land shows strong indication of violation of the legal right of customary community; hence HGUs issued under such situation were legally defected.
5. There were almost no legal settlements on HGU cases resulting in infringement of people's rights, both constitutional rights and human rights.

I, personally or as the Commissioner of the *Komnas HAM* welcome the publishing of this book. This draft book had been in preparation long because the study was performed during the term of service of Mr. Hakim Garuda Nusantara in the *Komnas HAM*. I extend my gratitude to various parties who have given their assistance in the study and issuance of this book among others the *Perkumpulan Sawit* Watch, BPRPI, Walhi Kalbar, Walhi Sulsel, various customary communities and several parties whom I cannot mention. Lastly, I hope that this small work can inspire and encourage parties who strengthen customary communities whose human rights have and or are being continually marginalized.

Ridha Saleh
Commissioner of the National Human Rights Commission

Introduction

OIL Palm plantation in Indonesia covers a total area of 9.1 million hectares (Sawit Watch, 2009), 40 % of which is large-scale plantations. This means that 3.6 million hectares is under the control of oil palm plantation companies. This also means that there are rights to cultivate granted by the State to companies for the 3.6 million ha of land.

Control of about 3.6 million ha of land indicates that companies are dominating the development of palm oil as compared to people's plantation. If we may be honest, management of land by state-owned companies such as PTPN in term of model can not be distinguished significantly as management by private-owned companies, as they are both the development model of large plantation. This means that if we follow the abovementioned way of thinking, the ratio of control of palm oil commodity between people's plantation and large-scale plantation is 35% vs. 65 %. Again if we may be honest, the type of plantation developed in the people plantation is plasma plantation, i.e the plantation in which domination by core companies is very strong. Hence, the portion of 35% needs to be questioned. I think the figure of 35% is too optimistic to be said as people's plantation.

The policy of granting rights to manage State's lands to companies is the management model similar to the model developed by the Dutch Colonial Government in the liberal era (1870s) namely the time which the Colonial Government issued the *agrarian wet* to

enable private companies to open plantation in colonized regions. In the Colonial era, this right was referred to as *Erpacht right*, and in the post colonial era (Indonesia), the term is known as the *Hak Guna Usaha* (Concession to Cultivate Land). Philosophically, the two rights are not very different. The *erpact* rights was granted by the colonial government to the private sector with the grace period of 75 years on average, while the right to cultivate is granted by the post-colonial government (Indonesia) in phases, first, 35 years that can be extended to 25 years. If combined together the time is almost 60 years.

I warmly welcome the publishing of this book titled "HGU dan HAM," which is the result of cooperation between the *Perkumpulan Sawit Watch* and the *Komnas HAM*. This is a very interesting book as it presents the issue of relations between Human Rights and HGU. In addition, this book is trying to look into historically changes taking place in the acquisition of communal lands into state lands through HGU. My understanding on this book is that the colonial government's policies in the form of *Erpacht* Right have been adopted elegantly by the Government of Indonesia into HGU. The HGU policy for large-scale plantation has given inspiration for similar rights in other forms, not only for plantation but also for sea waters, forests and so forth.

On different note, I hope that these efforts can be continued and not stop here (legal aspect) to also settle HGU issues in its relations with the social aspect. Questions might arise in future whether the granting of HGUs and issuance of new HGUs provide the aspect of social justice particularly the issue of agrarian structure. I am of the opinion that the granting of HGUs and issuance of new HGUs need to be restricted to one area so as to enable democratization aspect in the control of livelihood sources, so as not all lands are controlled by companies. Imagine if almost all the area is dominated by HGUs, then who is the in charge, the company, the people or the government? Unfortunately, this book has not yet covered the

said aspect. I understand that it is very difficult to get information on HGUs and the existing maps. I hope we can settle the entangled knot through transparency in HGU process and HGU maps.

Lastly, as the Executive Director of Sawit Watch, I extend my gratitude to the *Komnas HAM* for the good cooperation. I also congratulate members of the study team for their work. When this book has become the public property, the people have freedom to interpret the result of this study. Happy reading.

Abetnego Tarigan
Executive Director of Sawit Watch

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CHAPTER 1

INTRODUCTION

Background of Study

IN almost all government regimes, the plantation sector has important role for the national revenue as it is at present. The realized exports of CPO and its by products was 14.3 million tons in 2008 with the value of US$ 12.4 billion (Directorate General of Plantation, 2008). The other contribution made by this sector is its role in generating the people's economy in rural areas in particular in absorbing new workforce which reached 338,000 people/year, while 3.7 million households are estimated to involve in this business. Based on experience, the plantation sub-sector can generate other economic sectors, i.e involving upstream sectors (backward linkages) as well as downstream sectors (forward linkages). The output multiplier is 2.79, which means for every increase of one output unit in the palm oil palm industry there will be an increase of 2.79 units as output for the national economy (Gapki, 2010). The involved sectors are among others the sectors of fertilizer, seed, pesticide, agricultural machineries/equipment, while the affected sectors are among others the industries of manufacture, trade, transportation, finance and telecommunication[1].

Oil palm is not a new plantation commodity in Indonesia. The development of oil palm plantation industry commenced with the

1 Ir. Achmad Mangga Barani, MM, Plantation Development in Future, presented in the Extraordinary Meeting of Senate Members in the context of the 7th Anniversary and graduation ceremony in Universitas Islam on June 6 2007 in Makassar.

planting of 4 oil palm seedlings at the Bogor Botanical Garden, which were imported from West Africa by the Dutch colonial government in 1848. The large-scale planting for commercial purpose began in 1911 in Deli Serdang, North Sumatra. Afterward, when palm oil had become a commercial commodity, the palm oil production was sent to northern countries.

After the independence, plantation of oil palm encountered some constraints, when then President Soekarno applied the policy of nationalization on foreign and Dutch companies. However, not long after, plantation industry bloomed to the end of 1980s. At that time then President Soeharto encouraged reforestation of land through development of industrial forests and large-scale plantations.

Up to year 2009, the total area of oil palm in Indonesian had reached 9.1 million hectares with the average planting rate of 340,000 ha per year from 2001 – 2009 (Sawit Watch, 2008). The production of Indonesian CPO reached 20.91 million tons (Ministry of Industry, 2010). The production structure of palm oil business is controlled by and come from 27 large groups which are in control of about 6,000 subsidiaries in oil palm plantation business in19 provinces. The distribution structure of oil palm industry was 50% owned by the private sector, 33% by small-scale farmers producing fruit, and 17% by State-owned corporations (Ministry of Agriculture, 2006), From the aspect of investment, about 70% of oil palm plantation in West Kalimantan and 60% of oil palm plantation in Riau is controlled by Malaysia (Borneo Tribune, 20 April 2010).

Various policies issued and applied by the Indonesian Government also support the increased rate of expansion of oil palm plantation. Recently, a bilateral agreement was signed between the Government of Indonesia and Government of Malaysia which allocated 40% of the crude palm oil production for biodiesel production. To meet that commitment, the Government implements various strategic efforts, among others agreement with the business community for the allocation of 3 million ha of land for expansion of oil palm plantation

especially for production of biodiesel, providing incentives in the form of facilities and funds for revitalizing plantations, and encouraging the National Agrarian Reform Program (*Program Pembaruan Agrarian Nasional* -PPAN) by distributing state land to the underprivileged people. Some press media quoted the government's plan announced by the President to open land in a total area of 1.8 million ha along the border to develop the world's largest oil palm plantation. Data compiled from various sources of the Sawit Watch, indicates that almost all governmental provinces with the exception Bali, NTB and NTT provinces have planned to open and expand lands for oil palm plantation up to 19.8 million hectares.

To meet the expansion need of these large-scale private-owned and "hunger for land" plantation corporations, the government has provided legal mechanism and documents of entitlement referred to as "Land Use Rights(HGU)." This concession is the right to cultivate lands directly controlled by the state for a maximum period of 25 years for the purpose of agriculture, fishery or animal raising firms. The right to cultivate is granted on land with a total area of minimum 5 hectares under the provision that for land with a total area of 25 hectares or more must have adequate investment and good corporate techniques in accordance with the time development. A right to cultivate may be transferred to another party. Even though a HGU is granted for a maximum 25 years, for companies which need longer time, the right can be granted to maximum 35 years, and upon the request of the right holder and considering the company's condition, the period of 25 years with an extension of 35 years for HGU can be extended for a second time with a maximum period of 25 years[2].

As described in the table below, up to year 2006, the government had issued HGUs for a total land of 4,953.882.39 Hectares which were cultivated for agricultural, plantation, animal raising and fishery activities.

Recapitulation of Data of Land Use Rights(HGU) from

2 Articles 28 and 29 of Law No. 5 Year 1960 (UUPA)

Provinces throughout Indonesia Year 2006[3]

No. Provinsi	Jumlah Lokasi	Jumlah Luas (ha)	Posisi Data
1 Nanggroe Aceh Darussalam*)	185	346.410.37	
2 Sumatera Utara*)	381	907.631.26	
3 Sumatera Barat*)	65	164.583.26	
4 Sumatera Selatan***)	98	343.985.02	Data Year 2004
5 Bangka Belitung***)	30	109.237.19	
6 Jambi*)	55	160.092.79	Data Year 2004 from Pemda Prov.
7 Riau**)	186	592.112.74	
8 Bengkulu*)	62	129.348.40	
9 Lampung***)	98	322.487.25	Data Year 2005
10 Kepulauan Riau			Data masih menyatu dgn RIAU
11 DKI Jakarta****)	4	526.55	Data Year 2005
12 Jawa Barat***)	285	122.288.32	Data Year 2001
13 Banten***)	76	36.242.36	Data Year 2001
14 Jawa Tengah***)	105	39.756.54	Data Year 2004
15 Jawa Timur***)	458	149.445.52	Data Year 2005
16 D.I. Jogyakarta			
17 Kalimantan Barat**)	129	236.072.36	
18 Kalimantan Tengah**)	59	425.534.00	
19 Kalimantan Timur**)	40	180.178.51	
20 Kalimantan Selatan**)	107	268.493.56	
21 Sulawesi Utara**)	66	19.554.08	
22 Gorontalo**)	49	8.490.77	
23 Sulawesi Tengah**)	39	67.887.96	
24 Sulawesi Selatan***)	181	160.420.79	Data Tahun 2005
25 Sulawesi Tenggara**)	20	14.493.82	
26 Bali**)	24	2.141.80	
27 Nusa Tenggara Barat**)	66	18.859.21	
28 Nusa Tenggara Timur**)	38	64.046.15	

3 Note to the table:
*) Data from the Central government and confirmed by regions
**) Data verified by the Central Gov.t and under confirmation in Regions
***) Data already entered and edited but still requires re-verification
****) Data already stable, awaiting follow up action

29 Maluku**)	5	16.672.72	Data Year 2005
30 Maluku Utara**)	3	112.21	Data Year 2005
31 Papua**)	13	46.776.88	
32 Irian Jaya Barat			Data masih menyatu dengan PAPUA
Total	2.927	4.953.882.39	

Even though in the provisions, the lands to which HGU are granted are land directly controlled by the state, it does not mean that the lands are free from other people's right or fee State lands. Even on a plot of land to which a HGU is issued, there may be claims by other parties. For that reason, the system of land control explains the rights owned on the land. Rights to land are rarely held by only one party. At the same time on the same plot of land, there can be several parties having joint right to control the land but with different nature of rights. In English language, these rights are referred to 'bundle of rights'[4]

Prospective lands for HGU or land with HGU oftentimes have claims on the right to the lands by other parties, in particularly customary communities. The differences in the principles of law on land (farm) opening for the land under the control of a party which claim overlaps with other entities, with capital, are the basic root of problem that can trigger related conflicts which can be in the form of intimidation and violence.

According to Sawit Watch (2010), over 663 community members were in conflicts with more than 172 companies, 106 of whom were detained due to conflicts with palm oil plantation companies. The Agrarian Reform Consortium (*Konsorsium Pembaruan Agraria* -KPA) records significant increase in violence on farmers. This increase cannot be separated from the application of Laws which to this date receive criticisms from groups of civil society because they

4 World Agro forestry Centre, Rapid Land Tenure Assessment (RaTA): Brief Guidelines for Practitioners, 2006, page 1

open possible violence on farmers such as Law on Plantation, Law on Water Resources, Law on Forestry, Low on Mines and Presidential Regulation No. 65/2006.[5]

The above illustrations, some of which occurred in the field, are conflicts related to HGU issues. Incomplete process of land acquisition particularly the lands owned by customary communities by the government to be subsequently handed to plantation companies through HGU mechanism created prolonged conflicts, and in the issue of global climate change, it has placed separate pressure for use of environmentally-friendly energy.

The answer to the above problem is increased need for mass bio energy which in this case can certainly be provided by the plantation sector. The direct impact of the above is expansion of plantations which require HGUs. Of course, social problems which stem from acquisition of communal lands due to plantation expansion may again increase. Actually, the issue of HGU is in general not on how HGU documents are processed administratively and legally, but on the process of land acquisition for the purpose of obtaining HGUs for plantation business.

Study Objectives

Based on the above-mentioned brief description of situation and problem, this study is designed to find answers and clarification by way of the following:

a. Identifying gaps between legal provisions (de jure) and factual implementation (de facto) on acquisition of rights to cultivate (HGU) by oil palm plantation companies.
b. Proposing recommendations for change in policies and/or amendment to regulations on rights to cultivate on oil palm plantation which respects the basic human rights and continuity of livelihood for customary communities and local communities.

Scope of Study and Study Questions

5 Press Release of KPA Jakarta, May 8, 2007

To direct analysis on documents and field data, this study is guided by basic questions, namely;

a. Does the HGU grant create social conflicts in the field?
b. Does an HGU regulation respect the right of customary community?
c. Is there any indication of legal violation by companies in acquiring HGUs?

Methodology and Data Collection

This study was conducted by a national team which is formed under cooperation among government agencies, the National Human Rights Commission (KOMNAS HAM), and a Non Government Organization, *Perkumpulan Sawit Watch*, which is an organization with the legal entity of individual association engaging in social field on various impacts of development of large-scale palm oil plantations throughout Indonesia. The agencies and institutions involved in this study include *Komnas HAM* and *Perkumpulan Sawit Watch* in cooperation with and supported by the Palm Oil Farmers Association (SPKS) of West Kalimantan in Sanggau Regency, BPRPI in Langkat Regency and Serdang Bedagai Regency in North Sumatra, and *Wahana Lingkungan Hidup Indonesia* (WALHI) of South Sulawesi in Bulukumba Regency in South Sulawesi.

This study is an systematic effort to update, reconstruct and synthesize various data, facts, as well as data which exist and have been carried out by various parties including civil societies, customary communities and local communities, palm oil farmers, the government and other related parties. This is, in general, a descriptive-qualitative approach used as an effort to identify the situation and legal framework as well as the implication of application. Therefore, the data and facts incorporated in this study are a part of efforts and long series of processes and events which are inseparable despite changes.

Based on the purpose and study framework, the method used in

this study is case study method (qualitative approach). Studies on the aspects of policies, laws, regulations and institutions were performed using qualitative approach using cases which are relevant to the purpose of study. Therefore this study has produced a study which integrates the phenomenon of de facto and de jure. The measures taken are also an effort to study secondary, primary and tertiary data; and collect facts from cases related to implementation of laws and regulations on HGU to be analyzed and produce findings for conclusion and recommendation. The facts were obtained from:

i. Collection of primary, secondary and tertiary legal products related to the Right to Cultivate (de jure);
ii. Collection of filed facts and data in the form testimonies, documentations, reports and publications related to implementation of laws on HGU (de facto);
iii. Processed data related to legal products by way of interpretation on the grammar and sociological-historical interpretation.

Study Location and Duration

This study was carried out in Kalimantan, Sumatra and Sulawesi. This is intended to represent area reality in which structurally they apply the same legal framework in the process, procurement and stipulation of basis for HGU for companies. In Kalimantan the study was carried out in Sanggau Regency, and in Sumatra it was conducted in Langkat regency and Serdang Badagai Regency in North Sumatra, while in South Sulawesi the study was conducted in Bulukumba Regency. Series of this study commenced with collection of data on legal products, collection, documentation and verification of data in the field, while data processing was performed in 30 working days cumulatively.

The study was conducted in regencies in which palm oil plantation was first introduced so that they have root and history of plantation development to represent three deterrent situations. This enabled us to dig information on the situation prior to issuance

of right to cultivate, during the application and the implication of application. We hope that through selection of these locations we are able to answer and achieve the purpose of this study.

Basis of Thinking

> …Even love for customary law is often deemed equal to reluctance to growing private-owned companies (Logemann in ITR 125, 1927, pages 386-388)[6]

Law, in a broader definition, is certainly older in age than humans. Since that time reliance and expectation on law has been high. Various hopes are expressed such as to keep the harmony of relations among humans, and keeping order. When there is an interaction between interest and power, law is no longer standing white, holy, but has been controlled and has mission of power. Therefore, philosophically, law is incessantly discussed and argued about. At least debates revolve around the question of what is law, what is included into law and how law is applied, and even if the application is partial, ruthless and cold blooded.

When the power of an absolute king is toppled tragically due to various factors such as by the long-suppressed people, the law is regarded as a fortress to defend lives. The state is no longer organized using merely the power approach but must also be based on law, thus the doctrine of rule of law state as offered by Plato since long time ago is increasingly relevant for implementation.

However, the implementation of law as the commander does not work out as beautifully as its jargon, Interpretation of law is actually monopolized by the positivism. The positive law teaching deems it necessary to strictly distinguish between law and moral (between applicable law and should be law, or between *das sein* and *das sollen*. In point of view of positivism, there is no law but the ruler's order (laws is command of law giver). Even, a section of legal school sect known as

6 C. Van Vallenhoven, ***Penemuan Hukum Adat***, Djambatan, Jakarta,1987, p. 111

the Legism, has a stronger opinion that law is identical to constitution[7].

According to Sutandyo (2002), the legist – also referred to as the juries from the positivism— maintains that law is nothing but as defined in the following. Law is norm of justice (ius) which has been formed (constitutum, constituted) into life regulations by a legislative body through various formal procedures, and which subsequently is publicized (promulgated) as a positive law (approved on, positive) in the jurisdiction of a certain country, which will therefore bind all the citizen with no exception. That is positive law, also referred to as law of constitution (lege, lex, ius constitutum), which due to its procedural nature is promulgated as a product of legislative body. Hence, under the definition which limits law as constitution as above, the positive jurists maintain the doctrine of *rechtsstaat* (rule of law state) more or less as follows. A rule of law state is 'a state which manages all its lives based on the rules of live which have been made positive formally as a law, thus has a certainty as the only law applicable in the country." Based on the definition of rule of law as above, undeniably the doctrine of law supremacy will be limited as supremacy of constitution. Hence based on that definition, knowledge on the content of constitution and on how we understand the meaning and then become an important asset for a person who intends to involve in the field of law properly and win over a legal case through a proper method[8].

Actually, it is not only Constitution that regulates matters in the social and legal fields. There are other laws which also apply to the same object. Interactions between two or more laws applicable to the same object create various forms in the field which may, one of which, produce social conflicts in the field. Such situations have become discussion on pluralism of law.

"Pluralism of law" may be one of the most interesting and yet

7 B. Sukismo, …***Module IV, Aliran-Aliran Filsafat Hukum***, Faculty of Law University of Gajah Mada, not published, pp 96-97

8 Wignjosoebroto, Soetandyo, 2002 *Doktrin Apakah Sesungguhnya Yang Terkandung Dalam Kata Istilah Negara Hukum?*, paper, not published, pp 2-3

most controversial terms in the literature on legal sociology and theory of law. It is interesting and controversial because it has created debates on the monopolistic claim by the state in the case of drafting and enacting laws and regarding use of lawful violence and on the definition and scope of the term "law"[9].

Sulistyo Irianto (2006) is of the opinion that the concept of pluralism of law, despite slightly varied, basically refers to the existence of more than one legal system which co-exist in the same social field, as proposed by Sally Engle Merry, that pluralism of law is "generally defined as a situation in which two or more legal systems coexist in the same social field". Furthermore, he illustrates Griffiths' opinion on the relations between state law and community in the field. Griffiths distinguishes legal pluralism into two, namely: weak legal pluralism and strong legal pluralism. According to Griffiths, weak legal pluralism is another form of legal centralism because even though it acknowledges legal pluralism, the state law is still considered as superior, while other laws are united in hierarchy under the state law.

An axample of weak legal pluralism is the concept proposed by Hooker: "The term legal pluralism refers to the situation in which two or more laws interact" (Hooker, 1975: 3). Although acknowledging diversity of legal system, he still stresses on the controversy between the so-called municipal law as a dominant system (state law) and the servient law which according to him is inferior such as customs and religious law. Meanwhile, the concept of strong legal pluralism which according to Griffiths is the product of social scientist is a scientific observation on the fact of the existence of pluralism of legal products in existence in all (community (groups). All the existing legal systems are deemed to be of the same level in status in the community, and there is no hierarchy which indicates that one legal system is higher than the other. Griffiths include the opinion of

9 Beckmann, Keebet von Benda , 2006, ***Pluralisme Hukum, Sebuah Sketsa Genealogis dan Perdebatan Teoritis***, dalam buku Pluralisme Hukum, Sebuah Pendekatan Interdisipliner, Huma, Jakarta, p.19

several experts into strong legal pluralisms among others the theory of living law by Eugene Ehrlich, namely laws and regulations derived from the normative system, as contrast to the state law[10].

In the field of natural resources, fights often occur between the concept of control (land tenure) by the state under the constitution and the concept of control by the people under the customary law. There is an impression that the state does not see the customary law as a law which fully applies among the community, so that they should not be respected. The term "land tenure" is translated as control of land. Such control has materialized in various rights namely ownership right, pledge right, lease right and so forth. One of ways to identify the concept of land tenure in certain community is by making sure who in factual is utilizing the land and or natural resource. About the same time as the finding of community-based tenure system, the term customary tenure system/regime and or indigenous tenure system and or customary-based land control appeared. In Indonesian context, the community-based tenure system was found and disseminated by academicians from England and Holland, among others W. Marsden and C. van Vollenhoven, in the context of finding customary laws. In that time, there were no social terms for community-based tenure system except introduction of the term *petuanan* right or *beschikkingsrecht*, which was subsequently popular in Indonesia as *hak ulayat* (communal right) which is the right of certain customary community to their customary territory which is obviously from the community concerned or jointly with their 'neighboring' community[11].

