

Enhancement–The Role of Indigenous Law Community for Investment in Indonesia: Utilizing of Ancestral Land Under Public-Private Partnership

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ABSTRACT

The Indonesian government has issued regulation relating to the release of Ancestral-lands to legal entities in the form of government-owned and private enterprises including individuals. Such regulation has had an impact on the conflict between Indigenous Peoples and large companies and even multi-national companies regarding to providing compensation. The results are the re-claim of the Ancestral-lands by the Indigenous Law Community. In this case arising the question that, could Ancestral-lands be empowered specifically in the investment under Public Private Partnership between the Indigenous Law Community and Business Entities other than in the form of release of Ancestral-lands, and how the role of Indigenous Law Community in its implementation. Referring to the Chicago approach to Law and Economics which refers to "economic equilibrium" and "corrective justice" from Aristotle, this normative legal research will provide an alternative idea of the use of Ancestral-land which is more effective and beneficial for Indigenous Law Community in improving their welfare.

Keywords: *Ancestral-land, investment, public-private partnership*

1. INTRODUCTION

In the global dimension, the United Nations (UN) in 1994 made a declaration of protection for Indigenous and Tribal Peoples in particular related to discrimination against them [1]. In the case of the Ancestral-land problem, the United Nations Commission stated that the "Indigenous Law Community" ("ILC") must be given a clear legal status of land for their present needs and future development. Related to Ancestral-lands, United Nations Sub-Commission on the Promotion and Protection of Human Rights stated that, Indigenous Peoples have the right to the legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property. Also, have the right to recognition of their property and ownership rights with respect to lands, territories and resources. The States shall take all measures, including the use of law enforcement mechanisms, to avert, prevent and punish, if applicable, any intrusion or use of those lands by unauthorized persons to take possession or use of them, also shall give maximum priority to the demarcation and recognition of the properties and areas of indigenous use [2].

The Philippine Government, as comparison study, regulate the protection of the Indigenous peoples Rights related to Ancestral-lands under the Law. The Law stated that Ancestral-lands are, refer to land occupied, possessed and utilized by individuals, families and clans who are members of Indigenous Peoples. The concept of ownership of Ancestral domain is the "Private but Community Property". It means that the property of which belongs to all generations and therefore cannot be sold, disposed or destroyed. It likewise covers sustainable tradition resource rights. The recognition of the legal status of the right of Ancestral-lands state in the "Certificate of Ancestral-lands Title" that refer to the title formally recognizing the rights of Indigenous Peoples over their Ancestral-lands. In the case that any activities on Ancestral-lands, it needs a prior consent from all members of Indigenous Peoples according to their respective customary laws and practices [3].

Under the Indonesian Government, "*Indigenous Peoples*" or ILC are recognized in Indonesian positive law, in the national and regional dimensions, including in the Indonesian State Constitution, and the Decree of the People's Consultative Assembly [4], as well as Sector Laws [5], also in the regional dimensions of Regional Autonomy [6]. In Article 3 of Law Number 5 Year 1960 concerning Basic Regulations on Agrarian

Principles ("UUPA/1960") as positive law, it is stated that the implementation of customary rights and similar rights is from the ILC, as long as in reality there still must be in accordance with national and State interests and higher law legislation [7].

In Indonesian legal politics towards Ancestral-lands in Article 3 of UUPA/1960 does not provide important definitions that can be used to formulate the substance. This gives a problem of interpretation which is likely to cause the absence of legal certainty in its implementation. Article 3 of UUPA stipulates that the exercise of customary rights must fulfill the following requirements: (1) as long as according to the reality it still exists, (2) according to national and state interests, (3) based on national unity, (4) may not conflict with higher regulations. In the General Explanation of Article 3 of the UUPA on point (1) no explanation is given [8]. Post the Indonesian reform in 1998, at the urging of Non-Government Organizations ("NGOs") who were worried about conflict over Ancestral-lands, the government issued a Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency No. 5 of 1999 concerning Guidelines for Resolving the Issue of Ancestral-lands of Indigenous Law Communities ("PMA 5/1999"). In PMA 5/1999 the Ancestral Law is defined as: "Ancestral-lands and similar to that of the customary law community, is the authority which according to customary law belongs to certain customary law communities over certain areas which constitute the environment its citizens to take advantage of natural resources, including land, in the area, for their survival and life, arising from a hereditary and inward, uninterrupted relationship between the customary law community and the area concerned". PMA 5/1999 was revoked by the Government in 2015 but in 2016 was declared valid again. [9].

The problem that arises regarding the release of Ancestral-land is the inequality of perception between the executive, judicial and legislative bureaucracy in the consistency in providing compensation resulting in the reclaiming of the Ancestral-lands [10]. In this circumstances, could Ancestral-lands be empowered specifically in the investment development in Indonesia in the form of partnership between the ILC and the business entities (government-owned enterprises and private enterprises) other than in the form of transfer of rights or release of Ancestral-lands to such business entities?, and how the role of ILC in implementing the conception of such partnership?

2. LITERATURE REVIEW

2.1. The Concept of Public Private Partnership

The partnership between public and private or public private partnership ("PPP") is a western law concept. PPP contract particularly the model of concession. The current PPP scheme is thus based on a *rediscovery* of the PPP contract model with a concession approach and the development of the PPP contract model with the PFI approach. It should be noted that in some countries only the PFI contract model is referred to as PPP, to distinguish it from the concession contract model [11], beginning of its development was in France. Although the term PPP is new, the concept of using private capital to provide public facilities is very old. In the 18th and early 19th centuries British corporate groups formed a "turnpike trust" [12], who borrowed money from private investors to repair roads, and the loan was paid back from *tolls*. In France, canal construction with private sector capital began in the 17th century. Model contracts PPP is known as a model concession contract ("*concession*"): the model of "user pays" in which the private sector recipient of the concession ("the concessionaire") are allowed to charge (*fee*) public services in public for the use of the facility, for example, toll payments for bridges, tunnels or roads. Tolls are used to repay the private sector in the construction and operation of facilities, which are usually returned to the public sector at the end of the concession period. In Indonesia, the PPP concept had already begun in 1998 in the construction of the Jakarta-Bogor toll road infrastructure, being chosen as an alternative by the Government since infrastructure development began to falter due to the coming of the monetary crisis [13].

2.2. Ancestral-Lands Under Customary Law

Customary Law as the living law in Indonesia, has a function as a main resource of the development of National Land Law as well as complement of Positive National Land Law. In this circumstance, as increasing of New National Land Law, the existence, scope and range of Customary Law will be decreased [14]. Some scholar gives some different opinions concern to the existence of Customary Law, the variety of legal opinions from several scholars upon the existence of Customary Law as the basic of National Land Law gives the consequences that there are no standard guides for executive or officer or professional or legal actor, especially in the case of Customary Law face against the positive law of National Land Law. Notwithstanding, it doesn't mean that Adat Law should be against UUPA/1960 as positive law, but both should be synergy and harmonize towards the agrarian justice for the society [15].

Ter Haar in his book "Beginselen en stelsel van het Adatrecht" describes the state of the arrangement of legal associations according to various forms found in various structures of the people throughout Indonesia, which can be described in general lines or grounds: (a) all the legal alliance body is led by the heads of the people, (b) the nature and composition of the leadership is closely related to the nature and composition of each type of legal association body concerned. From this it can be concluded that the activities of the head of the people are mainly: (a) actions regarding land affairs related to the existence of close ties between the land and the land ownership agreement, (b) the administration of law in an effort to prevent violations of the law, so the law can work as well as possible (preventive coaching), (c) carry out the law as a legal correction after the law was violated (coaching repressively) [16].

As legal subjects, the alliances can act both within the scope of civil law and public law. For example, in ILC's customary rights there are aspects of civil law (i.e. shared ownership rights to the land with members or citizens), and public legal aspects (i.e. contains duties to manage, regulate and lead control, maintenance, designation and use) [17]. Then, the objects of Ancestral-lands consist of: land, water (waters such as river, lakes, beaches and their waters), plants that live wildly (such as fruit trees, wood or carpentry trees or firewood and others), wild animals.

The validity of Ancestral-lands applicable force out means that the non-ILC citizen principle is not allowed to participate in working on Ancestral-lands which is the territory of ILC, except with permission from ILC and pay income and then provide compensation. Whilst, the enforceability of Ancestral-lands applicable inside means that all citizens of the ILC together as a unit, can utilize the Ancestral-lands to reap the rewards of Ancestral-lands on all plants and wild animals that live on it. This right limits the freedom of ILC citizens in the interests of ILC [18].

Based on Adat Law, there are 2 types of land rights [19]: First, right to allied land rights (Ancestral-lands - "Beschikkingsrecht").