However, this tenure system has in such a way been reduced with the concept of State's Controlling Right (*Hak Menguasai Negara*,

10 Irianto, Sulistyowati, 2006, ***Sejarah dan Perkembangan Pemikiran Pluralisme Hukum dan Konsekuensi Metodologisnya***, dalam buku Pluralisme Hukum, Sebuah Pendekatan Interdisipliner, Huma, Jakarta, p. 59

11 Hedar Laudjeng dkk, ***Antara Sistem Penguasaan Berbasis Masyarakat dan Sistem Penguasaa-nBerbasis Negara di "Kawasan Hutan" di Indonesia: Studi Kasus dari DelapanLokasi***, Short paper presented in a Workshop on Land Control in Forest Area, organized by the Ministry of Forestry in a cooperation with NRM/EPIQ, DFID, ICRAF in Bogor, 27-28 November 2001, p 1

HMN) which is adopted in Indonesian laws and regulations to simplify the relation between the people and the state (government) to regulate the natural resources controlled by the community. In the implementation, the concept of HMN receives much criticism especially on how the New Order Regime applied it.

I Nyoman Nurjaya (2000) said that in the practice of government organization during the new order regime, they consciously manipulated the true meaning of ideology at least in 2 aspects, namely : 1) the new order government intentionally gave narrow interpretation on the terminology of state which simply mean the government, not the government and the people. Therefore, subsequently they established and used the paradigm of control and utilization of natural resources under the government (government-based resource control and management), not as state-based resource control and management as referred to in the 1945 State Constitution, Basic Law on Agrarian (UUPA), and UUPK above, 2) the consequence of use of government-based resource control and management above is that the people's position is no longer parallel to the government in the life as nation and state. It means that there occurred a relation with a subordinating nature between the people and the government in the sense that the people are under inferior position and the government was superior. For that reason, for over three decades, the new order government played at least 3 main roles in the control and utilization of natural resources, namely: 1) the Government as the controller over natural resources (government resource lord). 2) The Government as exploiter of natural resources (government resource protection institution). 3) The Government as the institution protecting natural resources (resource protection institution). Furthermore, use of paradigm of control and utilization of government-based resources produced a judicial implication in the form of creation of repressive laws which contained the following characteristics: 1) Regulating norms which overlook, marginalize and even eliminate the people's rights over control and utilization of

natural resources; 2) Place stress on security approach; 3) Prioritize legal sanctions imposed only on the people who commit violation; 4) Give criminological stigma on law perpetrators as destroyers of natural resources, looters of natural richness, unlawful farmers, forest dwellers, unlawful grass gatherers or herders, forest rioters, saboteurs of reforestation, stealers of forest products and so forth, all of which the stigma which has the same meaning.[12]

In truth, Indonesia expressly states that it is a rule of law state. For that reason, all acts must be based on law and, subsequently, laws must serve as the defender of power. However, the contrary occurs. It is not rule of law that applies which requires that laws and regulations function to uphold justice, protect the social and political rights of its citizens from any violations committed by the ruler or its citizens. But in this rule by law, with all laws and regulations are intended to serve the interest of the regime, and to verify their acts which are antidemocratic, anti national, anti justice and anti human rights. Under the regime of new order, laws were used as an effective tool to get political domination, control and intervene with state institutions and political parties to ensure their control over power. It is one of the identities of the dictatorial regime of the New Order in Indonesia which lasted for 32 years[13].

12 Iwan Nurjaya. 2000. Impoverishment process in the sectors of Forestry and Natural Resources: Political and Legal Perspective, Seminar and *workshop on Structural Poverty* organized on January l 18-20 i 2000 at Puncak Inn Hotel Jl. Raya Ciloto No. 88 Puncak – West Java.

13 M.D. Kartaprawira, Quo Vadis Law Reform in Indonesia, Not published, Den Haag, October 2000, pp 1-2.

- As at present there are no laws and regulations that specifically regulate customary community. The term customary community has spread in various regulations, both which expressly define and describe the characteristics. When this report was prepared, AMAN and HuMa and several related individuals were having discourse on Draft law on Customary Community. This draft law is one of priorities in the program of national legislations years 2005-2009 under the administration of Bambang Susilo Yudoyono & Muhammad Yusuf Kalla (SBY-JK)
- For this term of customary community, read the paper prepared by Ricardo Simarmata, titled Pilihan Hukum Pengurusan Hutan Oleh Masyarakat Adat
- Walhi, *the Kontu-Muna People: Symbol of fight on Inhumane Conservation*, Jakarta, 2005
- Regulation of State Minister for Agrarian Affairs/Chairman of the National Land Agency Number 5 Year 1999 regarding Guidelines on Settlement of Problems related to Communal Rights of Customary Community
- Kaban, Maria , Keberadaan Hak Masyarakat Adat Atas Tanah Di Tanah Karo, Faculty of

Law, University of North Sumatera, e-USU Repository ©2004 Universitas Sumatera Utara, pp. 1-2

- Resolution of AMAN Congress No. 01/KMAN/1999
- ILO Convention NO. 169 yearn 1989 on *Convention concerning Indigenous and Tribal Peoples in Independent Countries*
- Simarmata, Rikardo, MWElcoming the End of Customary Community Era: Resistance to Conditional Recognition, 2005
- This debate particularly occurred between BPUPKI members who supported federation and those who supported unitary state. One of analysis on the opinions of nation founders mentioned ".....based on the idea of totalitarianism of the three political scientists, Soepomo agreed because as presented in his political speech in the BPUPKI a state must be established based on the history of law and social institutions existing in the relevant state. This is because the feudalistic system of Javanese authority which was very totalitarian in the power. Read; Syahda Guruh LS, Menimbang Otonomi VS Federal. Mengembangkan Wacana Federalisme Dan Otonomi Luas Menuju Masyarakat Madani Indonesia, Remaja Rosda Karya, Bandung, June 2000, p. 38
- One of books specifically discussing enactment of UUPD was a book written by R. Yando Zakaria entiitled, Abih Tandeh, Masyarakat Desa Dibawah Rejim Orde Baru, Elsam, August 2000
- Desa, huta, marga, pekon, nagari or under other names in Dutch language can altogether be referred to *rechtsgemeenschap* and *volksgemeenschap*. The first term is legal term, while the second term is sociological term. However, the two terms are used for the same purpose.
- Rikardo Simarmata, Selection of Law on Fotest Arangement by Customary Community, p. 22
- Andiko, Decentralization & Governance; Reading Tendency of Regional Autonomy Issues under Law No. 32 Years 2004, 2005
- General Elucidation to Law No. 5 Year 1960 (UUPA) point 3
- Hedar Laudjeng, Legal opinion (draft) on Law No. 41 Year 1999 on Forestry.
- Articles 28-29 of UUPA
- Article 34 of UUPA
- Article 9 of Law No. 18 Year 2004 on Plantation
- Ibid Article 10
- Law No. 25 Yearn 2007 on Capital Investment is in Lieu of Law No. 1 Year 1967 on Foreign Investment as amended by Law Number 11 Year 1970 on Amendment and Supplement to Law Number 1 Year 1967 on Foreign Investment and Law 6 Year 1968 on Domestic Capital Investment as amended by Law Number 12 Year 1970 on Amendment and Supplement to Law Number 6 Year 1968 on Domestic Capital Investment.
- Consideration in Law on Capital Investment
- Article 21 of Law Capital Investment
- *Under laws and regulations. Some of land are from :*

(1) *State lands emerged from granting of HGU for plantation firms (Decree of the Minister of Agrarian Affairs / Chairman of BPN No. 21 Year 1994 jo Government Regulation No.40 year 1996 jo Decree of the Minister of Agrarian Affairs /Chairman of BPN No. 2 Year 1999 regarding Location Permit)*

(2) *State lands emerged under Government Regulation No. 24 year 1997 article 1 point 3, State Land or land directly controlled by the state are the land not owned under a right to land.*

(3) *State land emerged under Article (4) of Government Regulation No. 35 year 1956, Supervision on transfers of right to concession plantation lands which stipulate that the land from cancellations of transfer of right to plantation not having approval from the relevant authority shall become the land directly controlled by the state and the rights of third parties to the lands are void.*

(4) *State lands emerged under Article 3, of Law No. 1 Year 1958, Abolition of Private Lands which stipulate that as from the effective date of this Law for public interest, the right of owner and ownership on private lands shall be void and former private land by virtue of law all of which immediately become state land a.*

(5) *Government agency lands under Staatblat Year 1911 No. 110 on Control over immovable assets, buildings and other state owned constructions".*
(6) *Law No. 86 Year 1958 on Nationalization.*
(7) *Purchases of land for the Government through Bijblad Committee 11372 jo 12476.*
(8) *Land acquisition pursuant to Regulation of the Minister of Home Affairs No. 15 Year 1975.*
(9) *Land procurement pursuant to Regulation of the Minister of Home Affairs No. 2 year 1985.*
(10) *Free Relinquishment of Right from the owners to the Government.*
(11) *Historical control of Japanese Troops*
- Article 1321-1325 of KUHPdt (BW)
- Article 1328 of KUHPdt (BW)
- Chandra Ap, ***Unsettled Colonial Hwritage: Nationalization of Plantation Companies in Jember.*** Workshop on the Economic Side of Decolonization in Yogyakarta, on August 18-19, 2004, p. 1
- General elucidation, Law No. 86/1958, LN 1958, No. 162 on Nationalization of Dutch-owned Enterprises
- CHAPTER IV: Transitional Provisions. Part Two Conversion Provision s Article III Paragraph (1) of UUPA

Chapter II

Recognition on Right of Customary Community and Right to Cultivate the Land

DEBATES on who are classified as indigenous people or native people with autonomous right to regulate themselves and live in certain areas in Indonesia have encouraged studies on the terminology. These debates have given colors to laws which fully or partially regulate the life of customary community[1]. The terminology includes Masyarakat Hukum Adat (Customary Law Community), Masyarakat Suku Terasing (Isolated Community), Masyarakat Tertinggal (Socially and economically-disadvantaged People) and Masyarakat Adat (Customary Community)[2]. Hereinafter, the writer refers the above as the "Customary Community".

Variety of Customary Laws on *Tanah Ulayat* (Collectively Owned Land)

Indonesia is one of the countries constituted by hundreds of ethnic groups with diverse cultures and laws. Article 18 of the 1945 State Constitution stipulates that Indonesian territory consists of more or less 254 Zelfbesturende Landschappen and Volksgemeenschappen such as

1 At present there is no law and regulation that specifically regulates the customary community. The term customary community has scattered in many regulations, all of which define and describe its characteristics. When this report was prepared, AMAN and HuMa and several related individuals were having discourse on Draft law on Customary Community. This draft law is one of the priorities in the program of national legislations years 2005-2009 under the Supervision of Susilo Bambang Yudoyono & Muhammad Yusuf Kalla (SBY-JK)

2 For further information about the term of customary community, read the paper prepared by Ricardo Simarmata, titled Pilihan Hukum Pengurusan Hutan Oleh Masyarakat Adat

'Desa' in Java and Bali, 'Nagari' in Minangkabau, 'Dusun' and 'Marga' in Palembang etc. Those areas have their original structures and therefore can be considered as special regions.

There are plenty of differences in the regulations of the communal land among many ethnic groups in Indonesia. The differences come from various kinds of rights in the tenurial system they develop. There are plenty of examples in their terminologies as well as their regulations. For example, in the *Watuputih* customary community in Muna Island, one of their concepts is a stretch of land called *Dasa*. It is a piece of land which has been bordered permanently by its owners using stones, no matter whether it has been planted or not or has become a forest or has had a lot of bushes. The implementation of this right is relatively strong. Other people cannot cultivate this piece of land without permission from its owner and acknowledgment from *sarano liwu* (rural governance). This right can be exercised by his/her heir[3]. In Minangkabau, *Dasa* is almost similar to *Ganggam Bauntuak, Hiduik Ba Pangadok*. Its ownership is still communal, but its control belongs to the family who is authorized to cultivate it.

On one hand, there are discrepancies in the customary land regulations. On the other hand, they share common principles, one of which is the communal value which is contained within the regulations. The communal land ownership which is officially used as a terminology within the governmental regulations and laws is *hak ulayat* (communal right). However, if it is traced back, the term *hak ulayat* is only a familiar term used in the Minangkabau customary community.

Law No. 5 Year 1960 only explains that "communal right and the like" is what is referred to in the customary law terminologies as "beschikkingsrecht". Lower level laws explain that *hak ulayat* and other similar rights in the customary law community (hereinafter referred to as *hak ulayat*) is the authority which according to

3 Walhi, *Orang Kontu-Muna: Simbol Perlawanan terhadap Konservasi Tak Manusiawi*, Jakarta, 2005

the customary law is possessed by a particular customary law community over a specific area which is the area for its residents to take advantages of its natural resources, including land, in this area for their sustainable livelihood and others', which emerges as a result of hereditary and continuous relationship between this particular customary community and this respected area[4].

The concept of *hak ulayat* was first introduced by C. Van Vollenhwen, a legendary Dutch scholar in customary law. He wrote that throughout Indonesia archipelago, *hak ulayat* constitutes "het hoagste richtten aauzien van garand", which is the highest right to land ownership in the customary law which authorizes a certain customary community over a certain area which is the area for its settlers to take the benefits of the available resources in the area of customary law community and it is the joint ownership of its settlers. The realization of *hak ulayat* in reality is as follows:

a. The relevant legal partnership and its members are entitled to freely cultivate the forest land, clear it, build dwellings within it, collect its products, hunt for food and raise cattle in it.
b. Outsiders may perform activities mentioned in Point A above with permission from the relevant legal partnership, without which they are considered to commit a crime.
c. Outsiders must always pay taxes to do any activities on the land, while its settlers must also sometimes pay rental fee of it.
d. In the event of the certain crime committed in *tanah ulayat* that cannot be charged to a certain perpetrator, then it is the relevant legal partnership itself that must be in charge of.
e. Something subject to *hak ulayat* cannot be handed over permanently.
f. Despite the fact that a piece of land has been opened and cultivated by an individual, the interference of legal partnership cannot wholly be eliminated. This interference gets bigger when

4 Regulation of State Minister for Agrarian Affairs/Chairman of the National Land Agency Number 5 Year 1999 regarding Guidelines on Settlement of Problems related to *Hak Ulayat* of Customary Community

the individual's right is diminishing. On the other hand, it gets proportionally smaller along with the increase in his/her right[5].

Recognition of Community Rights (Communal Rights) in National and International Laws

Customary community is a group of people originally coming from a certain geographical area with their own value system, ideology, economic, political, social and cultural systems and their own land[6]. It has been regulated in international conventions since a few while ago. The conventions mostly referred are ILO Convention No. 169 Year 1989 on Convention Concerning Indigenous and Tribal Peoples in Independent Countries. This convention defines customary community as "Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations"[7]. The popular terminology used in the international level is Indigenous Peoples (IPs).

Regimes of the International Law on Human Rights acknowledge Indigenous People's human rights. Some of them are the right to determine their own lives, right to development, right to have possession, right to live, right to health and other rights mentioned in ILO Convention No. 169 Year 1989. The recognition of these rights rectifies an old-fashioned public opinion which regards IPs as the uncivilized society. Initially, ILO Convention No. 107 Year 1957 still assumed that IPs would develop and integrate into a modern community, but then it was amended by ILO Convention No. 169 by stipulating that IPs had the right to choose their own life based on their law and political system[8].

5 Kaban, Maria ,K*eberadaan Hak Masyarakat Adat Atas Tanah Di Tanah Karo*, Faculty of Law, University of North Sumatera, e-USU Repository ©2004 Universitas Sumatera Utara, pp. 1-2

6 Resolution of AMAN Congress No. 01/KMAN/1999

7 ILO Convention No. 169 year 1989 regarding Convention concerning Indigenous and Tribal Peoples in Independent Countries

In the national level, an ideal relationship between the customary community and the state is the one established by mutual understanding and respect of right and obligation. Customary community gives up some of its self-control authorities and matters to get prosperity to the state, and in return the state gets legitimacy to draft the law regulating all these aspects by opening a space control towards the customary community.

The fundamental regulation of customary community in the Indonesian positive laws stems from the agreement among the state founding fathers in formulating the constitution. After a tiring debate, the recognition of the existence of the customary community is stipulated in Article 18 of the 1945 State Constitution stating that the Indonesia territory is divided into large and small regions whose forms of governance are regulated by the laws with considerations of the collective agreement principles in the government system and the rights of origin in specially governed areas[9].

In the fourth amendment of the Indonesia constitution, Article 18 regulating the recognition of the aforementioned customary community has changed into Article 18b which reads as follows:

(1) The state acknowledges and respects units of specially-governed regions regulated in the laws.
(2) The state acknowledges and respects units of customary communities along with their traditional rights as long as they still exist and are in accordance with the development of community and the principles of the unitary state of the Republic of Indonesia regulated in the laws.

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8 Simarmata, Rikardo, Menyongsong Berakhirnya Abad Masyarakat Adat: Resistensi Pengakuan Bersyarakat, 2005

9 This debate particularly emerged among BPUPKI members who supported federation and those who supported unitary state. One of the analysis on the opinions of the nation founders mentioned ".....based on the idea of totalitarianism of the three political scientists, Soepomo agreed because as presented in his political speech in the BPUPKI a state must be established based on the history of law and social institutions existing in the relevant state. This is because the feudalistic system of Javanese authority was very totalitarian in the power. Read; Syahda Guruh LS, *Menimbang Otonomi VS Federal. Mengembangkan Wacana Federalisme Dan Otonomi Luas Menuju Masyarakat Madani Indonesia*, Remaja Rosda Karya, Bandung, June 2000, p. 38

The above stipulation of Article 18 is the last compromise which lifts up the condition "as long as they still exist and in accordance with the development of the community and the principles of the Unitary State of the Republic of Indonesia" from the levels of law to the Constitution. This condition opens a debatable issue regarding who is entitled to acknowledge the legality of the customary community.

If we trace back the recognition of the customary community in the implementing laws deriving from the 1945 State Constitution, there is no comprehensive law on the recognition of the customary community existence along with their natural resources which is subject to the *ulayat* system. The law seems to end up in two different sides. First, it is the one which regulates the customary community's institutionalized governance. Second, it is the one regulating the customary community's natural resources.

Law on the Customary Community's Institutionalized Governance

Beside Article 18 of the 1945 State Constitution which acknowledges the recognition of the customary community, there is no any other law specifically regulating their institutionalized governance. In 1979, a very important regulation was enacted determining the sustainability of the customary community's institutionalized governance namely Law No. 5 Year 1979 on Rural Governance (UUPD).

The uniformity of the low level governance concepts follows the village models in Java which are based on territorial bonds. On the other hand, the forms of local governance outside Java like *Nagari* in Minangkabau, *Kampung* in West Kalimantan, *Negeri* in Maluku and *Marga* in South Sumatera are based on genealogical ties and territorial genealogy.

One of the important impacts of the UUPD is placing the village governance unit at the lowest hierarchical level in the governmental authority bureaucracy in Indonesia. *Desa* is led under the control of

camat (sub-district head) and does not have authority to regulate its people independently. This condition raises people's resistance to the law and ends up with their demand on the amendment of the law on UUPD[10].

In 1999, after the fall of New Order Regime, the willingness to correct all the mistakes in the centralized and militarized governance appeared. Then, Law No. 22 Year 1999 on local government was enacted. As a result, the governance system was no longer centralized yet decentralized. What about the customary community existence under this new law?

Objection of Point e of one particular law reads:

"Law No. 5 Year 1979 on Desa Governance (State Gazettes Year 1979 No. 56, Supplementary States Gazettes No. 3153) that unifies the names, forms, structures and positions of the rural governance is not in line with the spirit of the 1945 State Constitution and does not recognize and respect the origin of a special territory; thus, the law needs to be amended".

The above objection is the first juridical recognition which admits the past mistakes in implementing local governance in Indonesia. The subsequent law, Law No. 22 Year 1999, provides sufficient space for customary communities all over Indonesia to re-establish their existence and it is taken in various models. Rikardo Simarmata writes:

..... The Constitution acknowledges the existence of customary community, while Law No.22/1999 acknowledges Desa or other similar terms (Marga, Huta, Nagari, Lembang, Pekon, Kampung) as areas that have authority to take care and regulate their own affairs[11]. Unlike province and district as autonomous regions, village

10 One of books specifically discussing the enactment of UUPD was a book written by R. Yando Zakaria entiitled, *Abih Tandeh, Masyarakat Desa Dibawah Rejim Orde Baru*, Elsam, August 2000

11 *Desa, huta, marga, pekon, nagari* or under other names in Dutch language can altogether be referred to *rechtsgemeenschap* and *volksgemeenschap*. The first term is legal term, while the second term is sociological term. However, the two terms are used for the same purpose..

is considered to have original structure in terms of rights of origin and real autonomy (General Content of Law No. 22/1999).

Apparently, the presence of Law No. 22/1999 is responded by some local governments by passing some local law products which recognize the existence of Desa, Marga, Huta, Pekon, Kampung, and other similar terms. Although Law No. 22/1999 stresses that the emphasis of local government autonomy is on the districts and cities, the policy on the recognition of customary community unit is also applied by provincial government, for example, the initiative from the provincial government of West Sumatera releasing Perda No. 9/2001 (Local Government Law) about Ketentuan Pokok Pemerintahan Nagari (Fundamental Principles of the Nagari Governance). We can say, until now, the Provincial Government of West Sumatera is the only provincial government taking that initiative. In other areas, similar initiatives are taken by the governments at distric levels, for example, the initiative from the Government of Toraja (South Sulawesi) releasing Perda No. 2/2001 about Lembang Governance which has been changed into Perda No. 5/2004 about Lembang Governance and actions carried out by some districts in the Central Sulawesi province creating Perda about Kademangan.

Similar to Law No. 22/1999, the recognition of customary community units by a number of Perda is followed by the recognition of territory, structure of government and right to natural resources. One of the Perdas is Perda of West Sumatera Province No. 9/2001. At the beginning part, it states the recognition of the Nagari territory (Article 3). After that, it acknowledges the structure of the Nagari governance (Article 4) and also recognition of the Nagari property (Article 7). The term used is not "hak" (right) but "harta" (property). Law No. 22/1999 uses the terminology "kekayaan desa" (rural property) (Article 107, Point 1), which is further followed up by Perda No. 76/2001 (Article 49, Points 1, and Article 50).[12]

12 Rikardo Simarmata, *Pilihan Hukum Pengurusan Hutan Oleh Masyarakat Adat*, p. 22

After taking into effect for about five years, Law No. 22 1999 was replaced by Law No. 32 2004 about local government autonomy. Law No. 32 2004 was released so quickly that it caused a significant debate; it was even created without a comprehensive and open evaluation towards the implementation of local government autonomy under Law No. 22 Year 1999.

When we observe *rural* management in Law No. 32 Year 2004, there is a decrease in quality of freedom for *Desa* to develop its own identity. There have been some efforts to recentralize the government, including *Desa*. BPD (the Rural Representative Council) is no longer the community representatives that have equal power and authority to the village head who is the representative of the central government on the basic level.

When Law No. 32 2004 was passed, many forums talked about the possible effects that might happen in the future. Some papers tried to dissect the spirit contained in this regulation about *rural* governance. One of them mentions it as follow:

"The idea to return autonomy to "ibu kandung" (a birth mother) is more challenging. There is no progress towards the position of Desa in Law No. 32 2004. Moreover, the authority of BPD as a learning medium and revitalization in democracy in the basic level has been cut off."

BPD in Law No. 32 Year 2004 is positioned to accommodate people's aspiration and stipulate the village regulations with the head of village. While in Law No. 22 Year 1999 BPD has strong position in which the BPD functions to guide the customs, draft Rural Regulations, accommodate and channel people's aspiration and supervise the organization of Rural Governance. It is even stated that the head of village is accountable to the BPD, while the Regent only receives a report of accountability on his/her duty implementation.

With respect to village authority, Law No. 32 Year 2004 narrows down the room of creativity for the village to interpret its authorities

for which Law No. 22 Year 1999 give a little space. Law No. 32 Year 2004 clearly outlines that the village specific authority is more bottom up in nature following the logics of delegation of duties, assistance duties and other affairs which are delegated under laws and regulations to the village"[13].

After we take a look at the laws on customary communities and how their governance/administration are regulated in laws, now let us take a look at the laws on agrarian resources and their natural resources.

Law on the Natural Resources of Customary Community

The highest law governing the utilization of agrarian resources and their natural resources is Article 33 of the 1945 State Constitution which serves the root for the state right to regulate its utilization and at the same time the purpose of management. Article 33 stipulates the following:

(1) The economy is organized as a joint effort based on the principle of mutual cooperation.

(2) Production branches which are important for the state and in control of the lives of many people are controlled by the state.

(3) Land and water and natural richness contained therein are controlled by the state and are used for the people's welfare to the fullest possible extent.

(4) The national economy is organized based on economic democracy with the principles of togetherness, justice and efficiency, sustainability, environmentally-perspective, independence and maintenance of the balance between advancement and the national economic integrity.

(5) Further provisions on the implementation of the article are to be regulated in a law.

Categorized as *rakyat* (civil citizens), many groups of customary communities become the lawful owners of agrarian resources and

13 Andiko, Decentralization & Governance; Reading Tendency of Regional Autonomy Issues under Law No. 32 Years 2004, 2005

natural resources so that these groups of people also have the right to reach the objective of …" the people's welfare to the fullest possible extent."

The first law undermining the spirit of Article 33 of the 1945 State constitution on agrarian and natural resources is Law No. 5 Year 1960 on UUPA. As the basis, the UUPA gave the reasons for the birth of the above law because up to now the agrarian law in Indonesia is under the situation of law dualism namely European Law and Customary Law. Customary Law is significantly influenced by the colonial law so that it is no longer relevant with the revolution spirit. For that reason, the UUPA declares to unify the agrarian law in Indonesia, and the customary law should still be used as the basis.

The UUPA also provides a space for the implementation of the customary community's Communal Right as referred to in Article 3 of the UUPA, which stipulates the following:

"With consideration of the provisions in Articles 1 and 2, the implementation of the communal right or other similar rights within the customary legal community, as long as they still exist, must be in such a way that they are in line with the national and state's interest, which is based on the national unity and may not be in contrary to the Constitution and higher laws and regulations.".

Furthermore, Article 5 stipulates:

The agrarian law applicable to land, water and space is the communal law, as long as it is not on the contrary to the national interest, based on the national unity, with Indonesian socialism and regulations set forth in this law and other laws, all elements based on the religious law.

The above two article focused on the phrase "as long as it still exists and not in contradictory to the national interest." With this phrase in the two articles above the state deletes the acknowledgement of the ownership of the customary community to

their agrarian resources and natural resources. Such arrangement up to his date created impact in the field both stemming from whoh have the entitlement to state that the customary community still exist or its impact to the customary community such as take over of ownership of customary community on heir communal land and make the customary community as if not have entitlement to their own property. The elucidation of article 5 stipulates:

" The implementation of communal right and similar rights from customary law communities, in so far as factually existent, must be in such a way that they are in line with the interest nation and state, based on the nation unity and may not contravene other higher laws and regulations.

This provision is first stemmed from the acknowledgement that there is communal right in the new agrarian law. As we know even though factually communal right exist and applicable and observed in judicial decisions, such rights have never been officially acknowledged in the Constitution, and consequently in the implementation of the agrarian law, communal rights were often disregarded in the colonial times. As communal right is mentioned in the Basic Agrarian Law which is in principal acknowledgement on the right, principally the communal right will be observed, in so far as the right is in factual in existence among the relevant law community. For example, in the granting a right to land (such as right to cultivate) of the relevant law community, they will be first heard of their opinion and be granted "recognitie", that they are entitled to receive it as the holder of communal right.

However, on the other hand, it is not alright if based on the communal right the relevant law community intervene the granting of the right to cultivate, while the granting of the right in the region is important for wider interest. The same is the case that it is not aright if a law community based on their communal right or example, simply reject

large scale and orderly forest clearing for large projects in the context of implementing the plan of increasing food produce and relocation of people. Experience also shows that development on those regions often times are hampered because of difficulty related to communal right. This is the basis of the second notion in the provisions of article 3 above. The interest of a law community must be subject to the national and state interest which is broader and the communal right must be implemented in accordance with the broader interest. It is not verified if within the life of state at present a legal community still defends the content and implements absolutely their communal right, as if they are separated from their relation with other law communities and regions within the State. Such attitude is clearly in contrary to the basic principle as set forth in article 2 and in practice will bring the consequence of hampering major efforts to reach prosperity of all the people.

However, as clearly explained above, this does not mean that the interest of the relevant law community is not paid into attention at all[14].

Such this legal politics create strong spotlight on the state in particular the treatment of state administrators on the customary community. Yet, there are not many implementing g regulations made to better explain acknowledgement on the customary community with respect to ownership. On the other hand regulations which regulate the government right to manage agrarian sources and natural resources eventually reduce the communal right of customary community such as flood.

After the downfall of the Old Order Regime, the New Order Regime acted as if intentionally overlooked the communal right of customary community. The UUPA was like frozen because it was not referred to by other sectoral regulations such as Law No. 5 Year 1967

14 General Elucidation to Law No. 5 Year 1960 (UUPA) point 3

on Basic provision on Forestry and Law No. 11 Year 1967 on Basic Provisions on Mines along with their implementing regulations.

If we observe further the spirit of this Law, there is no acknowledgement on forest ownership by the Customary Community, Forest is deemed as an area with no inhabitant, while actually in the field forests have become homes to customary community for thousand of years. Article 17 of Law No. 5 Year 1967 stipulates;

The implementation of rights of community, communal law and their members as well individual rights to get benefit from forest directly or indirectly based on a law an d regulation in so far as factually in existence, may not disrupt then achievement of objectives as intended in this law..

Such arrangement was subsequently corroborated in article 16 of Government Regulation No. 21 year 1970 regarding Forest Concession and Right to Collect forest products , in which paragraph (1) stipulates;

> *The rights of customary community and its members to collect forest produces based on a regulation in tee communal right in so far as factually in existence, must be implemented orderly so as they do not disrupt the implementation of forest exploitation.*

The same is the case when we observe regulations on mining, for example in settlement of disputes on land between community members and holder of mining authorization, this regulation implies that the community must be give in. In the even that there is a place where the community had started mining , where in some regions they are local customary community, when mining business came for business, the community must deliver their mining area to the mining business man.

After about thirty years, with negative impacts created, in 1999 the government promulgated Law No. 41 Year 1999 on Forestry. This law started to acknowledge the existence of communal forest even though the definition of communal forest is the state forest existing in the area of customary community. Various ambiguous

regulations in this law on Forestry have invited criticism from various groups among others;

> *.....whereas 1) the Law on Forestry has failed in making solid formulation on two matters namely formulation on the existence of law No. 5/67. Law on Forestry has also failed to formulate its ideological and political mission. 2) The Law on Forestry has distorted the definition of state to become only government. The Law on Forestry failed to conduct paradigmatic criticism or correction on Law No. 5/67. Therefore, the Law on Forestry has failed to fomrand with several; international law instrumentality its ideological and political mission. , 2) the Law on Forestry has distorted the meaning state to become only government, 3 The law on Forestry failed to conduct fundamental changes on the provision regulating the customary community. 4) the Law on Forestry is conflict with a number national positive laws and regulations, and several instrument of international law, both on the provision on basic rights of communal community, the authority of the regional government and spatial layout 5) in all series of activities in the organization of forestry affairs the role of the state cq government is still dominant. The role of community is only as supplementary and 6) from the aspect of use of terms and sentence structure, the Law on K has basic weakness so as to blur the central topic*[15].

Interestingly, in 1999, the National Land Agency (BPN) tried to interpret further the implementation of acknowledgement on the communal right of customary community. BPN issued Regulation the Minister of Agrarian Affairs/Chairman of the National Land Agency Number 5 year 1999 regarding Guidelines s on settlement of issues of communal right of customary community . This Regulation defines communal right as follows:

> *"Communal right and the like from customary law community (hereinafter referred to as communal right) is the authority which pursuant to the customary law is owned by certain customary law*

15 Hedar Laudjeng, Legal opinion (draft) on Law No. 41 Year 1999 on Forestry.

community over a certain area which is the living environment of their residents to get benefit form the natural resources including the land in the area, for the sustainability of life and livelihood which appear from physical and non physical relation from generation to generation between the said law community and the relevant area".

Even though remaining not detached from the confinement of 'as long as in existent," this ministerial regulation tries to explain the criteria of communal right. The communal right of customary law community is deemed in existent if : 1) there is group of people who feel bound by their communal legal structure as residents of a certain legal association which acknowledge and apply the provisions of the association in their daily lives, 2) there exist certain communal land which become the living environment for the member of the said legal association and as the place for them to get their daily needs, and 3) there exists communal legal structure on management, control and utilization of the communal land which applicable and complied by the member of the said legal association.

However, this communal right can no longer be implemented don lots of land which at the time of stipulation of the Regional Regulation on acknowledgement of customary community, 1) has been possessed by an individual or legal entity with a right to the land pursuant to the Basic Law on Agrarian Affairs; and 2) constitute lots of land which have been acquired or freed y the government agency, legal entity or individuals pursuant to applicable provisions and methods.

The interesting point of this ministerial regulation is the existence of a space for the customary community to release their communal right in a certain period of time. If the period of time elapses, utilization of the land must be performed upon the approval of the local customary community possessing the communal right. The legal fact as above then encouraged various parties to campaign the necessity for "Review" over law on agrarian affairs and management of natural resources in Indonesia prior to issuing

new laws and regulations. This wish was then legitimized under Stipulation of the people's Consultative Assembly of the Republic of Indonesia Number IX/MPR/2001 regarding Reform of Agrarian and Management of Natural resources in which article 5 regarding the principles of reform on agrarian and variety of national culture on agrarian resources and natural resources. However, various legislative product drafted recently doe not refer to this Stipulation that ignorance to customary community continue to take place.

Rights to Land for Plantation Industry

There are two law regimes applicable in opening large-scale plantations, namely licensing law regime and land law regime. Licensing law regime controls permits for any parties performing business in the plantation sector. At present, the applicable regulation is Regulation of the Minister of Agriculture No. 26/Permentan/OT.140/2/2007 regarding Guidelines on Licensing for Performing Business in the Plantation Sector.

Land law regime regulates land used for plantation. The Basic Agrarian Law (UUPA) grants rights for agriculture, fishery and plantation businesses referred to as Land Use Rights (HGU). This concession is the right to cultivate land owned by the State for business in the agriculture, fishery or animal breeding sectors. This right is granted for land of minimum 5 hectares in area under the condition that if the area is equal or more than 25 hectares; it has to use suitable capital investment and well-ordered company's techniques in accordance to recent development. A right to cultivate might change hands or assigned to other party and might be given additional rights. The maximum timeline for a right to cultivate is 25 years and for companies which need longer time, they might receive 35 years. Upon request by rights owner and by considering the company's condition, this right to cultivate might be extended for a maximum period of 25 years.[16]

16 Article 28-29 UUPA

In the elucidation part, it is described that according to its nature and objectives, the Cultivation Right is a limited in term of the validity. The timeline is 25 or 35 years with the possibility for extension of another 25 years which is considered long enough for developing long term plants. For example 35 years is the time required for palm oil plantation.

The cultivation right is granted to 1) Indonesian citizens and 2) legal entities which are established under Indonesian laws and operate in Indonesia. The UUPA stipulates that cultivation right should not be granted to foreigners. Legalentities which may receive the rights is any legal entities with progressive national capital, either original or otherwise. For foreign investment legal entities, the cultivation right may only be granted if it is required under laws which arrange national development plan.

A right to cultivate is considered void if 1) the timeline is expired, 2) ceased prior to the timeline because of failure to meet a set condition, 3) released by the rights owner before the timeline is over, 4) taken away because of public interest, 5) abandoned, 6) land is destroyed, and 7) if the right to cultivate is owned by a foreign country or foreign legal entity[17]. Further provisions regarding Right to Cultivate is regulated in Government Regulation of the Republic of Indonesia No. 40 year 1996 on Right to Cultivate, Right to Build and Right to Use Land.

In 2004, the Government promulgated Law No.18 Year 1994 on Plantation. This Plantation Law stipulates that in organizing a plantation business, a plantation company may, based on its interest, be granted rights to the land required for plantation in the form of ownership rights, right to cultivate, right to build, and/or right to use pursuant to laws and regulations. If the required land is the communal land of a customary law community which is factually in existent, prior to the granting of rights, the applicant must arrange discussion with the community who owns the communal rights

17 Article 34 UUPA

and community members who own the relevant rights to land, in order to reach an agreement regarding land acquisition and its compensation[18].

Subsequently, a right to cultivate for plantation is granted for a maximum 35 years and during the time period, the rights' owner might receive extension for a maximum 25 years granted by the relevant authority in the land sector if, based on the Minister's assessment, the rights' owner has fulfilled all his/her responsibility and managed the plantation according to applicable technical regulations. After the time period is expired, upon request from the ex-rights owner, a new right to cultivate will be granted for a time period as described above[19].

On April 26, 2007 the President signed Law No. 25 Year 2007 regarding Capital Investment (UUPM)[20]. This new law on Capital Investment was issued to improve the national economic development and Indonesia's political and economic stability. It is necessary to increase capital investment to manage the economic potentials to be a real economic force, not only national capital but also foreign capital. To face changes in the global economy and Indonesia's participation in a number of international cooperations, it is necessary to create a conducive and supportive climate, provide law certainty, justice, and efficiency for capital investment by observing the national economic interests[21].

To achieve that objective, the government through the UUPM provides facilities and facilitation to investors. The facilitations are in the form of services and/or permits for capital investment companies to obtain: 1) land rights, 2) immigration service facilitation, and

18 Article 9 UU No. 18 Year 2004 Regarding Plantation

19 Ibid Article 10

20 UU No. 25 Year 2007 Regarding Capital Investment is in Lieu of Law Number 1 Year 1967 regarding Foreign Capital Investment as amended by Law Number 11 Year 1970 regarding Amendment and Supplement to Law Number 1 Year 1967 regarding Foreign Capital Investment and Law Number 6 Year 1968 regarding Domestic Capital Investment as amended by Law Number 12 Year 1970 regarding Amendment and Supplement to Law Number 6 Year 1968 regarding Domestic Capital Investment.

21 Considerants in the Law on Capital Invetsment (UUPM)

3) facilities of import permit[22]. For rights to cultivate, the UUPM provides facilities to HPU applicants a time period of 95 years consisting of 60 years time line with possible extension of 35 years which can be obtained and extended in the beginning. Based on this model of right to cultivate, the UUPM has violated the UUPA. After a judicial review by the Constitutional Court on the provision of HGU timeline in the UUPM, the Constitutional Court stipulates that the time period for a right to cultivate is the period that stated in the UUPA and not in the UUPM.

Land Acquisition for Plantation

The process of obtaining HGU documents is the administrative process of obtain rights to land for plantation. The essence of this process is the process on how to acquire land for which the right to cultivate is issued.

As described above, a right to cultivate may only be granted to State's land. The definition of state's land first appeared in Government Regulation no.8 Year 1953 regarding State's Land Control. Article 1 letter a stipulates that state's land is the land that which completely controlled by the state. The elucidation to the Government Regulation mentions that:

"Pursuant to the "domeinverklaring" among others in article 1 "Agrarisch Besluit", all land free from individual ownership (either based on Indonesian customary or western law) are considered as "vrij landsdomein", namely lands owned and completely controlled by the government. These lands are referred to in Government Regulation as "State Land".

Meanwhile, pursuant to Article 1 letter 3 of Government Regulation No. 24 year 1997 regarding land registration, state land is defined as follows:

State Lands or lands controlled directly by the State are lands free

22 Articlel 21 of UUPM

from any ownership by someone or something[23] .

If we compare the two definitions above, there is development on the scope of definition of state land in Article 1 letter 3 of Government Regulation No. 24 year 1997, and Government Regulation No. 8 year 1953. Government Regulation No. 8 year 1953 limit the regulation on lands directly and fully controlled by the state and the most important thing is the so-called "vrij landsdomein", which is lands that are completely free from someone's rights (either based on Indonesian customary law or western law).

In Government Regulation no. 24 year 1997 there is no express statement if the intended rights also include rights to land under the customary law. But at least we can draw conclusion that lands without any rights on it in this Regulation refers to lands without agrarian rights as stipulated in the UUPA.

As described above, article 16 stipulates types of rights to lands,

23 From the point of view of laws and regulations, some of state lands are from:
1 State land created from the granting of HGU for plantation companies (Regulation of the Minister of Agrarian Affairs /Chairman of BPN No. 21 Year 1994 jo to PP No. 40 year 1996 jo to Regulation of the Minister of Agrarian Affairs /Chairman BPN No. 2 Year 1999 on Location Permit)
2 State land created under Government Regulation No. 24 year 1997 article 1 letter 3, State Land or lands directly controlled by the State are the lands not owned under right to land.
3 State land created under Government Regulation Number 8 year 1953 regarding Control of state lands
4 State land created under Article (4) PP No. 35 year 1956, Supervision on transfer of right to concession plantation land which stipulates the lands from revocation of transfer of right to plantation not obtaining approval from the competent authority shall be subsequently the lands directly controlled by the state and the rights of any third parties to the lands are void.
5 State land created under Article 3 of Law No. 1 Year 1958, revocation of Private Lands stipulates that as from the effective date of this Law, for public interest, the rights of the owners as well as the control rights to all private lands shall be void and the formerly private lands shall, by virtue of law, become the State law.
6 Land of Government Agency under Staatblat Year 1911 No. 110 regarding Control over immovable acccets, buildings and other state owned constructions".
7 Law No. 86 Year 1958 regarding Nationalization.
8 Purchase of lands through the Bijblad committee 11372 jo 12476.
9 Land acquisition under Regulation of the Minister of Home Affairs No. 15 Year 1975.
10 Land procurement pursuant to Regulation of the Minister of Home Affairs No. 2 year 1985.
11 Free of charge relinquishment from owner to the Government.
12 Historical control by Japanese troops

namely: a) ownership right; b) right to cultivate, c) rights to build; d) right to use; e) rights to rent; f) rights to open land; g) rights to gather forest's yield; h) other rights that are not included in the list above will be stated in a law and other temporary rights as set forth in article 53.

Rights to Communal Land are not included in the category of rights stipulated by the UUPA. The Communal rights of customary law community acknowledged under certain conditions by the UUPA are not the rights to land, but higher in the form of sovereignty to control which is comparable to the rights of the customary law community to control their territory. The rights are attached with various rights such as right to use for the community members and third parties.

Since the rights of customary community to their land are old rights which have existed before, Government Regulation No. 24 year 1997 opens room for proving the existence of the rights, even though it is not sufficient. Article 24 stipulates that to register rights to land obtained from conversion of old rights, the land must be proven from written evidences, witness testimonies and or statement of the relevant parties which can be verified by the Adjudication Committee in systematic land registration or the Head of agrarian office in sporadic land registration as sufficient. With regard to absence or incomplete evidences, the bookkeeping of rights can be performed based on physical control on the relevant land for 20 (twenty) years or more in a row by the applicant or his/her ancestor under the following conditions:

a. The control is carried out in a good faith and transparent by the relevant party as the party entitled to the land and supported by trustable witnesses.
b. The control, either before or during announcement, is not questioned by the customary law community or the relevant village/subdistrict or other parties.

The Basic Law on Agrarian (UUPA) defines ownership right as inheritance rights, the strongest and the fullest rights that an individual can have on a land. The right to cultivate is the rights to use land owned by the government during a certain period of time as set forth in article 29 for agriculture, fishery, or animal raising businesses. Right to Build is a right to construct and own building on a land which is not owned by the relevant person for a maximum period 30 years. Rights to use is the right to use and/or collect proceeds from the land which is controlled directly by the government or someone else who has granted authorities and obligations stipulated in the decision of competent authority on in agreement with the owner, which is not lease agreement or land processing agreement, all of which, as long as it is in contrary to the spirit and provisions of this law. An individual or a legal entity has rights to rent over a land, if he is entitled to use other people land for the purpose of construction by paying the owner certain amount of money as rent fee.

Ownership right is provided for in article 20 up to article 27 of the UUPA. This right is the strongest and fullest rights an individual can have on land and can transfer and be transferred or given to others and can also be used as collateral to guarantee loans. The UUPA stipulates that only Indonesian citizens are allowed to have ownership rights. Ownership right pursuant to customary law is regulated under Government Regulation and besides, ownership rights occur due to: a) Government stipulation, under the stipulated methods and terms; b) Government Regulation; c) Law. The UUPA also regulates revocation of ownership right because: a) the land is owned by the state (because of rights revocation, voluntary submission by the owner, or abandoned) and b) the land is destroyed.

In addition, sales, swap, grant, gift under will, gift pursuant to customary provision and other deeds intended to transfer an ownership right and its supervision are regulated by the government under Government Regulation. Every sales, swap, grant under

will and other deeds intended to, directly or otherwise, transfer an ownership right to a foreigner, to an Indonesian citizen who has other nationality, or to any legal entity unless stipulated by the government is cancelled by virtue of law and the land will be taken by the government with the condition that the rights of other parties thereto are still applicable and all the payment received by the owner is non-refundable.

Next is technical law regarding land acquisition, either state-land or land owned by individuals. Land acquisition will be commenced by a plantation company after it obtains location permit from the local Regency/Municipal Government. Based on series of investment steps in the plantation sector, after the company obtains investment permit from the Chairman of Capital Investment Coordinating Agency, the company's management requests Location Permit to the Regency or Municipal government and followed by plantation permit.

However, before we discuss the provisions on location permit, let us review the procedure for companies to obtain land for investment. Decree of the Minister of Agrarian Affairs/Chairman of National Land Agency No. 21 Year 1994 regarding Procedures to Acquire Land for Companies in the Context of Capital Investment and the granting, extension and renewing their rights.