Second, individual land rights (lands owned by individual - "Inlands Bezitrecht"). These individual rights are limited by Ancestral-land owed by ILC, where an ILC resident has the right: collecting forest products, hunting wild animals, taking produce from trees, etc., on the condition that he must respect: the rights to Ancestral-lands, the interests of others who own the land, customary regulations. If this land is abandoned, the rights of the ILC residents will become a shared right of ILC. Land ownership systems vary in various customary laws. For example, for Javanese traditional law, there are 4 types of agricultural land ownership systems: (1) Public or communal property systems with use instead, (2) Communal-owned systems with rotating use, (3) Communal-owned systems with fixed use, and (4) Individual-owned systems [20].

2.3. Ancestral- Lands Under Indonesian Positive Law

Recognition of the existence of ILC in Indonesia has been stated in legislation, starting with the 1945 Constitution of the Republic of Indonesia (UUD 1945) the second amendment which in Article 18 B paragraph (2) states that the state recognizes and respects ILC units and their rights their traditional rights as long as they are alive and in accordance with the development of society and the principles of the unitary state of Indonesia. Then in Article 28 I paragraph (3) states that cultural identity and traditional community rights are respected in line with the times and civilizations [21].

However, Daniel Fitzpatrick in his research, said that the original systems (in this case adat rights over Ancestral-lands) were subordinated under UUPA/1960 as a result of the conversion of customary rights into rights not guaranteed by law. The Political Law of the Government in Articles 2, 3 and 5 of UUPA/1960 that subordinates this to the extreme by treating all land that is not certified to be under the direct authority of the state or "Right to Controlled by the State" (HMN) [22]. So in relation to Ancestral-lands there are three arguments in that context, namely: (1) the customary rights of the occupants are not included in the list of customary rights which are converted into rights which are guaranteed rights according to UUPA/1960, (2) by not being registered and obtaining a formal certificate according to UUPA/1960 means that any rights that have ever existed are lost due to lack of registration efforts or due to abolition, (3) as stipulated in Article 8 of the Minister of Agrarian Regulation No. 2 of 1962 that the transfer of ownership of customary lands without authorization from the village head or customary head would result in the new owner only receiving usage rights for five years, after which the land would be transferred to the state [23].

Legal construction that exists in UUPA/1960, the granting of land rights such as "Right to Cultivate" (HGU), "Right to Use" (HP) above land that comes from Ancestral-lands begins with the process of releasing Ancestral-lands from ILC into state land. This means it is released forever. When Ancestral-lands has been released to a third party, then a third party can be given a right on land on state land and that right can be extended by a third party with a request to the state. Obviously this is detrimental to the ILC because the loss of Ancestral-lands forever let alone accompanied by improper compensation. This problem has been tried to be fixed in the proposed draft land law, where if the HGU period expires then the land will return to the ILC control or return to state control if the ILC is not exist or the ILC will release it, then when the application for the extension of the HGU and ILC is still there is then an application can be submitted after obtaining written approval from the concerned ILC, and the granting of the HGB on condition that the business

activities carried out support the interests of ILC, preserve the environment. In the case of MIFEE the average Ancestral Lands are valued at IDR. 300,000 (three hundred thousand rupiah) per hectare. This means that it is tantamount to assuming that their land has been lost and that it is impossible to return to their control [24]. In fact, the implementation of utilizing Ancestral-lands in Indonesian positive law, there are many conflicts of which. Even if, the use of Ancestral-lands by outsiders who are not members of ILC is allowed to open and utilize a portion of Ancestral-lands by paying the so-called "recognition" [25].

3. METHOD

The nature of this research is qualitative normative juridical [26]. To answer the legal issues in this study, a legal study was conducted. Legal research is an activity of know-how in legal science, legal research is carried out to solve the legal issues faced [27]. Normative juridical research methods are also called library legal research is legal research conducted by examining library materials or secondary data [28]. This secondary data includes primary, secondary and tertiary legal materials. To obtain research results that can be scientifically justified, the writing of this study uses the theory of corrective justice from Aristotle and the Chicago approach to Law and Economics which refers to economic equilibrium.

The problem of PPP is "economic equilibrium in investment contracts", and it can be seen from the argument of Professor Dr. Klaus Berger, in his writing on "Renegotiation and Adaptation Clauses in Investment Contracts, Revisited". He argued that [29]: (a) because these contracts typically are of long duration, the political, economic and social climate could change radically during this period and dramatically alter the economic benefits that the parties originally envisioned would flow from the agreement, (b) a negotiation clause may both protect a state's sovereign right to change laws that may affect the agreement and provide a measure of protection to the private investor. He saw that the existence of this clause was a stabilization clause in which if the government changed its law it would affect economic equilibrium.

Regarding the economic equilibrium problem, Aristotle explained that corrective justice is equal, but equality in this case is not based on geometry but based on arithmetic proportions. Rationalization or concretization of the idea of justice can be stated in a clause on "Stabilization" and "Renegotiation" in contracts or in the form of laws. This normative legal research will provide an alternative idea of the use of Ancestral Land which is more effective and beneficial for ILC in improving the welfare of such ILC [30].

4. RESULT

There are still differences of opinion among the Government, the public and experts regarding the term Ancestral-lands, as well as the regulation being spread sporadically in several laws and regulations resulting in the absence of legal certainty and legal protection of the Ancestral-lands. This creates conditions for over-regulation and overlapping regulations in the field of land and natural resources, the absence of guidelines for equitable compensation for the use of Ancestral-lands so that ILC will always be a disadvantaged party [31].

Related to HMN ("State") contained in Article 1 number (6) of Law Number 41 Year 1999 concerning Forestry (Law 41/1999) submitted by the Judicial Review, the Constitutional Court has ruled that the word "state" in Article 1 number (6) of Law 41/1999 is contrary to the Indonesian Constitution and it is stated that the word "state" in the article has no binding legal force so the Article should read as "Customary Forests are forests within the territories of indigenous and tribal peoples". Referring to the Decision of the Constitutional Court Number: 35/PUU-X/2012 which was pronounced in the plenary session of the Constitutional Court dated May 16, 2013 related to the Judicial Review of Law Number 41 of 1999 concerning Forestry. In the opinion of expert Maria SW Sumardjono, it is not appropriate if customary forests are included in private forests, because the authority of each legal subject is different. State Forests are subject to the state and their authority is public. Forest Rights are individuals/legal entities and civil authority. Indigenous Forests are subject to ILC and its authority is public and civil. This opinion is because according to Article 16 paragraph (1) UUPA / 1960 regarding land rights, customary rights (Ancestral-lands) are not included in land rights [32].

Muhammad Bakri's research, ILC's Ancestral-lands and private lands should not be taken by the state to be subsequently given to a legal subject at any rate, except those permitted by legal provisions namely by revoking land rights [33]. The issue of HMN in the forestry sector also becomes a problem where the government policy regarding the implementation of forest tenure rights in forestry's ancestral lands, apparently in its implementation can lead to conflict with the ILC which controls the forestry's customary lands. Bambang Daru Nugroho said that the ILC should be able to exercise its rights to natural resources in its ancestral lands, but in reality various obstacles arose. This is because: (1) various kinds of policies in implementing development programs marginalize the existence of ILC, development success is only measured at a macro level at the state level, (2) ILC has traditional characteristics considered as a constraining factor for development, (3) various kinds of stereotypes given to ILC are like forest encroachers, shifting cultivators, poachers, and others with a negative rating [34].

5. DISCUSSION

5.1. *Transaction Upon Ancestral-lands Under Adat Law*

In the case of land transactions, according to Customary Law, it can be divided into [35]: First, transactions that are unilateral legal acts. An example is, (a) the establishment of a village where a group of people inhabit a certain place and make a settlement on the land, (b) land clearing by an individual citizen of ILC with permission from the village head. Second, the nature of the legal action of two parties, of which in this transaction, there will be a transfer or surrender accompanied by a cash payment from another party at that time [36]. Then the transaction which is a legal act of the two parties over by B. Ter Haar bzn divided into two groups [37]:

First, the action sequence whose object are the land. This transaction is an element of legal action is the simultaneous transfer of rights to land with cash payments ("cash" - "contingent handling") [38]. In this case, assistance from "community leaders" or "customary leaders" is needed so that when or when a transaction is made, it is stated before the leader of ILC. Partial payments must be seen as cash and the balance of the payment is considered an ordinary money loan.

Second are the transaction of which the object are not the land. This transaction is an agreement related to land where land is an important factor but the object is not land. In this case need not be done in a "light" before the Leader of the ILC but fairly among the parties, rarely made "identity documents" ("deed") on the agreement, the applicable period of the agreement within one year of harvest, the agreement can be made by anyone (owner land, pawn buyers, land tenants on annual sales, revenue collectors).