General provisions in article 1 provide formula for several definitions that can be used as guidance on the procedure to acquire land. Land acquisition is an activity to obtain land through transfer of rights to land or by giving or releasing rights to land with compensation to the rightful party, transfer of rights is a law act that can be performed by the land owner to transfer his/her/its land with compensation based on agreement.

Second article explains how land acquisition to obtain location permit can be done through transfer of right or by giving or releasing rights to land with compensation of new rights. Land acquisition through transfer of rights is possible if the land is owned by the same

rights that the company needs to run its business, with the provision that if the company requires it, it can release the rights and applies for another right pursuant to applicable regulation.

Land acquisition through rights delivery or relinquishment of rights can be performed on the land owned by under ownership right or other rights that are not suitable for the company to run its business, with the provision that if the company needs the cultivation right, the company can obtain the land by converting rights to land into Cultivation right.

If the land acquisition is performed by transferring rights after converting the right to Cultivation right, then for the interest of the related parties prior to draw up deed of cultivation right before the PPAT, they can make agreement about land control by paying certain amount of money they have agreed before.

In several new plantation cases, there are many facts in the field indicating that the land was obtained via land acquisition from a community to company. Therefore, decision of the Chairman of BPN is necessary to ensure that transfer of rights to land for the company's interest in implementing location permit is carried out by the lawful owner or its representative with statement of rights to cultivate land made before the local Head of the Agrarian Office by using the form as attached in Annex V.

If necessary, prior to delivering or relinquishing a right to land, both parties may draw up an agreement regarding willingness to deliver and relinquish the rights by using the form which includes the agreement that by receiving compensation, the right owner is willing to:

a. Deliver his/her land to the state,
b. Release the right to cultivation, right to build, or Right to Use so that the land belongs to the state to be given to a company with the right to land according to its interest and business.

If the land is the state land used by a third party, that the third party can release all its relationship with the land so that the land

becomes free for other company to use according to its interest and business.

Form of legal interaction between the community and company is regulated under regulation. Article 1320 of the Indonesian Civil Code (BW) stipulates that an agreement is considered valid if:

1. The related parties agree to bind them selves
2. Have competent to enter into he agreement
3. Certain things
4. Legal cause

An agreement is invalid if the agreement is made due to mistake or obtained by force or fraud. Mistakes do no cancel the agreement unless it happens on to the item that is part of the agreement. Force exerted by someone who made the deal is one of the reasons for cancellation of agreement, including if the force came from a third party. The definition of force is if someone who is healthy in mind feels his/herself or his/her wealth is threatened by someone else. Force will cancel the agreement not only if it is applied to the person who sign the agreement but also to his/her family members[24].

Fraud is also one of the reasons for cancellation of an agreement if the deception committed by either party is so apparent that if the other party does not believe in the deception he/she will not sign the agreement[25]. Provisions on this agreement are an important parameter to assess the validity of an agreement including in trading and transfer of rights. Next we see a glimpse of regulation regarding Location Permit. Location permit is regulated in Decree of the Minister of Agrarian Affairs/Chairman of the National Agrarian Agency no. 2 year 1999 on Location Permit. The consideration in the law stipulates the Location permit is intended to for the following a) a regulation regarding the necessity to obtain Location permit before a company obtains land for its investment to regulate investment; b) Location

24 Article 1321-1325 KUHPdt (BW)
25 Article 1328 KUHPdt (BW)

permit is given as a mean to control investment as part of the layout in land usage; c) The location permit had also been widened into permit to obtain land for things that are related to investment; and d) to guarantee the intention of location permit as mentioned above, it is important to restore its function and limit it only for investment by adding general regulations related to Location Permit in Decree of the Minister of Agrarian affairs/Chairman of National Land Agency.

Location Permit is a permit granted to a company to obtain land it needs for investment. This permit also functions as permit to transfer rights and to use the land for its investment activity.

Location Permit is required for investment (PMA & PMDN), but in certain situation, Location Permit is not required if a) The land has been used by the investor as his/her income source b) the land has been owned by other company and it will be used to continue the investment plan of that company and therefore had obtained permit from the relevant institution; c) the land is needed to run a business in industrial area; d) the land comes from the authority or the agency for developing an area and in accordance with the layout of the regional development; the land will be used to expand an ongoing business and the company had obtained the permit for expansion according to the applicable regulation, the land is adjacent to the business location; f) it is not more than 25 ha for agriculture business or not more than 10,000 m^2 for non-agriculture business; and g) the land is owned by the company with the provision that the lands are located in the location that is in accordance with applicable regional spatial layout area and the usage is in accordance with the investment plan.

The time line for a Location Permit is determined based on the required area's size. If the land used for investment is 25 ha, then the location permit will be granted for a year, and the permit for land with a total area of 25-50 ha, is valid for 2 years, and for the area more than 50 ha, the permit is valid for 3 years. If during the location permit timeline, land clearing has not finished but had reached more

than 50% for total area, and then the permit can be extended for another 1 year. But if the land clearing can not be completed after the extended time, then one of the following shall apply to the land:

a). Will be used for investment with some adjustment regarding the total area with the provision that if required it is still possible to obtain land so the land will be a whole.

b). Released to other qualified company or party.

Regulation of the Minister of Agrarian Affairs/Chairman of National land Agency no. 2 year 1999 regarding Location Permit stipulates maximum limit for land control. For plantation, location permit can be granted to companies that have possessed permit for investment in certain area of land, and the land control by the company and other companies under the same business group, with the following total area of land:

1) For sugar cane, the allowed area in a province should not exceed 60,000 Ha or 150,000 Ha for the entire country;
2) For other commodities, the maximum area for a province is 20,000 Ha and 100,000 Ha for the entire country.

The decision for granting Location Permit is signed by the Regent/Mayor or, for the Special Capital City Region of Jakarta, by the Governor of Jakarta. It is given after coordination meeting between related institutions lead by the Regent /Mayor or Governor (in case of Jakarta), or by the appointed official and it will be given based on the consideration related to land control and land usage including rights condition, area physical assessment, land usage and land ability.

The Local office of the National Land Agency arranges coordination a meeting to give consideration to head of region regarding rights owner which include these aspects: a) dissemination of information regarding investment, its scope of impact and land clearing and its compensation plan; b) free opportunity to holder

of rights to land to get explanation regarding investment plan and find alternatives for problems; c) gather direct information from community to gain the necessary social and environment data; and d) community's role and suggestion related to types and value of compensation of land clearing.

Article 8 stipulates that after the plantation company obtains Location Permit, it is entitled to release the land, rights and interest of other parties in location area based on the agreement between rights owner or other party as the owner by giving compensation, land consolidation or other means pursuant to applicable regulations.

Before land clearing conducted by location permit's owner, all other parties' rights and interests to related land are not abandoned, including the authority according to law based on rights to land ownership to get certificate and to use the land either for personal interest or investment according to the applicable layout, including the authority to transfer it to other party.

Location permit's owner must respect other parties' interest to unclear land, doesn't close or reduce access owned by local community, guard and protect public interest. After the land is clear from other parties' rights and interest, then the Location Permit's owner is able to use the land according the his/her investment plan.

After the land clearing process, the company can ask National Agrarian Office to issue cultivation right. The chart below tries to describe simple transformation of private land or communal land changes into cultivation right on land.

Before this part ends, it is necessary to inform that cultivation right didn't begin in Indonesia in the process described above. In the history of plantation in Indonesia, one of the important events is the process of taking over of Dutch's companies in the early independence era.

To 'destroy' colonialism power that was still having significant effect to national economy system, President Soekarno issued Law Substitutive Government Decree regarding Nationalism of Foregin Company. This regulation was later strengthened by law no.86/1958, LN 1958, No. 162. This law was supported and continued by many regulations in form of Government Regulation[26]. Its background was the thought that Indonesian Government as the sovereign government with responsibility to its citizen always tries to fasten the bases of national economy implementation to cancel Round Table Conferential in Den Haag. Government thought that the actions had taken to control Dutch's companies was parallel with the policy to cancel the Conferential and that with main policy in economy as it's described in Munap, To reach national economy in accordance with the spirits and soul of Indonesia and free non-discriminative

26 Tri Chandra Ap, Warisan Kolonial Yang Belum (Di)Selesai(Kan): Nasionalisasi Perusahaan Perkebunan Di Jember. Workshop on the Economic Side of Decolonization di Yogyakarta, pada tanggal 18-19 Agustus 2004, hlm 1

politic in economy to other countries and not giving special position to one[27].

As the follow up action of this nationalism, rights to land based on western law was converted into rights to land according to the new Indonesian agrarian law. This law decided *Erfpacht* right for big plantation company, which has been there when the law was issued, was changed into cultivation right and will be applied during the rest of *erfpacht* right with maximum time line 20 years.

Most of big companies that have been operated since before the independence of Indonesia were converted from *Erfpacht* rights to cultivation right.

27 Penjelasan umum, UU No. 86/1958, LN 1958, No. 162 tentang Nasionalisasi Perusahaan-Perusahaan Milik Belanda

Chapter III

Impact of Rights to Land for Industry on the Customary Rights to Communal Land

Short Description of Cases of Negation of Customary Rights to Communal Land in 3 Study Areas

Case of *Badan Perjuangan Rakyat Penunggu Indonesia*

THE *Badan Perjuangan Rakyat Penunggu Indonesia* (BPRPI), or the Indonesian Land Watchman Struggle Council) claimed a communal land located in areas between Ular River and Wampu River with a total area of about 250,000 hectares. This area covers 4 regions, namely Langkat Regency, Binjai, Medan and Deli Serdang (covering 73 villages which serve as the base for customary community). BPRPI is a public organization established in 1953 with the purpose of demanding restoration of the above communal land.

The people's claim over the land began since Dutch Government opened a big plantation in East Sumatra following the issuance of Agrarian Law in 1870. Colonial foreign private entrepreneurs started to come to East Sumatra (presently North Sumatra) to invest their money in the plantation industry. When these foreign entrepreneurs raced to enter East Sumatra and set up tobacco industry, the local customary community (the forerunners of the land watchmen) which previously tilled the agricultural land had to change their farming system.

Before the arrival of colonial foreign private entrepreneurs, the customary community cleared the forest and planted paddy under

the system of shifting cultivation. However, when the tobacco plantation industry started its operation, the old cultivation system also changed. The customary community no longer cleared forest, but used the former tobacco plantation tracks for their farming activities. This community is referred to as the watchmen community.

At present, almost all the communal lands owned by watchmen have been converted and owned by PTPN II. Under a complex process, the conversion did not involve the watchmen, and PTPN II considered the communal right to the land as non-existent. This is the source of disputes between the customary community grouped under BPRPI and PTPN II (ex PTP IX).

Tobacco Plantation from Time to Time

The first plantation company in North Sumatra was established in 1864 when Jacobus Nienhuys, a Dutch businessman, planted tobacco in Deli after obtaining permission from the Sultan of Deli. Nienhuys's business was a success when he was able to harvest 50 bales of tobacco; the first tobacco harvesting in East Sumatra. Apparently, the Deli tobacco was of high quality and with flagrant aroma that they immediately gained spot in the world market.

Nienhuys' successful business encouraged other plantation companies to come to East Sumatra. Several plantation companies were established among others *Deli Batavia Maatschappij* (1875), *Arensburg* (1876), *Amsterdam Deli Compagnie* (1979) and *Rotterdam Deli Maatschappij* (1881). They were followed by Harrison & Cross□eld (1906), *Deli Batavia Rubber Maatchppij* and *United Serdang Rubber Plantation*. There were 170 plantation firms operating in the region from 1863 to 1892s. These plantations operated in areas between Ular River and Wampu River. Several records showed that the total area used for plantation is approximately 250,000 hectares. East Sumatra which previously was a forest area changed to become plantation areas with various facilities such as roads, bridges, docks, et cetera.

Prior to the arrival of plantation businesses, the people used the agricultural system of *gilir balik* (shifting cultivation) or popularly referred to as *reba* farm. The farmers were called the *reba* farmers namely the farmers who clear forest for agricultural land. After few seasons when they feel the crop is reduced, they move to a different location; opening another forest area. This farming method is referred to as reba farming.

When the plantation companies arrived and massively opened the forest which had served as the community's area for farming, the reba system changed into track system, under which the community planted crops in tobacco's tracks. They had to wait and watch until tobacco was harvested and then used the area to plant paddy or crops. The community members who were the pioneer were forerunners of the so-called 'watchmen'. After the paddy was harvested, the watchmen community left the tracks because the area will be reforested or rotated into another business and the community members returned to their villages. In the following year, the watchmen community would go to find another ex tobacco tracks in their area.

In a glimpse, the people still adopted the same farming system with the *reba* system by moving from one tobacco track to another. However, the difference in the reba system is they had to cut the trees, while when they were using tobacco tracks they didn't have to, they just had to wait for the tobacco harvest to done. With regard to land ownership, in the contract between the Dutch colonial administration and the Sultan of Deli, it was stated that the lands belonged to the watchmen community pursuant to applicable customary laws.

So, changes in the way the community did farming did not affect the land ownership because the people's farming activities were admitted and included in the concession deed in years 1877, 1878, 1884, and 1892. These concession deeds admitted and included the communal rights to cultivate their land even though the land

was used to plant tobacco. After the tobacco was harvested by the tobacco plantation, the watchmen community could start cultivating the tracks, if the tobacco was not harvested yet, then the community waited until the harvest process finished. The community who waited for tobacco harvest were referred to watchmen and the tracks were called *Tanah Jaluran* (land tracks).

When Japan occupied Indonesia, the policy on plantation changed. Japan did not use the land for plantation but to plant paddy as food supply for war. In implementing the policy, Japan did not apply concession materials but allowed the community to use the plantation area as paddy farm. Japan also mobilized newcomers to plant paddy and corn in empty areas and as a result, migrants flocked this area.

The condition changed again after Indonesia's Independence. The dynamic condition because of social revolution made the watchmen community's marginalized by migrants who occupied the land. The climax was when most of the communal lands were turned into state land and granted to PTPN II (Ex PTP IX).

BPRPI Vs PTPN II (Ex PTP IX)

Japanese occupation and its policy of using empty plantation areas to be planted with crops plants to support their war by inviting migrants to use the land for farming destroyed the previous system. Many land tracks were occupied by illegal migrants. The Social Revolution in 1946 also worsened the social structure destruction.

Watchmen community has become identical to the Deli Sultanate, in which the Sultanate was represented as traditional patrimonial power that had close relationship with Dutch colonists. The Deli Sultanate tended to be reluctant to accept the republic (Agustono, 1997). Several plantation areas were occupied by people's armies. Land occupations by these armies changed to become a power struggle in competing for economic production sources (Agustono, 1997).

Control over these plantation areas by these armies made the areas shrunk. This was illustrated by Afnawi Noeh in his article titled: "*Dari Petani Reba ke Petani Jaluran*" (From Reba Farmer to Track Farmer).

"Illegal cultivations in tobacco plantation areas were getting out of control and the government could not do anything about it which consequently caused the land to be shrunk. The watchmen community were not involved in this shrinking because they still hold on dearly to the communal law. The watchmen community only cultivated the land tracks as mentioned above and then returned to their villages after paddy harvest.

Because the tobacco plantation areas had shrunk, the government and plantation companies decided to cut 130,000 ha of plantation areas and returned them to the government to be distributed. However, this agreement did not involve or even inform the watchmen community's figures. There were many benefits from the distribution but none of those was for the watchmen community. The watchmen community did not get land even just a foot."

Map of Areas Claimed by BPRPI

The shrinkage of plantation areas was followed up on by the Minister of Home Affairs by issuing decree No. Agr. 12/14 dated June 28, 1951. Under this decree, the Deli Tobacco Plantation area shrunk to 125,000 ha and the shrunken area was given to the community tilled the land. The Government cut the plantation area again due to illegal cultivation by cultivators supported by parties, particularly at that time PKI (Indonesian Communist Party) using its farmers organization wing, BTI (Indonesian Farmers Front). By issuing decree of the Minister of Agrarian affairs No 353/Ka and No 354.Ka dated August 24, 1959, the plantation areas were cut again by 66,000 hectares so that the plantation area only reached 59,000 hectares. Just like in the previous agreement, the watchmen community leading figures were not involved in the decision making process.

In 1957, Indonesian Government nationalized several Dutch Companies including plantation companies owned by Dutch businessmen. The Government handed over the ex Deli plantation areas to PTP IX (now PTPN II) under Decree of the Minister of Agriculture No SK 8/Ka/1963 and SK No 37/Ka/1964 and Decree of the Minister of Agrarian affairs No SK/61/Depag 1963 and Decree No 37/ka/1964 under which these decrees gave permission to the said party to cultivate tobacco plantation areas left by the Dutch companies for 20 years, effective as from the ministerial decrees were issued. This permit was later known as HGU (Concession to Cultivate Land) after the enactment of the Basic Law on Agrarian (UUPA) No 5 year 1960.

Decree of the Minister of Agrarian Affairs No 24/HGU/1965 confirmed the PTP IX's HGU and its area scope. The main points of this decree are 1) restating the HGU of *PPN Tembakau Deli Sumatera Timur,* North Sumatra, as intended therein; 2) granting HGU to *PPN Tembakau Deli Sumatera Timur,* North Sumatra (hereinafter referred to as HGU holder) on a 59,000 ha area for the purpose of Deli tobacco plantation; 3) asserting the remaining area of 191,000

hectares as the land reform object without prejudice to the PPN Tobaco Deli's interest in maintaining and replacing the ditches needed by *PPN Tembakau Deli*.. However, issuance of the above policies did not involve the watchmen community.

The position of BPRPI customary community was increasingly marginalized after the North Sumatra Governor issued statement No 370/III/GSU dated July 16, 1968 which annul all the rights of customary community to the land tracks. As a response, all members of BPRPI customary community planted land tracks used by PTP IX as plantation. Simultaneously and unanimously, the watchmen community who resided in Sampali, Sei Semayang, Simpang Marendal Villages and other villages planted stakes, put up signs and set up guard posts. PTP IX and security apparatus responded by trying to evict the community. A physical clash was inevitable and a villager (Abdul Halim Lubis) died from a gun shot. The BPRPI community commemorates this event as the Klambir Lima incident. In connection with this event, six BPRPI leaders (Anwar Nuh, Afnawi Nuh, Abdul Wari Husin, Buyung Ashari, Ramli Ali, and Achmad Ishak) were arrested and prosecuted in Medan. Interestingly, the Medan High Court acquitted them stating that what the farmers (BPRPI memebrs) did was not a crime or violation and released them from all charges.

In 1975, BPRPI and the government (Governor Marah Halim) declared a joint pledge which hand over land tracks to the community as an honor to their participation in the North Sumatra development. BPRPI hoped that under this pledge and land tracks handover the Government, directly or not, recognize the existence of track lands and the rights of BRPI communal land. Subsequently, the Government gave land compensation to BPRPI in Palu Kurau. However. it turned out that Palu Kurau was a swamp area and not suitable for living. Consequently, conflict occurred inside BPRPI even though it was finally settled. Considering this condition, BPRPI refused the land compensation.

This protracted land dispute encouraged the Regional Government through the Bukit Barisan Regional Military Command II to launch the *Operasi Sadar* in 1980. BPRPI fully supported this government's good faith in settling the land tracks problem as soon as possible. The conclusion of this operation is as follows:

1) Land tracks must be erased, but the fate of the watchmen community must also be settled;
2) The criteria of people classified as watchmen must be clear;
3) The settlement for the rightful watchmen community must be continued;
4) In the land settlement for watchmen community, there must be a balance between the government's interest and the people's interest;
5) Incomplete settlement of problem gives opportunity to several people who try to take material or political advantages out of it.

Satellite Images of Areas Claimed by BPRPI

In 1981, the government responded by reallocating 9,085 plantation areas for watchmen community under Decree of the Minister of Home Affairs No 44 year 1981 hence, the total area of PTP IX plantation became 44,370.16 hectares. However, in the implementation; these lands were sold to other parties and the watchmen community did not get any land.

Repeatedly disappointed, in 1995 the watchman community returned to the land tracks and divided the lands. There were 27 locations scattering in Mabar, Kelambir Lima, Percut, Tanjung Morawa, Batang Kuis, Bandar Kalipa, and Patumbak. All these areas are located in Deli Serdang Regency. PTPN II claimed that 556.80 ha of its areas were occupied by BPRPI while BPRPI claimed only 400 ha. The plantation company responded in a way similar to the 1968 event; together with security apparatuses they burned, buldozed and demolished lands occupied by the BPRPI in the form of huts, stilt houses, paddy fields, and corn farms.

Communal/Customary Lands in the form of Land Tracks in Deed of Concession and HGU of the watchmen Community/Malay Community

As discussed above, there is a claim of customary right over the communal land by the customary community. It is an ongoing problem in land tracks in North Sumatra to determine who are actually entitled to these lands. Some said that it is the Malay Customary Community are entitled to claim the land, while some others said the watchmen community are entitled. Who has the right? This will be discussed in this chapter.

During the era of East Sumatra Sultanate, there was no conflict between plantation companies and the community in land cultivation. Plantation companies opened forest and planted tobacco and then after the harvest time, the community would use the land to plant paddy or corn. After that the areas would be laid fallow for about 7-8 years. It is obvious that it was the Deli sultanate people or

Malays as the local community who waited for the time to cultivate the land after tobacco harvest time. The deed of concession used the word *opgezeten* (native). However, the deed never made it clear as the definition of the word. The 1878 concession deed mentions that *opgezeten* means the people who have their own houses on the land given to plantation companies. The 1884 concession deed states that *opgezeten* is all households living on the relevant land before and after the land handover. These two definitions according to the communal law are the people who are entitled to the land. The 1892 concession deed states that the people who have the rights to land tracks are those who live within the plantation perimeters. If referred to the *swapraja* regulation issued by the Sultan of Serdang, the Opgezeten is as follows:

> ....Dutch colonial government admitted that only the opgezeten who are entitled to the land tracks and all regulations related to it. The *Opgezeten* according to the Dutch colonial administration are: 1) the native people who had stayed in the land before the land was handed over to the Dutch; 2) the native who lived on the land before moving out to other area, but returned again after the land was given to Dutch merchants; 3) a native outside the area of sultanate who came to the land according to Zelfbestuur and Hoord Van Plaat Selijk Bestuur can be likened to the sultanate's native, and upon handed over to Dutch merchants lived and had family on the land; 4) A native widow from the sultanate, before divorce by death, had house and childs on the land, if she lives alone may receive full right, if she has kids she will receive half of it; 5) A widow, due to divorce, (maximum 4 widows), of a person entitled to the land, living in the same house and the house is part of the plantation areas, then each widow shall receive half of the right, similar right applies to widows due to death; 6) the entitled person who have more than one wife, each living in the plantation area, one in the house the other

> in the yard, but doesn't have children. If he lives in his own house, he receives 20% of the right, but if he has one or more children (from the second or the next marriage) he will receive full right; 8) an entitled son gets the right, if he lives in his own house; 10) all disputes that arise from this regulation shall be considered according to the meaning in Dutch; and 11) a native who hails from a part of the sultanate. After the land is given to Dutch merchants, he resides and has family on the land (Husni, 1971: 83 in Widiyanarti 2001).