Regarding legal subjects in land transactions in customary law, there are 2 legal subjects, namely, the first is personal nature which basically has legal rights and obligations from birth to death. This personal nature of his rights and obligations has a legal effect on his legal behavior if he is deemed capable or capable in legal actions and this skill in customary law occurs when he is an adult [39]. The second is the legal person, which is a subject of legal creation because there is a need to fulfill certain interests on the basis of shared activities, there are idiotic goals that need to be achieved without always depending on personal nature individually or individually.

So this legal person can have a legal relationship, seen in a legal event. An example is the ILC as a legal subject which is represented by leader of the ILC. The customary leader (leader of ILC) as the party representing ILC as a legal subject, the ILC is a unit of authority, environmental unit and legal unit that has its own power and its own assets in the form of material

and immaterial objects. Some Supreme Court decisions related to ILC as legal subjects (personal law) are:

- (a) Decree dated 19 September 1956 Number 39/Sip/1956 concerning village rights to land in the Lamongan area. The point is that people who get land from the village on the basis of the loan can transfer it to another party if there is agreement from the village.
- (b) Decree dated 9 March 1960 Number 65K/Sip/1960 concerning village rights to land in the Klaten area. The point is that for the legal transfer of land rights, a village decision is needed.
- (c) Decree dated 24 August 1960 No. 239K/Sip/1960 concerning the rights of indigenous and tribal peoples to land in the Tapanuli region. The point is that in the case of land grabbing, "huta" must sue [40].

5.2. *PPP Concept as Alternative Model of Partnership Between Indigenous Law Community and Business Entities*

In the implementation of UUPA/1960 derived from customary law, there are several principles that need to be considered: (1) The principle of Horizontal Separation, which means ownership of houses and buildings and plants above it is separate from land ownership, (2) The concept of transfer of land rights is related to the civil aspect (buying and selling) before the official of land deed ("PPAT") and the legal aspects of administrative registration of the transfer of rights, then the concept of "clear, real and cash" is carried out before the "PPAT" official and the registration is carried out by authorized agency, (3) The concept of obtaining rights, in customary law, a person can obtain rights by fulfilling certain conditions such as permission from the authorities, who control the land by proving it and carried out and known by the environment community honestly, (4) The existence of ILC is not subject to on the country's will, meaning recognition of the ILC and Ancestral-lands with a public and civil perspective not government decisions on ILC and Ancestral-lands are "declaratory" (announcing what already exists) and not "constitutive" (announcing something that did not previously exist or did not yet exist), (5) The concept of legal relations between ILC with land that is both public and civil and only civil, (6) Institution of "rechtsverwerking", meaning that land rights and legal relations between individuals and land are influenced or depend on the length of time, and customary law also regulates the period of time required by someone to obtain a right and vice versa when someone loses rights, (7) Nationality principle in UUPA/1960 where the subject status of rights influences the relationship with the object of rights, that is, only Indonesian citizens can have full relationship (ownership rights) with land, (8) The concept of abandonment of land which is the

implementation of the concept of "rechtsverwerking". The formulation in point 7 is an adaptation of the difference in legal relations between "fellow ILC citizens" and "outsiders ILC" in customary law to the same land. In ILC, the relationship between lands with fellow ILC residents is full, while the relationship between lands with outsiders ILC is less full [41].

PPP itself is a cooperation agreement between a legal entity both a public and a private as a land owner who does not have the capital to build an infrastructure, in collaboration with private parties who have technical and financial capabilities, by providing concessions for a certain period of time, with the project financing system [42]. This concept, can be transplanted into Indonesian positive law as per the law transplant theory proposed by Alan Watson. Watson's theory begins with the assumption that there is no inherent relationship between law and society in its implementation. Watson believes that law is broadly autonomous, with its own life. The legal rules are simply transplanted, because they are *good ideas*. Watson also does not actually present a method to predict the continuity of proposed legal transplants. He then identified several factors, which he believed should be considered to be decided if the conditions were ready for a change in the law by transplantation [43].

In the state administrative legal framework, Paul Craig, quoting Freedland's opinion, explained that Freedland has identified PPPs in three main types (one type is a concession right - item b), namely [44]: (a) the private sector provides capital assets, the use of which is then paid for by the public sector, (b) a public service such as a bridge or a road is built by the private sector, which then is titled to the tolls from those who use the service, (c) the assets provided by the private sector will be paid for partly by rent directly from the public body, and partly payments made directly by the public. Related to the application of the concept of PPP (Western Law) to Ancestral-lands (Adat Law) in positive law in Indonesia, it is necessary to synchronize both legal concepts in positive law in Indonesia. Ancestral-lands enactment means that non-ILC residents are not allowed in principle to participate in working on Ancestral-lands which is the territory of ILC, except with permission from ILC and pay income and then provide compensation, so outsiders not residents of ILC can get the opportunity to participate in using Ancestral-lands [45].