The word native was used to mention the local community who waited for their turn to plant after the tobacco was harvested. More precisely, it was the watchmen who lived near the plantation or in the plantation areas and waited until the tobacco was harvested. It is obvious that it was Malays who had villages and lived around the area. However, the one that is used in the regulation is not merely ethnicity but the Malays who resided and waited in villages adjacent to the land tracks. The words 'wait' and 'resided near the plantation' are the key words. Hence, not only Malay community who are entitled but also non-Malays as long as they meet the conditions.

After Indonesia's independence, conflict occurred between PTPN II and the community who intended to use the land tracks. During Dutch colonial era, such conflict almost never occurred, and if a land conflict occurred, it was settled immediately. At that time, plantation companies were allowed to clear forest using the *erfpacht* right but the local people were also allowed to use the land tracks. In addition, people's mobility from and to the plantation areas was very low. At present, the Convention to Cultivate Land (HGU) does not tolerate it if the people use the land. This is evident from the facts that the PTPN II always evicts people who use some of the land tracks.

Another issue that aggravates the condition is the definition of the word *opgezeten* or native among the Malay community. At

least there are two opinions on the definition; first the party that considers the Malays as the community entitled to the land tracks. The real bond in this aspect was ethnic bond based on blood as represented by BKMAD (*Badan Kesejahteraan Masyarakat Adat Deli* or the Deli Customary Community Welfare Body) and KMHAS (*Keluarga Masyarakat Hukum Adat Serdang* or the Serdang Customary Law Community Brotherhood). Several parties stated that these mass organizations were purposely established to challenge BPRPI (*Badan Perjuangan Rakyat Penunggu Indonesia* or the Indonesian Land Watch Struggle Body). These mass organizations appeared in April 2000 established by several noblemen from these two sultanates. BKMAD demands the government and plantation companies to restore the land to Malay people while KMHAS fights for KMHAS Malay's rights (Agustono, 2002). In 2000, these two organizations clashed with BPRPI; several houses belonging to BPRPI members were damaged and some of BPRPI members were injured. The security apparatus acted only after the fight was over. Several people from BKMAD and KMAS were released right away while BPRPI members had to undergo complicated process before eventually discharged (Widiyanarti, 2001).

The other opinion is the party that considers the watchmen community as the party entitled to the land tracks. According to this party, if they do not wait for the land tracks, then they are not entitled to the land. This is represented by BPRPI (*Badan Perjuangan Rakyat Penunggu Indonesia*). This version of community by BPRPI is more stressed on its geographical location rather than by blood. The aspect of blood (in this case Malays), is not the only determinant to be referred to as the watchman community. The geographical aspect as the land on which the people interact and share their daily lives in the process of shaping identity as the watchmen community is the main consideration in determining the identity (see box 1 for more details)

Box 1. Watchmen Community and BPRPI

... Wherever we are, we value the Malay traditional values. We may come from different ethnicities but we all are watchmen people for the land tracks, and BPRPI fights for it" as stated by one of BPRPI members during discussion on watchmen community.

The word 'rakyat penunggu' (watchmen community) derives from the word '*penonggol*' which means the native, but does not necessarily mean the indigenous people. As a consequence, all watchmen people are considered as native. Without seeing the ethnicity, all people can be considered as native as long as he/she is the part of watchmen community. Hence, the watchmen community in Durian Selemak Village has rights to the communal land in Durian Selemak Village, and so does in other places. In a broadline, the community members who are part of BPRPI consist of *Musthotiin*, who has Malayan parents, Semendha, whose one of parents is Malay, and Resam, whose both parents are not Malays but is sympathetic to the watchmen community struggle and the Malay custom and is one member of the watchmen community.

BPRPI is a mass organization that is strong in its Malay value established on April 19, 1953 in Medan. The main goal of this organization is restoration of the land tracks to the watchmen community.

BPRPI divides its work area into 5 areas, namely Langkat, Binjai, Medan, Deli, and Serdang. Up to 2007, more than 50 villages participated in this mass organization. At the moment, the President and the Secretary General of this organization are Harun Noeh and Alfi Syahrin.

Several BPRPI demands are:

a. The Government must implement the policies that were previously issued on the case of BPRPI communal

rights

b. The Central government must form as special team which includes BPRPI community members to locate the land previously distributed by the Government to the BPRPI community in a total area of 9,085 ha of land located in two regencies: Langkat and Deli Serdang Regencies in North Sumatra Province, which up to now has not yet received by BPRPI communal community.

c. The Government must perform re-measurement of the lands controlled by PTPN II (Ex PTP IX).

d. The Government must cooperate with BPRPI customary community in managing the lands presently controlled by PTP II (Ex PTP IX).

e. The Government must have negotiations (draw up new contracts) if they want to use or cultivate the communal land of BPRPI customary community in which the customary community is involved without any intervention from other parties.

f. The Government must provide compensation for the land used by the customary community for their welfare including social welfare (education, health) and economic welfare (agriculture, stocks).

g. The Government must protect the communal lands which have been managed independently by the BPRPI customary community. This serve as the real sample of the Government's success in materializing food security as one of the government priority program.

h. The Government must investigate and examine the lands sold by PTP II (Ex PTP IX).

i. The Government must revoke the HGU of PTP II (Ex PTP IX) on the communal lands of BPRPI.

Source; Interview with several BPRPI officials

PIR-SUS PTPN XIII Case in Parindu District,–Sanggau Regency[1]

PT.Perkebunan Nusantara XIII (Persero) or PTPN XIII in short is a State-owned Corporation (*Badan Usaha Milik Negara* – BUMN) established on March 11, 1996 under Government Regulation No. 18 year 1996. The Company's deed of establishment was drawn up by Notary Harun Kamil, SH No.46 dated March 11, 1996 and approved by the Minister of Justice of the Republic of Indonesia no C2-8341.IIT.01.01.TII.96 year 1996 and placed in the State Gazette of the Republic of Indonesia No. 81.

PTPN XIII is engaged in the agro industry business. Its main commodities are oil palm and rubber. The development of oil palm is carried out through horizontal and vertical businesses. Horizontal development is performed through land expansion especially Plasma Plant because Kalimantan is the region with tropical climate all year long and is still suitable for land expansion. Vertical development is the strategy used to build Downstream Industry, which includes industries of fractionation, refinery, Oleo chemical and residue management.

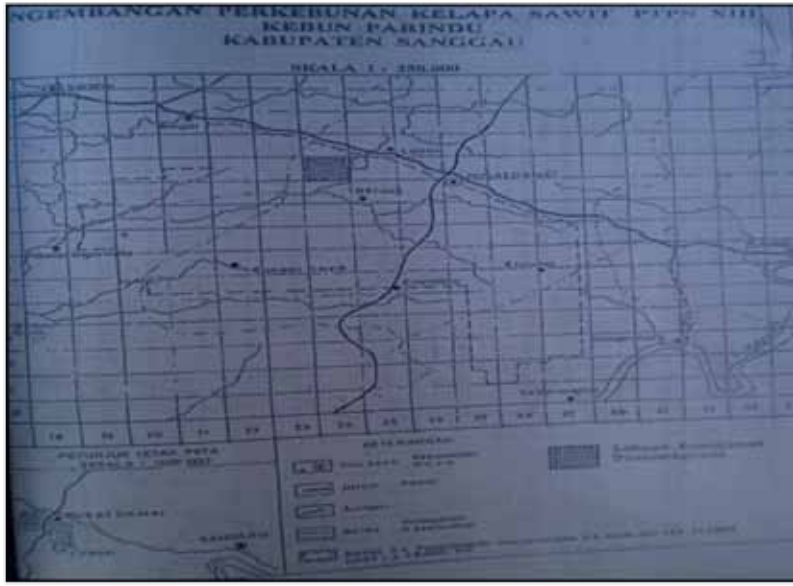
Box 2. *Perusahaan Terbatas Perkebunan Nusantara* (PTPN) XIII

The legal foundation of PT Perkebunan Nusantara XIII (Persero) or PTPN XIII in short, is a State-owned Enterprise (BUMN) established on March 11, 1996 under Government Regulation No. 18 year 1996 and Deed of Company drawn up by Harun Kamil, SH No.46 dated March 11, 1996 and approved by the Minister of Justice of the Republic of Indonesia no C2-8341.HT.01.01.TH

1 This case study is processed from the case study written by Asep Y Firdaus in his book the entitled Promise Land.

96 dated August 8, 1996 and placed in the State Gazette of the Republic of Indonesia No. 81 dated October 8, 1996.

In its early operation (March – July 1996), the PTPN XIII Director Office was located in ex LO PTP 7 office. Because the building was reconstructed, the Director Office was temporarily relocated to PT. POS Indonesia's office building from 1996 to 1998. After the reconstruction work was completed, the PTPN 13 Director Office moved to Jalan Sultan Abdurrachman No. 11, Pontianak, West Kalimantan. PTPN 13 is a joint development program from 8 ex PTP: PTP VI, VII, XII, XIII, XVIII, XXIV-V, XXVI and XXIX development projects, all of which located in Kalimantan.



PTPN XIII (formerly PTP VII) entered Ngabang and Sanggau areas since 1984. Especially in Sanggau, Parindu and Kembayan area the districts opened for oil palm plantation. The system used by PTP VII in opening plantation was Large-scale Plantation Company in which the community was not involved and only as spectators. To fulfill its demand for workforce in Meliau (new developed plantation) and Kembayan, migrants from Java were employed. Related to the transmigration program, a plantation system using the PIR Trans pattern was established since 1987.

Witnessing special treatment received by the transmigrants, the local community demands for the rights to the lands taken by PTPN XIII. This effort has reached the national level where the met with the Golkar fraction in the House of Representatives (memorandum dated November 12, 1989) followed by litigation which up to the present has not been settled. However, after observing the struggle of the local community, the PTP VII management started to apply the partnership pattern by giving and returning the community's land under the plasma pattern. As up to the present time, there are 6 plantation districts established in Sanggau Regency namely Parindu, Kembayan, Rimba Belian, Sungai Dekan, Gunung Mas, and Gunung Meliau Plantation.

Since operating in 1984, PTPN XIII only obtained the concession right (HGU) in 2003, which means for almost 20 years PTPN operated without HGU. It is weird that it took a long time for the National Land Agency (BPN) to issue a HGU for PTPN. Until now there are several versions on the total of area cultivated by PTPN XIII,; For the Kembayan plantation, according to the Regent, PTPN XIII Kembayan Plantation HGU covers the area of:1) 4,028,7 Ha, 2) the original main HGU is 5,033,67 Ha 3) DMKB-2 : 5,414 Ha 4), Pursuant to Decision of the National Land Agency dated July 21, 2003 no. surat ukur 75/ sanggau/ 2003, the total area of land is 4,439.9529 Ha,

Table 1. Total Area of PTPN XIII 's HGU

No	Location / Plantation	Data on Total Area from the Plantation office of West Kalimantan	Data on HGU Certificate, from Sanggau BPN Office
1.	Kembayan	5,413 Ha	4,439.9529 Ha No 75/Sanggau/2003
2.	Meliau	9,531.25 Ha	*)
3.	Tayan Hilir	18,479 Ha	*)
4.	Sanggau Kapuas	1,615 Ha	*)
5.	Tayan Hulu	*)	1. 80.03 Ha No. 74/sanggau/2003 2. 893.46 Ha No.76/sanngau/2003

*) Data not available

When PTP VII entered Prindu and Kembayan regions, the pattern applied by the company was corey plantation without involving the local community. To fulfill its need for workforce, the company employed transmigrants from Java under the PIR Trans pattern. Until now there are plenty plantations sold to the local people or even completely abandoned. However, after demands from the local community to participate in oil palm plantation which demand their right to the confiscated land, the company started to apply the partnership pattern and give some of the core plantations to the community.

In 1997, PTPN XIII expanded its business and opened new plantation using the plasma pattern (Pir-Bun), by which the community gave 7.5 ha of land and they would receive 2 ha of oil palm plantation in returm. However, the community would have to pay credits to the bank in which the company acted as the credit warrantor for which the proceeds for the community from oil palm plantation will be deducted. Unfortunately the credit value and payment timeline is often unclear and not transparent.

Pir-Bun pattern (Plasma) encountered many problems because

farmers still depend on the Rural Unit Cooperatives (KUD) and the company. In 2000 another new plantation was opened and this time using the KKPA pattern. This KKPA pattern should be owned fully by farmers through primary KUD established by its members. That means the plantation should be owned only by farmers while the company only functions as the technical implementer to develop the plantation. The credit was proposed directly by KUD to the bank to fund the plantation. However, in the implementation, there were many violations and overlaps of lands, and KKPA should require the company to open new plantation. However the plantation used now is the coconut plantation opened in 1996. Hence, deduction for the credit has began since 1996 until full settlement (4 years under official agreement), but farmers do not know when it will be setled because they do not know how much the total credit they have to pay. Meanwhile, KUD only serves as the payment counter and the administrative process for plasma farmers' plantations.

PTPN XIII still controls the KUD work mechanism through the company officers assigned in KUDs, namely plantation assistant, foreman I (plasma plantation supervisor), fruit clerk (calculating the plasma farmers' TBS) and assistant foreman (supervising the KUD staff). The strange things is, every time farmers ask for fertilizer, pesticide, drugs for plants and trucks, the company never fulfils their requests.

Table 2. Type /pattern applied by PTPN XIII

No	Pattern	Year	Remarks
1	Nucleus Pattern	1984	The entire palm oil plantation used by the company (100 %)

No	Pattern	Year	Remarks
2	Trans PIR Pattern	1987	Management of palm oil plantation procured transmigrant (government program) to be employed as laborers in palm oil plantation, in which a transmigrant obtain 1 lot of garden /family plantation and pay credit to the company.
3	KKPA Pattern (Primary Cooperative Credit for Members)	1999-2002	Investment credit and or Work Capital Credit granted by Bank to the KUD primary cooperative to be forwarded to there member in order to pay there productive business. However in the field there are lot of indication of violation of KKPA fund by KUD in the company
4	Parnership Pattern /PIR-Bun	1997-present	People were given lots by delivering land (in accordance with agreement on total land to be delivered) and will get 1 lot (2 Ha) plantation and there after pay the credit to the bank.

Customary Rules in Parindu

In Parindu district, there are 62 villages and each village is dominated by one ethnic[2]. Originally in this area there were two ethnic groups: Malays which are located in Balai village and Dayaks which consists of 6 sub-ethnics: a. Pang Kodan/Kodan, b. Taba, c. Mayau, d. Ribun, e. Pandu, dan f. Dosan[3].

The name Parindu was derived from the first/last initial of Daya sub-ethnics which reside in majority in this district, namely "Pa" from Pang Kodan, "ri" from Ribun and "Ndu" from Pandu. According to Marius Jimu[4], the origin of Parindu come from the word Pandu and

2 Sapardi, Influence PIR-BUN project on the economy of RT Peladang,Thesis, UI Jakarta, hal.34
3 Ibid, page 35
4 Interview on July 19, 2005

Ribun who are the majority sub-ethnics in Parindu District.

The total area of Parindu district is approximately 59,390 ha, most of which are used for oil palm plantation in the form of core or plasma. These oil palm plantations changed the land allocation from forest and plains. The Residential pattern of Dayak community is linear, which is lined up in each side of the road. The Dayak residences are usually quite far from clean water sources for their daily lives need, especially during dry season.[5]

Land ownership system

The land ownership system in the Pandu and Ribun ethnic adheres to the collective ownership by which customarily they are regulated by their respective customary regulations. Land cultivation is performed by each family/individual remains in the context of commonly held land or communal land. Distribution of land to each family in the ethnic group is not known as to when they began but according to Matius Anyi and Marius Jimu, the land is inherited to them from generation to generation. Hence, they will also inherit it to their children and so forth. The total land they cultivate is also never known, hence there is no technical measuring process. The perimeter of land cultivated is also determined under agreement among the cultivators or the natural border agreed upon by the cultivators. The Parindu community applies the pattern of shifting land cultivation which has been practiced from generation to generation. This pattern, however, has almost disappeared due to plantation expansion which sweeps communal land and forest.

Case of Procurement of Pirsus Parindu Land

Based on information from the people of Dayak Parindu namely Matius Anyi and Marius Jimu, factually, the Dayaks have been deceived by PTPN XIII, because the information and promise given by PTPN XIII is never kept. Meanwhile, in general, the Dayak

5 Ibid, page 39

communities who are the participant of PIR SUS Parindu said that PTPN XIII only demand the farmers for their obligations in the project but never observe and give what should be the right of farmers. Even in the implementation of PIR SIUS project , there are matters that are not in conformity with the material given/promised during the dissemination in the preparation phase, example:

- In Prontas area (Majukarya Village) there are about 37 families that have surrender their farm land since 1982/1983 and up to now they have never received land for palm oil plantation, crops and yards.
- The total area of oil palm plantation, land for crops and yard received from the project is not in line with the total of land they should receive namely 3 hectares of land as promised to them during the dissemination time.
- The time limit for implementing conversion has been postponed.

Chronologically, the process of land acquisition in the PIRSUS parindu project as stated by Matius Anyi and Marius Jimu is as follows:

- Around the 1980s, the Parindu Dayak people heard about the opening of oil palm plantation. The information was obtained from the leading figures of the local government (village and district).
- Then, PTPN XIII (formerly PTP VII) opens a model palm oil plantation in Meliaau District.
- Leading figures of the Parindu Dayaks were intentionally brought to the Meliau oil palm plantation to witness the model plantation. This was suspected to be PTPN XIII's strategy to ensure the leading figures to be their campaigner tool to successfully implement the PIR Sus Perindu program.
- Subsequently, the leading figures of Parindu Dayaks who have been to the Meliau oil palm plantation informed the result of their "trip" to the people of Parindu Dayak community in a

village meeting attended by the head of hamlet, head of village, head of neighborhoods and Temenggung.

- After that, the leading figures of Parindu Dayak were taken for a 'trip' to visit an oil palm plantation in Pematang Siantar known as Kebun Bah Jambi. All the expenses were paid by PTP for 1 month. It is not clear as to what the leading figures from the community and PTP did in that particular one month.
- Then, suddenly, the leading figures who have enjoyed the "trip" together with PTPN XIII came to the parindu dayak people to ask them with all kinds of persuasion to become members of the PIR SUS Parindu. They only need to register by surrendering land in a total area of 5 ha. There is no other information other than the obligation to surrender land. The information obtained indicates that there is a deliberate effort not to give clear information on the project and the requirements to participate in the project to the people Parindu Dayaks. The forms of persuasion from PTPN XIII to the Parindu Dayak community are among others if they participate in the PIR SUS Parindu program they will be rich, because if one oil palm produces fruit, it is equivalent to 1 buffalo, 2 oil palm trees can be used to send their children to college. So they are encouraged to deliver their land to the company or oil palm plantation (under this situation, rejecting the project is the same as creating problem) ,hence none of them are brave to turn down the request of the company to become the participant of the PIR SUS project.
- Afterward, immediately, registration was opened to residents who intend to participate in the PIR SUS Parindu project. Direct registration was carried out by officials from the PTPN XIII together with the head of hamlet. The requirements that they must fulfill are Identity Card, photograph, Family Card. In reality, some residents who cannot fulfill the requirements can participate in the PIR SUS Parindu, such as not married, while it is actually not forbidden. In the dissemination process,

registration to participate in the PIR was even held only one day, that the information they received was very minimum and not fully understood by the Parindu Dayak community.

- The subsequent process was land clearing was performed by arranging a people feast. For some of the participants, this party was only as a strategy to show that the PIR SUS project had been agreed upon jointly between PTPN XIII with the Parindu Dayak community. The process of land clearing was performed by involving the community members as the laborer with the daily wage of Rp.1,200.
- The deserted land will then be holed to be planted with seedlings of oil palms. This job was performed by a contractor using the local resident as the laborer.
- Up to this stage, there is no information as to whether there has been any compensation given on the land acquired by PTPN XIII to be as the land for the PIR SUS Parindu project. However, the information from trusted sources said that there is no any compensation on the land given to PTPN, other than the 5 : 3 patterns.

The Chronology of after seedling works:

- In the first phase of harvest, the results of fresh oil palms are the right of the company (PTPN XIII as the core) because the fruits harvested are not stable (still in the form of sand fruit). The first harvest is held 3 years after the seedling cultivation process.
- KPTPN XIII then divides the land into lots to be delivered to the participants of PIR SUS Parindu (plasma farmer). This process takes some time, some people get land after 3 years, some other 5 years but some others haven't event get lot land until now. It means they lost their land. Another issue is the plotted land they should receive which is in a total area of 3 ha (2 ha land for oil palm and, 0.75 of land for crop and 0.25 of land for yard/ housing) now they have much less. When asked to PTPN XIII,

their response is since the beginning only 5 ha of land was given. The residents have never been told that since the beginning (from registration up to measuring of land to be delivered) their land would beless or more in area.

- The harvesting process is carried out by farmers and their groups and the products are accommodated by companies to be processed in the processing plant.
- According to participants of PIR SUS Parindu, they now realize that have been deceived by PTPN XIII. They have never enjoyed the prosperity promised by PTPN XIII if they become the participant of PIR SUS Parindu.

Bulukumba Case

Plantation owned by PT Lonsum PP Sulawesi is located in Bulukumba which is one of regencies in South Sulawesi with a total area of 1,154.67 Km^2. Geographically, Bulukumba is located between 119 0 58' – 120 0 28' East longitude and 05 0 20' – 05 040' South altitude. To the north bordering Sinjai Regency, to the Easy with Bobe Bay, to the South bordering Flores Sea and Selayar Regency, while the west bordering Bantaeng Regency.

Year 1918, is the early time when large-scale plantation came to the Bulukumba area in the area of Kajang Customary community. A Dutchman named John Steven through that NV Celebes planned to buy barks and ask the residents of Bulukumba to poultry and horses. The NV Celebes tried to monopolize by claiming that the land whereon the trees which skin is peeled and poultry and horse ranch are located as their property. Apparently, NV Celebes started to open kapok and citronella plantation in the land claimed based on the purchase of bark and cooperation in poultry breeding[6]. The area used to be the place for large plantation is Bolombasi in Bulukumpa District for kapok and citronella plants; and Palangisang in Ujung Loe District plants with kapok and citronella.

Few years afterward, the focus of kapok and citronella was changed to rubber plantation and the company changed its name to NV Celebes landbouw Maatschappij under operation permit on erpacht in the form of decision of the Governor General No 43 dated July 10, 1919 and No 44 dated May 18, 1921. When the Dutch colonial era ended and replaced by Indonesia, in 1961 NV Celebes landbouw Maatschappij tried to propose for conversion of the erpacht right into HGU (right of cultivation), however, during 1963 up to 1968 the company was nationalized by the Government of the Republic of Indonesia and changed its name into Perusahaan Negara Dwikora. In 1968, kapok and citronella plantation was replaced by rubber plantation.

In year 1976, NV Celebes landbouw Maatschappij returned to Indonesia together with the returning to the previous owners several nationalized companies under the flag of PT PP Sulawesi. Pursuant to Decree of the Minister of Home Affairs dated September 17, 2976 No 39/HGU/DA/76 they can extend HGU under the name PT PP Sulawesi which was effective retrospectively to May 13, 1968 with the condition that thy involved local partners. PT PP Sulawesi

6 Bulukumba National Solidarity, Chronology of Shooting Case on Farmers and Customary Community of Kajang, Bulukumba, South Sulawesi Province by the Officer from the South Sulawesi Regional Police and Bulukumba Police Resort on July 21, 2003, Walhi 2003

was then popular as PT PP Lonsum (London Sumatera), in which PT PP Lonsum (Lonsum, red) was initially owned by Harrisons & Cros eld (presently owned by Indofood). There is a possibility that PT PP Sulawesi has been taken over by PT PP Lonsum. In 1979, the location of rubber plantation in Ujung Loe was extended to Balong with a total area of 374 Ha.

Based on the HGU obtained, Lonsum started expanding its land without observing whether the lands were customary lands controlled and cultivated. In 1981, Lonsum in Kajang District bulldozed 500 houses owned by the Kajang customary community. In 1982, the plantation in Bulukumpa District was extended up to Jo'jolo with a total area of 300 Ha and tore down 300 houses and plantation by the community.

In 1986 up to 1989, lonsum again expanded its land while still flattened the lands claimed as customary land. The plantation in Ujung Loe was extended to Tamatto so that the land was in a total of 800 Ha, in Bulukumpa the plantation was extended up to Bonto Mangiring and Tibonang so that the total area reached 500 Ha, and in Herlang district extended up to Tugondeng so that the total area become 30 Ha. In that era, all lands owned by the community members in the plantation location was totally bulldozed without any negotiation pr compensation.

Several villages experiencing the same events were among others Ompoa Kukumba, Tangkalua, Batulapisi, Allae, Sarraea, and Pangisokan. In addition to house leveling, Lonsum also setting fire on 4 houses in Kangkalua village. The last occurrence identified was leveling down 5 residential houses in Lapparaya Hamlet, Bonto Mangiring Village.

In the 80s, the Kajang customary community tool litigation effort, by which about 253 people from the Kajang customary community through Laica Marzuki, SH file suit against Lonsum the Bulukumba court. The location of object of the suit recorded in the lawsuit was a land in Ganta Hamlet, Tambangan Village in a

total area of ± 350 Ha bordering with Galonggo river to the North, Garden owned by the Kodam XIV/HN to the east, Belanglohe river to the South and people's field/Bulo-bulo village in Bulukumpa district to the west.

The suit by 253 residents of the Kajany customary community was granted by the Bulukumba Court under verdict No 17/K/1982/Blk dated March 24, 2983 declaring that the plaintiff is entitled to the 200 ha land and Lonsum as defendant I was declared to have committed tort. Therefore, Lonsum is required to immediately return the land to the residents. In addition, Lonsum is also subject pay fine amounting g to Rp 5,638,000,- subject to 3% interest effective as from April 3, 1982 for the fine is paid for and compensation amounting to Rp 10,917,000,- for the people's failed harvest.[7]

However, the verdict of the District Court No 17/K/1982/Blk was annulled by the Ujung Pandang Higher Court No 228/1983/PT/Pdl dated February 19, 1987. The decision of the Higher Court stipulates that the appeal filed by Lonsum was granted and turned down the lawsuit filed by the Bulukumba community.[8]

Upon the award, the Community filed cassation to the Supreme Court of the Republic of Indonesia which subsequently decided under award No 2553 K/Pdt/1987 which annulled the award of the Higher Court and corroborated the Verdict of the Bulukumba District Court which favor the community as the owner of ± 200 Ha of land. For that purpose, the Supreme Court instructed the Clerk Office of the District Court (Bailiff) under Stipulation No 17/Pen.Pdt. G/1982/PN.Blk, hence on December 3, 1998 the land was confiscated in the presence of 3 witnesses and Lonsum, as follows:

1. Land bordering to the north Galoggo River, to the east plantation owned by Kodam XIV/HN, to the south bordering Belanglohe River, and to west people's plantation/Bulobulo village, Bulukumpa District. With respect to the total area, there are 2

7 Decision No 17/K/1982/Blk

8 Supreme Court of the Republic of Indonesia, Award No 2553K/Pdt/1987

versions, namely the company version, 540 Ha and the people's version, 200 Ha.
2. 20 units of official houses and 1 machine house owned by PT Lonsum
3. A Merk Rocky car DD 170 YA 1 unit and Fultura car 1 unit owned by PT Lonsum
4. 150 stilt houses owned by the people located on a land 103 Ha in area as compensation from the company to the plaintiff, however, this information was denied by the community when asked by the bailiff, according the people the land was obtained through purchase to a party.
5. Rubber plants which according to the company is on the land in an area of 60 Ha, however, when measured by the bailiff in the field, the land was 418,6 ha in total area, so as the total number of rubber trees were 167,440 trees.

The difference in the interpretation of total area required the District court to conduct execution two t times. Upon the instruction of the District Court, the total land executed is 200 Ha not through geographical perimeters.

Legal Analysis on Cases of Negation on Communal Land in 3 Study Areas

After viewing the chronology of cases used as samples in the previous part, one interesting question needed to rise is how law see this? Because in the field the team found frictions between the entrepreneur and the government and more importantly, the friction between companies and the government on side and the local community on the other side.

The three cases discussed earlier stemmed from different historical root of the HGU. Two cases namely the BPRPI and Bulukumba cases, commenced as from the Dutch colonial era, wile the PTPN XIII case obtained their HGU after Indonesian obtained

independence and not from right conversion.

Prior to analysis in legal approach, it is better to summarize the legal facts that are basis for this analysis.

Legal Facts for the Three Cases.
Cases of *Badan Perjuangan Rakyat Penunggu Indonesia* (BPRPI)

1. The plantation land originates from the land of customary community leased by the Sultan of Deli to a Dutch Entrepreneur in the Dutch Colonial Era.
2. This lease caused the community to know the *Jaluran* (land track) agricultural pattern, but did not affect the land ownership. The community ownership was acknowledged and their rights were included in the concession deeds in years 1877, 1878, 1884, and 1892.
3. In 1957, this plantation company was nationalized and the former Deli Tobacco Plantation was handed over to PTP IX (presently PTPN II) under Decree of the Minister of Agriculture No SK 8/ Ka/1963 jis SK No 37/Ka/1964 and Decree of the Minister of Agrarian Affairs No SK/61/Depag 1963 and Decree No 37/ka/1964 by which the decision letter contain the granting of permits to manage the tobacco left by the Netherlands for 20 years effective as from the Ministerial decree is issued. The granting of permit was subsequently known as Land Use Rights (*hak guna usaha*, HGU)) after the enactment of the Basic Law on Agrarian (UUPA) No. 5 Year 1960.
4. In 1965, the Minister of Agrarian Affairs issued Decree No 24/ HGU/1965, which asserted the HGU of PTP IX. This Decision principally stipulated the following (1) revive the HGU of PPN Tembakau Deli Sumatra Timur in North Sumatra Level I Region, as intended (2) grant HGU to PPN Tembakau Deli Sumatera Timur in North Sumatra Level I Region (hereinafter referred to as the HGU holder) on a land with a total area of 59,000 Ha for the

purpose of Deli tobacco plantation (3) assert the remaining land in a total area of 191,000 Ha as a land reform object, without prejudice to the interest of PPN Tembakau Deli to maintain and replace ditches required by PPN Tembakau Deli.

5. In 1968, North Sumatra Governor issued statement letter dated July 16, 1968 No 370/III/GSU 1968 which stipulates revocation of the right of customary community to the land tracks.
6. This protracted dispute on land had encouraged the Regional Government through the Bukit Barisan Military Regional Command II to form an *Operasi Sadar* in 1980. BPRPI fully supported the Government's good faith so that the land tracks can be settled immediately. The conclusion of the operation is as follows:
   1). The land tracks must be wiped out, but the fate of the people living on the land must also be settled
   2). The definition of people living on land must be clear
   3). Completion of accommodation for the people living on the land who are entitled must be continued
   4). In settlement of issue of land of people living thereon need to have balance between the interest of the state and the people's interest
   5). Incomplete settlement of land of the people living thereon cause efforts by some elements who would lit to get material or political benefits for the eland settlement
7. In 1981, the Government responded by again excluding the plantation land in an area of 9,085 hectares for the people living thereon under decree of the Minister *o*f Home Affairs No 44 ear 1981 so that the total area PTP IX plantation become 44,370.16 Hectares. In the implementation in the field, what happened were sales of those lands to other parties so that none of the people living thereon get any land.

PIR-SUS PTPN XIII Case

1. PTPN XIII has operated in Ngabang and Sanggau areas since 1984. Especially for Sanggau the Districts that have been opened for oil palm plantation are Parindu and Kembayan.
2. Since its operation from 1984, PTPN XIII only obtained HGU in 2003, meaning almost 20 years after PTPN operated without HGU.
3. Around 1980s, acquisition of costmary community lands occurred without sufficient information. Efforts made were among others giving promises and other efforts to get people' approval.

Bulukumba Case.

1. 1918, was the years large scale plantation entered Bulukumba area within the region of the Kajang Customary Community. A Dutchman named John Stevan through NV Celebes who wished to buy bars and ask the Bulukumba residents to engage in poultry and horse breeding business. NV Celebes tried to monopolize by claiming that the land where the trees from which the bars were obtained as well as the place where the poultry and horse business were located were its property. After that the company changed its name to NV Celebes landbouw Maatschappij under the operation permit of erpacht right in the form of decision of the Governor General No 43 dated July 10 1919 and No 44 dated May 18, 1921.
2. In 1961 NV Celebes landbouw Maatschappij attempted to propose for conversion of erpacht right to become HGU, however from 1963 up to 1968 the company was nationalized by the Government of the Republic of Indonesia to become Dwikora State Company. In 1968, kapok and salmonella trees were changed with rubber plants.
3. In 1976, NV Celebes landbouw Maatschappij returned to Indonesia at the same time as the restoration nationalized companies to their former owners under the company flag of

PT PP Sulawesi. By virtue of Decree of the Minister of Home Affairs dated September 17 1976 No 39/HGU/DA/76 they could extend their HGU under the name of PT PP Sulawesi which was retroactive to May 13, 19968 under the condition they must involve local partner. PT PP Sulawesi was then known as PT PP Lonsum (London Sumatera), in which PT PP Lonsum (Lonsum, red) was initially owned by Harrisons & Cros□eld (presently the company is owned by Indofood).

4. Based on the HGU they obtained, Lonsum started to expand tier land without observing the fats that the lands were communal land which had been in control and cultivated. In 1981, Lonsum in Kajang district flattened 500 houses owned by the Kajang customary community. IIN 1982, the plantation in Bulukumba district was expanded up to Jo'jolo with a total land of 300 Ha and bulldozed 300 people's houses and gardens.
5. From 1986 up to 1989, lonsum again expanded their land and continued to bulldoze lands claimed as communal lands, the plantation on Ujung Loe was expanded up to Tamatto with a total area of 800 Ha, Bulukumba district was expanded to include Bonto Mangiring and Tibonang as that their area increased to a total area of 500 Ha, and Herlang district in Tugondeng location increased to 30 Ha. In that year, all lands owned by the people in the plantation location were totally flattened without negotiation or compensation.

Conflict of Legal Logics

One interesting thing and appeared in all location where the filed study was conducted was facts were found on conflicts of laws between the state laws (laws and regulations) and laws living and grown among the people (norms, habits & communal law). Contact of two legal systems in different areas but all confirming their jurisdiction and legal subject, namely on the local community tends to be the main cause of further conflict related to the existence of the oil lam plantation in the place.

Therefore, we try to analyze the fact in the field in the perspective of law; there are two starting points that can guide us in drawing final conclusion. First, form the point of view of normative or positive law to see how conflict between facts in the field with the existing laws and regulations and second, from the conflict between legal structures which both apply to he relevant community, namely the state law and customary law, even though normatively there was legal claims that the national positive law was derived from laws which grow, live and develop among the people (customary), as expressly stated in Law No. 5 Year 1960 (UUPA). However since Indonesian independence, this friction can be kept low and sometimes it becomes big conflict, when the problem in the field turns to become a detonator with its trigger.

As a starting point, Griffiths'' opinion on the relation pattern between the state law and community law in the field shows the situation and relation between the national positive law and applicable customary law in the three cases above. Griffiths distinguished two types of legal pluralism namely: weak legal pluralism and strong legal pluralism. According to Griffiths, weak legal pluralism is another form of legal centralism because even though law pluralism is acknowledged, the state law is still deemed as superior. While other laws are united in the hierarchy under the state law. Example of view on weak legal pluralism is the concept proposed by Hooker: "The term legal pluralism refers to the situation in which two or more laws interact" (Hooker, 1975: 3). Although acknowledging the variety of legal system, he still places stress on conflict between the so-called municipal law as a dominant system (state law) and servient law which according to him is inferior such as custom and religion law. Meanwhile, the concept of strong legal pluralism according to Griffith the product of social scientists is scientific observation on the fact of existence of plural legal structure existing in all (group of) people.

Customary community in the three case is in general have the opinion that the disputed HGU land remain the communal land,

and even in the case of communal land fought by BPRPI, the community still believe that the land is communal land which is attached to their rights and obligations as customary community. The land track right, as a communal right growing to adjust it self to the agreement on use of land by Dutch Tobacco Company remain the right demanded to be fulfilled land up this present. However, the positive law applicable at present is not so. The same is the case for the claim of ownership of HGU land base don the customary law not acknowledged by the state, especially by the state, especially in the BPRPI case and Bulukumba Case.

Under this situation, the relationship between the customary law and positive law is within a weak circle of legal pluralism. Customary law is and tries to stay in the middle of domination by the state law. Because of the above there occurs acquisition of the lands because in the perspective national law, there is no regime of right applicable to HGU land other than the right regime in the positive law.

Even though the position between the customary law and the national positive law is in unbalance space, it does not mean that the customary law does not have place. Many cases indicated that customary law became a tool to expand plantation. In this position, the positive law tries to use instruments, rules and symbols of customary law to encourage acquisition of customary law for plantation purpose.

However, even though on one side with its enormous power, the positive law successfully incarcerated customary law and practically has successfully tae over ownership on the customary community to communal land, but within the circle it cannot avoid internal contradictions, conflict and disputes between one regulation to another relation. However, certainly it is legal politics that eventually determine who win this battle. The final destination and direction of legal games is determined by who has the power and where the power is aimed at. Next, we will see how the Positive Law reveals the cases and all internal conflicts.

Legal Analysis on HGU Issuance

There are three different cases that we elaborate using analysis from positive law. There are two cases namely BPRPI case and Bulukumba case which are based on the legal event of nationalization and one case namely the PTPN XIII case which was based on a more recent legal event, namely the policy of plantation development in the era of 1980s.

Legal analysis of HGU Originating from Nationalization of Dutch Companies

Nationalization (take over) of Dutch companies was a strategic policy at that time. This take over of Dutch companies was due to Netherlands' reluctance to return West Irian to Indonesia. As a consequence, Indonesian Government annulled the KMB agreement. The nationalization was based on Law Number 86 year 1958 on Nationalization of Dutch Owned Companies. This law stipulates that;

> "The Government of Indonesia as a sovereign Government responsible for its people always tries to accelerate the implementation of the national economic basis in the context of annulling the KMB. The Government was of the opinion that the action taken on Dutch owned companies c.g take over was in line with the policy of annulling .M.B an din conformity with the main policy in the economic field as formulated in the Munap, toward national economy which is in accordance with the personality and spirit of Indonesian nation an din accordance with the policy of independence in the economic field which non discriminative on friendly countries and hence does not give priority to any country.. Hence nationalization of Dutch owned companies had the purpose of solidifying our national potentials. Or to liquidate the colonial economic power, in this matter the Dutch colonial economy. The companies that were nationalized were in principal all Dutch

companies which operate within the territory of the Republic of Indonesia, both at the central level and branches"[9] .

In the field of plantation, nationalization began from the opinion that all nationalized lands have no other legal binding other than the legal bond formed between Dutch entrepreneur and the Dutch Colonial Government. Facts from the field often times indicate the said erpacht land are from the lands of customary community promised by Dutch entrepreneurs under certain conditions. That is why the provisions on erfpacht regulate the above which read as follows;

Article 720. Right to cultivate land (erfpacht-ed.) is a material right to fully enjoy movable goods owned by other people, with the obligation to pay for annual tribute to the landowner, as an acknowledgement to ownership in the form of money or proceeds or income.

The document of entitlement of the Right to Cultivate Land must be publicized under the method as stipulated in article 620 (Ov. 26; KUH Perdd. 508-4, 528, 616, 696, 712, 1548, 1963) Article 721. Holder of right to cultivate land shall enjoy all rights contain in the right to own land existing in its business, but may not act anything that can lower the land price.[10]

In the BPRPI case, the communal land was leased by the Deli Sultan to Dutch Entrepreneurs for tobacco plantation. As described above, land ownership, in the contract between the Dutch colonial government and Deli Sultan, it was stated that the lands under contract were owned by the community (land watchmen) in accordance with applicable customary law. The agricultural activities of the community (land watchmen) were acknowledged and incorporated in the deed of concession years 1877, 1878, 1884, and 1892. The said deed of concession acknowledges and includes

9 General Elucidation to Law Number 86 year 1958 regarding Nationalization of Dutch Companies

10 Indonesian Civil Code (Burgerlijk Wetboek voor Indonesie) publicized with Statement dated Aprli 30, 1847, Stb. 1847-23

the right of customary community to process the land for planting tobacco. Until the tobacco was harvested, the customary community takes care of the tobacco until harvesting time. The deed of concession acknowledged and includes the right of customary community to cultivate the land even tough the land was planted with tobacco. If the tobacco has been harvested by the plantation company, the customary community (watchmen) may cultivate the formerly planted plantation So long the tobacco had not been harvested the customary community wait the tobacco until harvest time. Those who wait for tobacco harvest are referred to as the watchmen while the land formerly planted with tobacco cultivated by the watchmen community is referred to as *tanah jalur* (land tracks).

In the Bulukumba case, control over customary community land commenced in year 1918. NV Celebes which intended to buy barks and ask the Bulukumba resident to engage in poultry and horse breeding business. NV Celebes attempted to monopolize by claiming that the land where they keep the trees from which they take the bars and the place where they open poultry and horse breeding business as their property. Apparently, NV Celebes started to open kapok and citronella plantation on the land claimed based on purchase of bars and cooperation in breeding cattle. Subsequently, NV Celebes landbouw Maatschappij under the operation permit of erpacht right in the form of decision of Governor General No 43 dated July 10, 1919 and No 44 dated May 18, 1921.

In the BPRPI case, the obligations to pay the annual tribute by the holder of erfpacht right are materialized in the form of giving a chance to engage in the agriculture activity in the land tracks in addition to other compensations. However, unlike the Bulukumba case, since the beginning this case was rife with deception. However, an important note from the two cases, Ditch entrepreneur acknowledges the existence of customary community under various models.

When Indonesia got its independence, as a young republic, the founder of the republic took strategic measures to bridge and keep

law gaps. This bridge is Article II of the Transitional Provisions of the 1945 Constitution which stipulates "all state agencies and existing regulations are still applicable so long as here are no new ones under this Constitution". Hence, subsequently the erfpach right stepped on entering independence era, although the sovereignty holder has changes. Subsequently, laws and regulations on nationalization stripped off all the above and subsequently welcome with regulations on conversion of wetereen rights to agrarian rights set forth in Law No. 5 Year 1967 regarding Basic Provision of Agrarian (UUPA).

Since the beginning the constitution of the Republic of Indonesia has outlined that land, water and natural resources continued therein are controlled by the state and used for the people's welfare to the fullest possible extent. Based on the above, subsequently the new Government interprets it in to the form of the State's Controlling Right (HMN). Nationalization was performed with the purpose of to give most benefit to Indonesian people and also to strengthen the state security and defense.

HMN as interpreted in the UUPA Article which stipulates that;

(1) the provision of article 33 paragraph (3) of the State Constitution and matter as intended in article 1, land, water an space are included therein all at the highest level controlled by the state, as the power organization of all the people..

(2) The State's right to control as intended in paragraph (1) of the article in provides the authority to:
   a. Regulate and organize the allocation, utilization, supply and maintenance of land, water and space;
   b. Stipulate and regulate legal relationship between people with the land, water and space;
   c. Stipulate and relate the legal relationship between people and legal acts concerning the land, water and space.

(3) The authority derived from the state's right to control as referred to in paragraph (2) of this article shall be used for the people's welfare to the fullest possible extent in term of happiness, welfare

and independence within the community and rule of law state of Indonesian which is free, just and prosperous.

(4) The implementation of the aforementioned State's right to control can be delegated to the autonomous regions and customary law community, as necessary and not in contrary to the national interests, pursuant to the provision of Government regulations.

As described above, as a follow yup to this nationalization, the rights to western lands were then converted into the right to land according to the Indonesian new agrarian law. The UUPA stipulates that the Erfpacht Right for large-scale plantation which had existed since the enactment of this law, since that time become right to cultivate which is valid until the remaining period of the said erfpacht right , but maximum 20 years[11].

Meanwhile, Land Use Rights is the right to the land controlled directly by the State as provided for ion Article 28 of UUPA which stipulates;

(1) Land Use Rights is the right to cultivate the land directly controlled by the State within the period as set out in article 29, for the purpose of agriculture, fishery or cattle breeding.

(2) Land Use Rights is granted to land with a minimum 5 hectares in total, with the provision that if they total area is 25 hectares or more, the party concerned must use adequate investment and good corporate techniques in accordance with the time development.

(3) Land Use Rights may transfer and be to another party.

The legal consequence of nationalization and conversion of the western right to the right in accordance with Indonesian law cause the land formerly erfpacht subsequently become the land directly controlled by the State. ON the land, a new right was issued referred

11 CHAPER IV Transitional Provisions Part Two, Provisions on Conversion of Article III Paragraph (1) of UUPA

to as the Concession to Cultivate Land. Base don the HMN which was subsequently deformed into nationalization and conversion of right, the communal land whish were under agreement with Dutch employers who afterward requested for erfpacht right to the colonial government, transfer to land directly controlled by the State.

In the BPRPI case, the agreement between the customary communities represented by the Deli Sultan is like deemed to have never existed because there had not been legal remedy performed to give and respect the right of the customary community, either through compensation or indemnity. The Government, through the policy of nationalization and right conversion, consciously took over the lands to be then issued the HGU thereon. Meanwhile in the Bulukumba case, confiscation committed by Dutch employers was corroborated by the take over by take over by the government under the policy of nationalization and conversion.

Nationalization should replace the position of Dutch employers as the holder of erfpacht right, not instead replacing the position of the customary community as the lawful owner of the communal land who has bound themselves in the agreement of borrowing and use of land wit Dutch plantation employers. If the Government places itself as the holder of companies nationalized, there should have existed amendment to the contract of borrowing of the people right not instead taking over their land.

Actually, when the Colonial government left there should have been pause period whether there occurred vacuum of public law which regulate the relations between the citizen and the state I order to maintain order, and in order not incline to anarchic situation due to vacuum of law, private regulation must remain applicable to the parties. When the Dutch colonial government left the region and the sovereignty was transferred to the new state namely the Republic of Indonesian, it would not automatically annul the civil contract made by the customary community and the Dutch employers. Hence, when the Dutch employer was replaced by the

Government of the Republic of Indonesia due to nationalization, the borrowing and use of land contract must be amended and position the customary community and the government of the republic of Indonesian as parties to the new contract. This analysis which occurred in the BPRPI case and the relevant clauses in article 1338 of BW/Indonesian Civil Law stipulates that all agreement lawfully drawn up shall apply as law to those drafting the law.

ON the hand, in the Bulukumba case, nationalization carried out on NV Celebes, should have been followed up on by the act to restore the right of the Kajang customary community. When the government needs the land, negotiation on borrowing and use of land to the customary should, be performed. The government acts of taking over these customary community lands can be classified as a trot committed by the ruler (onrechtmatigh overheiddaad).

The government confusion in settling land issues as ea consequence of nationalization is apparently acknowledged and has strong legal basis, this statement is as follows;

"Finally, regarding the gentlemen agreement that is oftentimes questioned in the settlement of dispute ion plantation land in East Sumatera can be explained that the problem is so complicated (gecompliceerd), that up to now is still under the arrangement but the State Committee and Executive Body assigned to give recommendation on settlement of the problem"[12].

Legal analysis on HGU derived from the Granting of New Right when Indonesian had its independence.

The legal aspect of the process of land take over for the interest of palm oil plantation need to be further viewed because based on finding on the filed, in this process there had been intensive contact between the community and the plantation employer and the Government. This interaction process among them created legal

12 Decree of the Minster of Agarian Affairs dated April 29, 1959 regarding Policy of the Minister of Agrarian Affairs on Larga-Scale Plantation Companies which terms of service have/to be Expired.

relationship which will determine the sustainability of plantation in the future. In all locations visited, facts were found in the problems and conflict rooted in the process of take over of people's land for large scale plantation. The intensity of conflict had their ups and downs during the time but has never stopped until now.

Based on the existing regulations, the initial process of plantation investment in the form of licensing processes was the domain between the government and prospective employer. There was no room fir consultation on the investment plan with the community residing in the investment location. Hence since the beginning of the plantation development plan, there was no sufficient information as the material for consideration for the community whether to accept or reject the plantation based on the impact caused.

Such matters should be open in the process of lay out and planning and development of kicing aerial space for the people. Pursuant to the Law on Spatial Layout, spatial layout is intended to improve the people's welfare performed by the Government with participation from the people. Fore that reason the Government must organize guidance through, a announcing and disseminating the planned spatial layout to the people, b, develop consciousness and responsibility from the people through extensions, guidance, education and trainings. However, the acts found on the filed suggest that the people almost know nothing about what would happen in their area[13].

The initial information on the development of plantation in their area was only received by the people when the plantation company had had obtained Location permit in order to acquire the land for the intensive plantation and in this phase there had occurred distortion ion information in real sense. This first information manipulation started a series of other manipulating acts from the company and the government against the community. Fir example, let see the process of development of oil palm plantation owned by PTPN III

13 Law No. 24 year 1992 regarding Spatial Layout Article 12 Paragraph (1) and Article 25

in Parindu West Kalimantan. When the plantation was s about to be developed several representative of the community were asked to have comparative study North Sumatera to see palm oil plantation areas there. During the time of comparative study, the community members were informed that oil palms are good to boost the regional development and give large contribution to the city development. There was no comparison of information from the local people or farmhands[14].

Now, let see the process of acquisition of people's lands for plantation. Pursuant to applicable laws, when the first location permit is obtained for a period of one year, the company must endeavor to land for its plantation area. Long negotiation process with the people started from the acquisition of their land for the interest of the company. Based on the provision on location permit, within the period of first location permit (1 year) the company must be able to acquire land 50% of the existing total area in the location permit. With the said figure, the company can only get extension of location permit for the second phase for anther year period[15]. This provision indirectly encourage extra judicial acts ion obtaining land for the purpose of plantation. Such acts can be in the form of information manipulation as described in the previous part or coercive measure.

Acquisition of land for the interest of plantation in areas strong with communal rights, particularly West Kalimantan, there is a legal fact very interesting to be analyzed. This fact commences with the status lands in this region. In these regions there are lands with the status of state land. Al land is under the authority of traditional figures or feasibly to be called communal land[16]. Even though factually there exist poor protection on land belonging to customary community in the national positive law, the government does not use

14 Interview with Mr. Jailani

15 Article 5 letter (3) of Regulation of the Minister of Agrarian Affairs No. 2 Year 1999 regarding Location Permit

16 Pursuant to Government Regulation No. 24 Year 1997 regarding Registration of Land. The definition of State Land or the land directly controlled by the state is the land now owned by any right to land.

the approach of vulgar and arrogant power in obtaining the lands. Such acquisition was performed in such a way hat the government has as if respected or at least took into consideration customary ownership on the areas. This was where actually the game of law started.

Pursuant to laws and regulations, the Land Use Rights (HGU) is the right to cultivate land directly controlled by the State, within a certain period f time (as set forth in article 29), for the interest agricultural fishery and cattle breeding for companies[17]. This provision was subsequently asserted that the lands that can be garneted under the Land Use Rights are state land[18].

If further analyzed pursuant to the provision on HGU above, prior to granting HGU to a bi plantation company/investor, all right to the land on the lands allocated for that purpose must be released to the state so that the status become the state land. Then, how is it to make the communal land be assigned of its status to state land?.

Acquisition of lands for plantation was performed through waver of right to the land by giving an amount of compensation to the owner, and is the case for lands possessed by customary community[19]. However, there is a major problem on the lands namely tradition regulations which stipulates that those land cannot be transacted or have its ownership transferred. Utilization of communal lands may only be performed through a certain licensing process by complying with several applicable customary regulations. This provision applies is strongly applicable in west Kalimantan during the early time plantation companies arrived. Consequently, a certain method and approach were required to obtain the land for the interest of plantation.

17 Article 28 paragraph (1) of Law No. 5 year 1960 regarding UUPA

18 Article 4 Paragraph (1) of Government Regulation No. 40 year 1996 regarding Right to Cultivate, Right to Build, and Right to Lease

19 For detail please see circular letter from the Minister of Home affairs i, Directorate General of Agrarian Affairs No. Ba. 12/108/12/75 regarding Implemantation of Land Acquisition & latest Regulation of the Minister of Agrarian Affairs /Chairman of the National Land Agency No. 2 Year 1999 regarding Location Permit

In West Kalimantan, in the first time of plantation, customary term/institution term "derasah" was popular (introduced). In practice, the institution of "derasah' was in the form of granting an amount of money to the local customary community for the use of communal land for developing plantation. In the perspective of the local customary community, the "derasah' money was not the reason the right to land is assigned to the giver, but only the right to manage the eland..

In the people perspective, after the term of HGU for plantation expires, the land will be automatically return to the people. However, pursuant to article 28 paragraph (1) of Law No. 5 year 1960 on UUPA, it is not so. Because the derasah money is deemed as the compensation money which caused the right to the land is transferred to the state for which the HGU will be issued thereon. The same is the case for the provision on Location Permit namely the holder of location permit is permitted to clear the land I the area of location permit from the right and interests of other parties based on an agreement with the right holder or the party having interest by way of sale and purchase, provision of compensation., land consolidation or the methods pursuant to applicable regulations[20]. In interview with the community members, the wish for the restoration of communal land to them after the HGU expires appeared.

Based on the above description, by virtue of law, there has occurred transfer of right to communal right fro the customary community to the state (government), so as the status of land which previously was communal lands become the state land because essentially the authorities owned by the customary community to their land as the authorities included in the ownership right have been transferred to the giver of derasah money. Furthermore, from the legal formal perspective, after HGU expires, those lands will become the land directly controlled by the state. However, conscience on

20 Article 8 Paragraph (1) Regulation of the Minster of Agrarian Affairs /Chairman of the National Land Agency No. 2 Year 1999 regarding Location Permit

the legal consequence was not fully communicated to the customary community.

The most fundamental legal analysis is on the object, i.e. the communal land promised is the process of delivering right for the interest of plantation. Based on its function, communal land is the reserve land/forest for meeting the needs of all members of the communal right. This function produces a customary provision that customary land cannot be transacted. The aspect of public interest is strongly supported by the function of the relevant communal land. Based on the provision of civil law "only tradable goods that can e be the object of agreement. "[21]. According to Prof. Dr. R. Wirjono Prodjodikoro, SH the terms of goods that can be traded in article 1332 of Indonesian civil law does not include objects used for public interest.[22]

If the above approach is to be used, it is clear that communal land is not the land that can be promised, because it involve public interest for reserve for all member of the local customary community in the future. Furthermore, facts in the field indicate that the acquisition process was only performed by a group of traditional figures. Consequently, all agreements on sale-purchase or compensation with the object of communal land are contrary to the element of article 1332 of the Indonesian Civil Law, which is the basis for the validity of a sales agreement.

The above mentioned legal facts and analysis are almost as what happened in West Kalimantan in which in this region plantation areas are developed in the communal areas of the Dayak Customary Community. IN the perspective of the community gathering in this study FGD, after the HGU of plantation expires, the former lands of HGU will automatically become the property of this customary community. Unfortunately, the team failed to find documents on the acquisition communal land with the provision of "derasah" money.

21 Article 1332 KUH Perdata

22 Prodjodikoro, R. Wirdjono, Prof. Dr, SH, Azas-Azas Hukum Perjanjian, Pt. Bale Bandung, 1981, hlm 22

After viewing the object, le us see the legal facts, namely sales-purchase agreement on the communal land. The customary community should realize that the process of transfer of ownership the communal land to the state for issuance of HGU is a legal act of sale-purchase as set forth in Article 1457 of Indonesian Civil Law which stipulates that sales and purchase is an agreement by which one parties bind itself to deliver am object and the other party pays for the price promised. However, it is important to examine whether the agreement has met the requirements for an agreement as set firth in article 1320 of Indonesian Civil Law, namely;

"for an agreement to be valid four conditions must be met as follows; 1) they agree to bind themselves, 2) the competence to make a bond, 3) an object, and 4 a lawful cause.

Subsequently, article 1321 stipulates that there is no lawful consent or agreement if the agreement is made because of mistake, or obtained under coercion or deception. Deception is a reason for an agreement to be aborted, if the tricks used by one of the parties are in such a way that it is clear and apparent that the other party had to make that bonding because of the trick. (Article 1328).

In the case of acquisition of communal land in Sanggau Kalbar, around the 1980s, acquisition of customary community's land were performed without giving sufficient information on the real fact of the communal land in future. In addition there were efforts to give promises and other efforts to push for people's approval.

Based on information from the Dayak Parindi people that in reality, the Dayak community has been deceived by PTPN XIII, because the information and promises given by PTPN XIII was nit kept. Meanwhile in general, the Dayak community which was participant of the PIR SUS Parindu said that PTPN XIII only demanded the obligations of the farmers participating in the project, but not observing and giving what the farmers should receive. Even in the implementation of PIR SUS project activities, there were matters not in conformity with the material given/promised during

the time of dissemination in the preparation stage, for example:

a). In Prontas area (Majukarya Village) there are 37 households having delivered their farms since 1982/1983, but until now they have not received the land for oil pals and crops and yards.

b). The total area of oil palm lands, land for crops and yards received from the project are not conformity with the total are of land they should receive namely 3 ha as promised during the dissemination time.

c). Limit of time of conversion which still postponed until now. .

If this fact is compared with the provisions in several articles in the Indonesian Civil laws as above, there is a strong indication of violation of article 1320 on the terms and conditions of an agreement. This violation indication stems from fulfillment of article 1328 of Indonesian Civil Law. Hence, in a more general approach, the defect agreement subsequently serve as the basis for delivery of land, and the birth of HGU has caused all the legal facts are legally defect.

Recognition of Customary Community

The practices of acquisition of people's land for the interest of plantation in the field create a basic question as to who really owned the area on which the plantation is to be built. This question is important because fact in the filed indicates that the people of all case regions visited cannot oppose to the plan for plantation development in the residential places.

The basis for legitimizing management of natural resources in Indonesia by the State (Government) is article 33 of the 1945 State Constitution. The basic concept of management (control) of natural resources is expressly stipulated in Article 33 paragraph (3) of the 1945 State Constitution which states *that land and water and natural richness contained therein are controlled by the state and be used for the people's welfare to the fullest possible extent.*

The formula of basic concept of Natural resources management

by the state is further elaborated in Article 2 of Law No. 5 Year 1960 on Basic Agrarian Law (UUPA) which stipulates: 1). By virtue of Article 33 paragraph (3) of the 1945 State Constitution contained therein at the highest level is controlled by the state, as the organization of all the people, 2). The right to control by te Sate is include d in paragraph 1 of this article which grant authorities to: a). Regulate and organize allocation, utilization, supply and maintenance of land, water and space. b) Determine and regulate legal relationship between men and land, water and. c) determine and regulate legal relationship between men and legal facts on land, water and space. 3). The Authorities derived from the right to control by the state in paragraph 2 of this article dare used to reach people's welfare to the fullest t possible extent, in a sense of nation prosperity and independence among the community and the rule of laws stats of Indonesia, and 4). The implementation of the right to control by the state as mentioned above can be delegated autonomous regions and customary law communities. as necessary and not in contradiction with the national interest, pursuant to the provision of Government regulation. This popular basic concept is referred to as the State's **Right to Control (HMN)**.

Theoretically, HMN was born from the mixture of two concepts namely the concept of welfare state and the concept of communal known in the customary law. The concept of welfare state was born as criticisms over the concept of classical rule of law state influenced by liberalism and socialist rule of law state influenced by Marxism. IN the concept of welfare state, State is deemed not merely as the tool of power but also has the function of service tool (an agency of service[23]). Under this understanding, the State has the right to intervene in

23 Characteristics of a Welfare state is as follows; 1) prioritizing the people's social and economic rights, 2) the executive role is higher that the legislative role, 3) ownerships right is not absolute in nature, 4) State is not only as the night Guardian (nachtwakerstaat) but is also involved in social and economic businesses, 4) administrative law principles increasingly regulate the social economy and put certain obligations to the citizens, 6) public law tend to push the private law as a consequence of broader state role , and 7) the state is material legal state which prioritizing material social condition

land affairs. IN the framework of customary law, communal area is a management area under joint control (communal right). I practice, this control is implemented y their representatives for example chiefs of customary institutions[24]. Article 33 of the 1945 State Constitution illustrate how Indonesian should adopt these two teachings and give juridical foundations for Article 2 of Law UU No. 5 year 1960 which stipulated for the first time the conceptualization of HMN in a more technical level in managing natural resources..

Conflicts in the field in utilization of natural resources caused the concept of the State Right to Control (HMN) debated in particular I discussion on the relation between the state and the community in management of natural resources (PSDA) in Indonesia. Many writers are concerned on the community's member 'rights in the SDA, claiming and requisitioning the philosophical, sociological and juridical basis of HMN. This suit appeared because of bias of power by the State (government) on the Natural resources, has created conflict related to land tenure and land use between the government and the community.

For example in the forestry sector particularly on tenurial issues. Sandra Moniaga, Hedar Leudjeng and Rikardo Simarmata (2001) write that grammatically, the word 'tenure' derives from Latin word 'tenure' which means to maintain, hold and own. The most important aspect of this term is its legal status. That's why; talking about the term tenure must talk about the legal status of a control over certain natural resources to a community. Another term is also known namely 'tenurial system'. Tenurial system is defined as a

24 In the Minangkabau customary community there re is customary proverb reading *Sakalian negoutan tanah, Baik pun jirak nan sabatang, Sampai ka rumpuik nan sahalai, Maupun batunan saincek, Kabawah takasiak bulan, Kaateh mambuhuang jantan Pangkek pangulupunyo ulparagraph Kok ayianyo buliah diminum, Kok buahnyo buliah dimakan*. This principles of the customary law which explain the position of the Nagarai Right to Control communal land which performed by the traditional leading figures. According to this proverb, communal land include all from natural resources starting from the land surface, underground u to the sky above consisting of living objects and dead objects. Control of communal land is exercised by the Pangulu as the representation of communal ownership of ethnical groups holding the communal right. The Pangulu right to control would no mean as the owner.

group of or a bundle of rights to utilize agrarian Sources or natural resources in a community organization (Joep Spiertz and Melanie G. Wiber: 1997) [26][25].

In another approach, Iin Ichwadi review several opinions on this tenurial. He quoted opinions of several experts which basically state the following:

> *.....Ridell (1987) defines tenurial system as a bundle of rights. IN every tenurial system, each right contains at least 3 components, namely right subject, right object, and right type. In addition, in the tenurial system it is important to know who has the right (de jure) on a resources and who factually (de facto) use the resources. Another concept which is also close to the above is property rights, which according to Schatter (1951) in Fedel, G and Feeny, D (1991) "property as a social institution implies a system of relations between individual ..... It involves rights, duties, powers, privileges, forbearance, ets., of certain kinds". IN principle, there are 4 types of property rights on resources which is very different one to another, namely private property, common property, state property, and open access. In the view f economic theory, in particular after the appearance of the concept "tragedy of the commons" by Garret Hardin in which common property will be easy to spoil (fugitive), then forest resources as a public resources which is us allay in the regime of "common property", "state property" "open access" rights must be determined as to who has the right to the resources so as to avoid opportunist free rider*[26].

25 Hedar Laudjeng, Sandra Moniaga & Rikardo Simarmata, between the Sistem of Community-based Control and State-based Control System in "Forest Area" in Indonesia" a Case Study from Eight Location, HuMA Presentation, Workshop on Tenure, November 2001. "Every tenure system alwasy three components, namely: right subject, right object and type of right. Right subject can be in the form of individuals, households, groups, communities, social economic institutions, and political institution under the state level. Right object can be in the form of land parcels, objects growing on the land, mineral materials, etc. The type of right spans from ownership right, right to lease and riht to use. The term tenure stresses more the importance of control aspect (the right to manage control and allocation) insetad of ownership right (right to own). Tenure stresses on who in factual are using a certain natural resources rather than thinnking who has control over the land. The term 'land tenure' is translated as control of land. The act of control materializes in various rights such as lien, right to lease etc.

26 Iin Ichwandi, Failure of tenure sysem and conflict of forest resources: Challenge to forestry policy in future.

Distortion on HMN practices is also interestingly brought up by Owen J Lynch who write that there is no other countries in Southeast Asia that has the colonial mentality –prioritizing defending the power and centralistic authority on the local natural resources and controlling practices- which is quite dominant in Indonesia[27].

Furthermore I Nyoman Nurjaya (2000) elaborates, in the practice of state organization, the new order government consciously manipulated the true meaning of the said ideology at least in 2 things, namely; 1) the new order government purposely gave narrow interpretation on the term of state which merely translate into government, not the government and the people. Therefore, subsequently, a new paradigm is built and used namely government-based resource control and management, not state-based resource control and management which is referred to in the 1945 State Constitution, UUPA, and UUPK above, 2) the consequence of use of government-based resource control and management above is the people's position become not parallel to the government in the life of statehood. It means creation of subordinating relationship between the people and the government – in a sense that the people are inferior position and the government is superior position.

Therefore, for more than three decades the new order government played at least 3 major roles in the control and utilization of natural resources, namely; 1) the Government as natural resource controller (government resource lord). 2) The Government as the natural resources exploiter (government resource protection institution). 3) The government as the protector of natural resources (resource protection institution).

More than that, use of paradigm of control and utilization of government-based natural resources produced juridical implication in the form of creation of repressive law which contains the following characteristics as follows: 1) regulating norms which ignore, marginalize, and even eliminate people's right to control and

27 Owen J. Lynch & Kirk Talbott, Balance of Act, Pople Forest Management System and State Law in Asia Paci□k, WRI & Elsam, Jakarta 2001

utilization of natural resources; 2) Placing stress on security (security approach); 3) Prioritizing legal sanctions which is only intended for the people which commit legal violation; 4) Giving criminological stigma to law violators as Natural Resources destroyer, looter of natural richness, wild cultivator, forest dweller, grass gatherer or wild cowboy, forest security rioter, reforestation saboteur, stealer of forest product et cetera, all of which have the same meaning[28].

Based on the above description, we can see unilateral defining by the government on HMN which created serious impact in the field. Under this context, Soetandyo Wignjosoebroto said all terms and all juridical constructions are in principle language signs and these signs are never neutral but tend to take side. It is indeed more realistic when people say based on consciousness constructed with critical semiotic perspective; it never occurs that law is neutral and independent not to take side (Soetandyo Wignjosoebroto, pages 235, 2002). This approach can prove that HMN can not be deemed as a neutral clause.

With this legal semiotics we can examine whether the form of government recognition on the customary community as the owner of areas acquired for plantation. Article 3 of the UUPA stipulates that considering the provision in articles 1 and 2, implementation of communal right and similar rights from customary law communities, in so long as factually in existent, must be in such a way that they are in line with the national and state interest, based on national unity and may not contravene the Constitution and higher laws and regulations. The phrase 'in so long as' is factually tend to have different interpretation. The basic assumption and approach used is at the point where there is no customary community, so that treatment on them in obtaining their communal lands is full with inappropriate acts.

This conditional approach in the view of causality is certainly the cause of appearance of conflicts in the field. However, actually

28 Impoverishment process in the Forestry and Natural Resources sectors; Political and Legal Persepective, Seminar and workshop on Structural Poverty organized on January l 18-20, 2000 at Puncak Inn Hotel Jl. Raya Ciloto No. 88 Puncak – East Java.

distortion of recognition on the customary community do not only occur on the derivatives of various provisions in the 1945 Constitution and its implementing regulations, but political consensus in the amendment of the 1945 Constitution also expressly give conditional recognition. Elucidation II of Article 18 of the 1945 Constitution stipulates that within the territory of the Republic c of Indonesia there are about 250 zelfbesturende landschappen and volksgemeenschappe, such as desa in Java and Bali Nagari in Minangkabau, Dusun and Marga in Palembang and so forth. This region has original structure as they may be considered as special regions. However, Amendment II to the 1945 Constitution the elucidation was changed to become the state recognize and respect units of regional governance which are special and specific in nature provided for in a law and the state recognize and respect units of customary law community along with their traditional rights in soar as they are in existent and in accordance with the development of the people and principle of the Unitary State of the Republic of Indonesia, as provided for in laws[29].

With the inclusion of the clause, Amendment II of the 1945 Constitution places and raise the position of conditional recognition which was initially at the level of implementing regulation to become main regulation which will become the main sources of laws in Indonesia. The consequence is of course, predictably, the tensions between the customary community and the state will increase.

Human Rughts Perpsctive

The practices of acquisition of people lands for the interest of plantation in the field sparked various reaction from the community, such as in the form of protests and in West Sumatra, this movement was marked with land occupation/reclaiming. The demands appeared ranging from demand for plasma, compensation or demand for restoration of communal land. The action of farmers to acquire the

29 Article 18B of 2ns ammedment to the 1945 Constitution

land cerate theoretical debates whether it is a new exploitation wave or if there is a theoretical frame work and accurate term to explain this situation. Discourse on this farmer's attitude gave birth to the term Reclaiming. Reclaiming is one form of social movement. As a social movement reclaiming is closely related to the dynamic of macro politics. Reclaiming is directly related o the openness and closeness of the national political structure. Change in the national political structure was marked by the fall of president Soeharto regime, May 1998 creating a new subjective condition among the community, namely the creation of political room which allows freedom in people's political expression. This freedom encourages the birth of various expressions of victims of state repression. The existence of reclaiming movement was based on the emergence of various groups which dominate economically or politically, try to claim – precisely looting the right to natural resources. The birth of reclaiming movement can be said as the condition sine qua non ignited by the similar event previously, forceful acquisition of right ownership of natural resources[30].

However, viewed from the above, the reason why farmers are involved in a social movement are among others reclaiming movement. There are many theories and perspective that can give answers to the above questions among others 1) moral economic perspective, 2) economic-political perspective, 3) historical perspective, 4) radical theory perspective, and 4) perspective of social revolution theory. Such various reasons are among the reason why farmers fight back which according to Scott can be distinguished between incidental fight and serious fights. Serious fights have the following characteristics 1) organized, systematical and cooperative, 2) have principled or without any ulterior motive, 3) have revolutionary consequences and contain ideas and purpose of negating the basis of domination. Meanwhile incidental farmer fights are 1) not organized,

30 Boedi Widjarjo & Herlambang Perdana, Reclaiming & People's Sovereignty, PT. Sembrani Aksara Nusantara, 2001

not systematic, and individual, 2) opportunist and with motives, 3 no revolutionary consequences and with the purpose of adjusting to the present dominant system.

However, the farmers do not have any constraints in establishing movement to initiate fights because 1) often time the farmers cultivate their own land and few are in groups, 2) rough condition of work oftentimes press the farmers to work routinely all year and prepare for the following years, 3) consideration for selecting subsystem production rather than choosing trade plants which often time are detrimental to the farmers, 4) bod to the big family or relatives and mutual help within the community make the farmers carried away, 5) farmers interest are oftentimes overlap with the interest of other classes, and 6) confinement of residential place oftentimes cause the farmers to be unable to improve their knowledge[31].

In other approaches, such reactions can be understood as in the following sentence; " .. That if we do not want to push other to revolt as the last resort to defy tyranny and suppression, it is most important to guarantee human rights through supremacy of law"[32]. Based on this Human Right Covenant, it s relevant that we view acquisition of people's land for plantation from human rights perspective, because there are many injustices and traces of suppressions found in the field.

Internationally-acknowledged human rights include human rights as included in the human rights covenant or the rights as elaborated in the implementing instruments as adopted by the UN General Assembly. The human rights covenant includes universal declaration of human rights and two covenant adopted based on the said declaration namely International Covenant of Civil and Political Rights (ICCPR) and Economic, Social and Social Covenant (ECOSOC)[33].

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31 The main source of the farmer movement theory is the book wriiten by Basrowi & sadikin entitiled; Theories of Struggle and Collective Violence published by Insan Cendekia, Surabaya, 2003.

32 Preamble of the Universal Declaration of Human Rights dated December 10, 1948

33 Ifdhal Kasim & Johanes da Masenus Arus, Economic, Social, Cultural Rights, Selected Essays, 2001, p. 4

Human Rights in Indonesian Law

Substantially, Indonesian acknowledges and adopts the existence of human rights since the birth of the 1945 State Constitution. In the preamble, it is stipulated that "independence is the right of all nations and therefore colonization must be wiped out because it is not in conformity with humanity and justice". With a determination to implement the 1945 Constitution purely and consequently, in the session of the Provisional Peoples' Consultative Assembly (MPRS) of the Republic of Indonesia in 1966, the MPRS issued Stipulation Number XIV/MPRS/1966 regarding Establishment of the Ad Hoc Committee to prepare Draft Charter of Human Rights and Rights and Obligations of Citizens[34]. This draft was not deliberated until issuance of Stipulation of MPR No. XVII Year 1998 regarding Human Rights. This MPR Stipulation instruct, assign State High institutions and all Government apparatuses to respect, uphold and dissemination on human rights to all the people and assign the President of the Republic of Indonesia and the People's Legislative assembly (DPR) of the Republic of Indonesia to ratify various instruments of the United nations on Human Rights in so long as not contrary to the State Ideology of Pancasila and the 1945 State Constitution[35].

Follow up action taken by the Government in the legislation sector is the promulgation of Law No. 39 Year 1999 on Human Rights on September 23, 1999. This Law consists of eleven chapters, ten parts and 106 Article.

On October 28, 2005, after obtaining approval from the DPR, the Economic. Social and Cultural Right Covenant was ratified by the Government of Indonesia through Law No. 11 year 2005 on Ratification of covenant on economic, social and cultural rights. At the same time as this International Covenant on Social and Political Right (ICCPR) was ratified under Law No. 12 Year 2005.

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34 Letter C point of MPR Stipulation No. XVII Year 1998 regarding Human Rights
35 ibid Article 1 and Article 2

Another covenant which is relevant to the condition of Indonesia as a multi-nation country, which consist of many groups of customary communities is ILO Convention No. 168 on Indigenous People and Customary Communities in Independent Countries. Unfortunately, this convention has yet to be ratified by the Government.

Land Acquisition for Plantation and Human Rights

In the previous part, we briefly illustrated how the Human Rights regulations were ratified slowly and became a part of Indonesia's law. In this part, we will see how these international provisions perceive acquisition of land for plantation in Indonesia. But, before we go to the real issue which was found during our visit in Lampung, West Kalimantan and West Sumatra, we will begin this part with conveyance of relevant norms.

Let us see the relevant norms in the General Declaration of Human Rights. Articles 1 and 2 are the basic foundation for the subsequent provisions in this Covenant and other Covenants that are based on this declaration. These two articles stipulate that all mankinds were born free and are equal in dignity and rights. They are given common sense and consciousness and they have to socialize under the spirit of fraternity, and everybody has the right to all rights and freedoms set out in the Declaration, without any discrimination such as race, skin color, gender, language, religion, political opinion or other opinions, citizenship or social status, wealth, breed or other status. Subsequently, there must not be distinction based on political status, jurisdiction, or internationality owned by the original country which is independent, under trusteeship government, or under other sovereignty limitations. In connection with wealth possession, article 17 of the General Declaration of Human Rights states that everyone has the right to possess wealth, whether alone or jointly with other people, and nobody can take away this wealth unjustly. However, the provision on material protection is not adopted by the ECOSOC Covenant. But implicitly this substance contained in the provision of

materials protection can be explained in the right to get a proper life standard in the Ecosoc Covenant.

Unlike other Covenants, the ECOSOC Covenant places a stress on the State's obligations of conduct. In negative approach, a state is deemed to have breached the Covenant if 1) failed to take the required measures, 2) failed to immediately remove the obstacles, 3) failed to fulfill the obligations without any delay, 4) placed limitation on the stipulated right, 5) purposely slowed down or ceased the realization of a specified right gradually, et cetera.

Article 11 paragraph (1) of the ECOSOC Covenant stipulates that the State as a Party to this Covenant must recognize everyone's right to get a proper life standard for himself or herself and for his or her family, including food, clothing and shelter, and to get constant improvement of life condition. The State shall take appropriate measures to guarantee realization of this right by acknowledging the importance of international cooperation based on mutual agreement.

In this context, Asbjorn Eede wrote that the right to proper life standard is related to the state's obligation to, first, respect individual and group freedom to maintain and exercise their rights. In practice, the State's obligation is to respect the space available for everyone from which they can earn their food in their own way or their own efforts.... every government, especially the one that is non-representative although in some cases is democratically elected, sometimes neglects or breaks the rights of very marginalized groups of people and sometimes puts them at risk because it damages their resources.

Second, the State is obligated to protect its citizen's rights from confiscation by any third party. In this context, the State must make efforts to prevent confiscation of resources basis from happening, including acquisition of communal land or land owned by unfortunate parties by force, and if possible prevent the land owners from selling their land in case of natural disasters such as, drought or other temporary difficulties, where the proceeds from the land sales is used to pay their debts.

Third, the state is obligated to assist and to fulfill the needs of people. The aid is given especially to the underprivileged so that they can execute their rights properly. Actions to assist farmers to increase their productivity without any tricky conditions, for example, which can make the farmers lose their lands, are included in the context of this obligation.

Fourth, the state's obligation as a provider. In this case, all the state's actions in reaching the adequate living standard, such as land reform program in a broader sense, or providing health facilities are included in this scope[36].

As mentioned above, the Covenant that is relevant to observe practices in acquisition of community land for oil palm plantation is ILO Convention No. 168 on Indigenous People and Customary Community in Independent Countries. This convention was drawn up in a situation where many indigenous people and customary community in this world cannot enjoy their true rights at the same level as other citizens in the country where they live. Their laws, values, customs and perspectives are often wiped out.

ILO Convention No. 168 stipulates the right of the indigenous people and customary community to set their own priority in connection with the development process[37]. The government must respect the particular interests of the cultural and spiritual values which are applicable among them related to their land or living area, especially the collectivity aspects of that relation. Hence, it is expressly stated that their right of ownership and control over the land which they inhabit traditionally must be recognized including the land that is not inhabited but from which they can make living and which they have access to the land traditionally. In the case where the State still possesses the resources, the government must

36 Taken from an article by Asbjorn Eede entitled Right to Proper Living Standard including Right to Food, edited by Ifdhal Kasim & Johanes da Masenus Arus, Economic, Social, Cultural Rights, Selected Essays, Elsam, 2001, p. 99-128

37 Article 7 paragraph (1) ILO Convention No. 168 concerning Indigenous People and Customary Community in Independent Countries

consult with the indigenous people and customary community. The community must enjoy the profit and get adequate compensation for any losses following those activities which they must bear[38].

Now, let us see further into laws and regulations in Indonesia, especially which relate to Human Rights. Pursuant to Law No. 39 year 1999 on Human Rights, violation of human rights is any act committed by an individual or a group of people including state apparatuses either in purpose or otherwise, or a negligence which in a way against the law reduces, hinders, restricts, and or deprives someone's or a group of people's right which is guaranteed by this Law, and not getting or is feared not to get just and right solution, under applicable law mechanism[39].

Such violation includes acts that are against the law which reduce, hinder, restrict, and or deprive the human rights as incorporated in the Law, namely: First the Right to Live, Second the Right to Have a Family and Descendants, Third the Right to Develop Oneself, Fourth the Right to Get Justice, Fifth the Right to Personal Freedom, Sixth the Right to Safety, Seventh the Right to Prosperity, Eighth the Right to Have a Share in the Government, Ninth the Women's Right and Tenth the Children's Right.

This Law determines that in order to uphold Human Rights, differences and needs of the customary law community must be observed and protected by the law, by the community, and by the government, and the identity of customary law community, including the right to communal land, is protected in line with the development of time. The customary right which is factually applicable and highly upheld in the customary law community must be respected and protected in order to defend and enforce Human Rights in the relevant community by observing laws and regulations, and in the context of upholding human rights, the national cultural identity of the customary law community, customary laws which

38 Ibid article 14, 15 and 16- quoted by writer.

39 Law Number 39 Year 1999 regarding Human Rights Chapter I. General Provisions, Article 1 letter 6

are factually and dearly maintained by the local customary law community, are still highly respected and protected as long as they are not contrary to the principles of rule of law state based on justice and people's prosperity[40].

This Law regulates the Right to Live under which everyone has the right to live, to sustain their life and enhance their life standard. Everybody has the right to live quietly, securely, peacefully, happily, prosperously in material and spiritual way, and everyone has the right to get a good and healthy living environment.

In relation thereto, The Right to Welfare is also regulated. This right states that everyone has the right to possess things, whether individually or mutually, in order to develop themselves, their family, their nation, and their society in a way that is not against the law, where those possessions are determined to have social function. Nobody can take away other people's belongings at his wishes and in a way that is against the law. "Ownership right has social function", meaning that every use of right must observe public interest. If public interest wants or requires it, then an ownership right can be lifted pursuant to the provisions of laws and regulations. Deprivation of ownership right for public interest, can only be done by giving an appropriate and immediate compensation which procedure must be accordance with the provisions of laws and regulations. If an object according to a particular law must be demolished or not to be empowered either forever or for a short period of time in public interest, it must be performed by giving compensation pursuant to laws and regulations unless stipulated otherwise[41].

Pursuant to the basic provisions on Human Rights, commencing from several International Human Rights Covenants and Human Rights regulations at the national level, they show us that violation of Human Rights has taken place in cases of land acquisition for the interest of plantation.

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40 Ibid Article 6 and elucidation

41 Ibid articles 36 and 37 along with the elucidation thereof

1. Right to Live/ Right to Proper Life Standard as regulated in the ECOSOC Covenant.
   If we compare the findings from the field discussed in the previous part with the explanation on the right to live above, we can conclude that either directly or not the state has violated its obligation to do the following. First, the obligation to honor individual and group freedom to maintain and execute their rights. Second, the state is obliged to protect the rights of its citizens from violation by third party. Third, the state is obliged to assist and to meet the needs especially to the underprivileged so that they can execute their rights properly. Fourth, the state's obligation as a provider.

   Field findings in the three case areas show that acquisition of community land starts from the modus of manipulating the information. If acquisition of community land using that approach does not work, then violance and intimidation approach is used. A series of these actions cause the society to lose their resources so that they cannot materialize their wishes and their rights to get adequate life standard.

   In this kind of cases, the government should perform its duty to protect people's ownership, but the fact is there is a strong indication that the government in every level, tends to facilitate or at least let the process of acquisition of community resources by third party happen.

   In the case of Sanggau Customary Community in West Kalimantan, field findings showed that there was enticement of improving the people welfare if they took part in the plasma program. However, viewed from the agreement, it is clearly seen that the community lost most of their land.

2. Right to Possess Wealth as provided for in the General Declaration of Human Rights and Law No. 39 Year 1999.
   The right to have wealth is quite interesting to discuss, first because this right has been debated for a long time after it was adopted in the UNO General Declaration so that it does not have a place in the ECOSOC Covenant. But this right came to the surface again in Law No. 39 Year 1999 on Human Rights, although it is followed with a sentence that the ownership right has a social function and so that for the public importance that right can be lifted. The same arrangement is also provided for in Law No. 5 Year 1960 concerning Basic Provision on Agrarian Affairs or known as UUPA.

   If it is related to the field findings, although lifting of people's right to communal lands to converted into plantation area did not happen, the essence of the substance and acquisition process of land show that the community's right to their wealth is not protected.

   The reason is, there is hardly any field findings which show that the community was able to maintain their wealth (the land) in the process of land acquisition at the Location Permit level by the plantation company. As illustrated in the first point, eventually by any ways the communal land was able to be taken over. Morever, the connotation of right to land was the right obtained from the state, such as the ownership right which certificate was issued by the National Land Agency. As a result, in the term of civil law, the community is considered only as Beziter or the authority, not Eigenar or the owner, which causes low compensation for the land.

3. The Right of indigenous people and customary community to set their own priority in relation to development process as provided

for in ILO Convention No. 169 and Law No. 39 Year 1999.
Based on the field finding, there is a priority conflict or in high language allocation of living space for the community with the living space allocated by the government.

Initially, the plantation locations served as supporting and reserve areas which also had economic value to the society, such as area for collecting forest products, hunting, et cetera. The priority of area use was made in agreements among the community leaders, including leaders of the customary community. Often times, the agreement is based on their life experience in managing their living space.

But subsequently, the government had another priority on their living space, namely for plantation. The result was, priorities in using the area which was determined by local community based on their experience, were totally neglected.

In West Kalimantan, most of plantation areas are the community's "tembawang" area. There are many kinds of plants growing on the land which are very useful for the people, such as, fruit plants. That area is purposely arranged in such a way based on the function according to the custom. But the priority and the development plan which had already been arranged by the community, was spoiled in seconds when facing the government's priority development.

4. The government's obligation to respect the special interests of cultural and spiritual values which are applicable among indigenous people and society related to the land or their dwellings, especially the collectivity aspects, as regulated in ILO Convention No. 169 and Law No. 39 Year 1999.
Based on the field facts, the implementation of the government's

obligation to respect the special interests of cultural and spiritual values that are applicable in their group related to the land or their living space especially the collectivity aspect, almost cannot be carried out.

It can be concluded that the root of the problem is that the politics of land law which has been applied all this time is never meant to protect the communal land ownership of the natives and the customary community maximally. Regulations on protection of indigenous people and customary community is laid on the normative stages that make the said recognition stop until the level of utopian idea. Because, the implementing regulations issued were almost not in harmony with the idea of respecting the customary community.

In the field there are some facilitation given for certification of communal land to become individual land. This makes it easy to renounce the right. For example, in the context of plantation, the land that is handed over to plantation was at first a communal land. But, with the plasma model, a small part of the land is owned individually.

Another fact which is not directly related is how the National Land Agency grants certification to the communal land surrounding the plantation easily,that makes it easy to let go of the right of the land.

5. Right to ownership and control of indigenous people and customary community over the lands where they inhabit traditionally including the lands that are not inhabited by them as provided for in ILO Convention No. 169 and Law No. 39 Year 1999.
   Lastly, the state's obligations to respect and protect the right of

indigenous people and customary community's to ownership and control over the land which they have inhabited traditionally including the lands that they do not inhabit.

Facts in the field show the reverse. When tens of hectares of the customary community lands, for example in West Kalimantan, were handed over to the government to be given to plantation companies in the form of leasehold (HGU), the status of the lands has legally been changed to state lands. The consequence is, the customary community does not have the right and authority of the lands anymore even though the term of plantation leasehold has expired.

The acquisition process of land which is full of manipulation with agreement letters or statements of delivery of right that give them a great loss show us that there is no protection for the right of indigenous people and customary community to ownership and control of the land which they inhabit traditionally including the land that is not inhabited. All of these facts occurred to customary communities in Sanggau, West Kalimantan, Langkat and Serdang Bedagai, North Sumatra, and Bulukumba, South Sulawesi.

Chapter IV

Conclusion and Recommendation

Conclusion

THE three cases that became sample for this short study are from different time setting. The people of Penunggu, Langkat and Serdang and Serdang Bedagai North Sumatra and the Kajang Bulukumba Customary Community South Sulawesi are from the Dutch colonial era, while cases of PTPN XIII West Kalimantan are from the early era of plantation booming in the 1980s. Nevertheless, there are major similarities in all case involving the HGU of plantation. Based on research on laws, regulations, facts in the field and legal analysis, there appear several major conclusions as follows;

1. The policies of nationalization and conversion of western rights in the earlier period of the Independence did not take into account agreements on use of land between the customary community and Dutch plantation employers which subsequently obtained the erfacht right from the Dutch colonial government.
2. Conversion of Erfacht right into HGU, has resulted in the take over of people's land by the state.
3. Take over of land in the after-independence era also did not respect customary law, that they created legal and social conflicts.
4. Release of rights to customary rights demonstrate strong indication of violation of legal right of the customary people, hence, HGUs issued under such situation brought law defects.
5. There appeared almost no legal settlements to such HGU cases

that caused infringement of communal right , constitutionally or their human rights.

Recomendation

With regard to the present condition of Right of Cultivation there are several matters that need to be performed, namely:

A. Short-term

- Several conflicts or disputes on land between the customary community and plantation companies must be immediately settled. Hence, it is necessary to make breakthrough to settle the existing conflicts and disputes on the land. The executing mechanism on settlement of conflict and disputes is apparently insufficient in delivering justice to the community.
- It is important to have review on all existing HGUs. This is very important to be performed to ensure tat the issued HGUs would not remove and seclude customary community. The above facts indicated large number of HGU which remove and alienate the customary community since the Dutch Government colonial era up to the present time.
- It is important to have reform on various policies on communal land related to right of cultivation. In the people's perception and understanding, HGU serves as a rental for land use from the government/businessman to them, so that the community's perception is that their communal land can be returned to them as communal (*ulayat*) land. However, as a legal consequence of HGU, former HGU lands can no longer be returned to the customary community. The HGU lands have subsequently become the land controlled by the state.
- The principles of transparency and people's participation with ideal principles such as free, prior, and informed consent, accountability, emancipation, and legal protection must be the key in the formulation, planning, and stipulation of lands to be

granted right of cultivation. Reform on policies must also include who are actually prioritized to get state land prior r to granting right of cultivation. Another important point is how to guarantee that those communal lands are protected for the livelihood of the customary community in relation to expansions of large-scale plantations. The broader aspect is how to materialize reforms in the process of formulating, planning, and stipulating land utilization the ideal principles of which include priority to free decision and fully informed since the beginning (free, prior, and informed consent), accountability, emancipation, and legal protection.

Long-term

- Reinterpretation of the state's right to control. The most fundamental things in conflict on natural resources is the government policy which regulate ownership, control and manage land and other resources based on the State's Right to Control. The Government has intentionally or otherwise, interpreted 'the state right to control' to become' the government's right to control". Therefore, the government has drafted laws and regulations which cause infringement of the customary community's and local community's rights. Consequently, the customary community and local community lost their communal (*ulayat*) land and which subsequently developed to violation of human rights. This is exacerbated by large-scale companies which make us of the loophole in the said laws and regulations. Therefore, it is important to have re-interpretation of the state's right to control by stressing on guaranty that the customary community and their livelihood are protected.
- Elimination of conditional acknowledgement by the state on customary community. Almost all regulations on customary community give conditional acknowledgment to them such as Law on PA, Law on Forestry and Law on Plantation. In reality in

the field, the model of conditional acknowledgement has limited the capacity of customary/.local community in executing the customary community's right on the land and natural resources. The customary community's position becomes weak when facing a company/government who intends to take over the communal land. Therefore, elimination of conditional acknowledgement to become full acknowledgment on customary community must be performed for example under Law on Protection of Customary Community. However, it is an important for this recommendation that amendment to this Law on PA must take into account the social and political condition because the Law on PA has sufficiently gives protection to the [people. This is important to ensure that such amendment to the Law on PA would not narrow the people's space to utilize their natural resources.