5.3. The Role of Indigenous Law Community Against Partnership for Prosperity of Indigenous Peoples

As explained above, there are 3 types of territorial legal alliances, namely: (a) village alliances, (b) regional alliances, (c) several village alliances. Ter Haar also explained: (a) All legal fellowship bodies

are led by the heads of the people, and (b) The nature and composition of the leadership are closely related to the nature and composition of each type of legal community association concerned. As a subject of law then such alliances can act both within the scope of civil law and public law.

Judging from the legal structure of the ILC mentioned above it can be said that academically ILC meets the elements of modern government (the author gives the term as "Pseudo Government" or "Pseudo Government"). The scope of the area can be in one province or even across provinces. Including the Ancestral-lands coverage of the ILC [46]. The difference lies in the legal nature, where ILC is based on unwritten law or "living law" (understand "natural law") [47], whereas modern government is based on positive law (understand "legal positivism") [48]. Then associated with the positive law of Indonesia where ILC legally recognized, but many conflicts over Ancestral-lands which harm the ILC as research conducted by Maria SW Sumardjono [49].

In this circumstances, should ILC got representation in the Regional Representative Council or "Dewan Perwakilan Daerah" (DPD). So that ILC Representatives in the DPD can: (a) provide an objective understanding of ILC issues related to State Land, Ancestral-lands and land rights in the context of Customary Law and Positive Law, (b) take a persuasive-educative approach and not impose a unilateral will, and (c) cultural-religious approach with three elements, namely the leadership of indigenous leaders, religious leaders and formal leaders who truly understand the Customary Law and Positive Law, especially related to National Land Law [50].

With there being ILC representatives in the DPD, referring to the legal system, as Friedman formulated: (a) aspects of the structure of the legal system (*legal structure*), (b) the substance aspect of legal system (*legal substance*), and (c) the cultural aspects of the legal system (*legal culture*) [51]. The substantive aspect has been fulfilled by ILC as a legal subject and the implementation of customary law norms, while the legal structure aspect has been represented by the ILC in the DPD which can make regulations that provide an economic balance between ILC and investors, and for the legal culture aspect will emerge by itself with the role of ILC in the DPD. With the presence of ILC representatives in the DPD, can make regulations to overcome the condition of having unbalanced information ("Asymmetric Information") between ILC and large and multinational companies over the condition of Natural Resources in the Ancestral-lands region. It is stated that the *Asymmetric Information Doctrine* is: "*Consider a dynamic contract between a principal and an agent, where initially the productivity of the agent is not known to the principal. In any separating equilibrium, productivity of the agent will be known to the principal after the first period. For the 'bad' type of agent, separation of*

involves a distortion leading to a lower utility in every period of the contract than would be the case if his true type was known. If the true type is really the bad type, the distortion can be removed after the first period when the agent's type is known for sure. Hence if renegotiation is possible, it will take place - the contract is not robust against renegotiation. Moreover, since both parties want to renegotiate, it is difficult to see how the legal system can prevent this happening..." [52].

And also made regulations that provide control mechanisms for unbalanced contracts between the ILC and large companies which have an adverse effect on the ILC. Referring to Atiyah's view, it is said that the contract has three basic objectives: (1) enforce a promise and protect reasonable expectations that arise from it, (2) prevent enrichment or efforts to enrich themselves carried out unfairly or improperly, (3) "to prevent certain kinds of harm. Besides that, Herlien Budiono added from the three objectives that the other essence of the contract objective is derived from the principle of harmony (harmony) in Customary Law, namely: (4) the fourth goal of the contract is to strike a balance between one's own interests and those of the opposing parties [53]. Thus, representatives of ILC is expected can be a channel of their aspirations for regional development (ILC) as mandated by the Constitution of Article 33 paragraph (3) of the 1945 Indonesian Constitution, namely natural resources (earth, water and natural resources contained therein) overpowered and controlled by the State and is used for the greatest prosperity of the people and is certainly in line with the spirit of Regional Autonomy.

6. CONCLUSION

The transfer of rights or releases of Ancestral-lands of which owned by ILC to Business Entities arises many conflicts between ILC and the Business Entities. The problem arises regarding the release of Ancestral-lands is the inequality of perception between the executive, judicial and legislative bureaucracy in the consistency in providing compensation resulting in the reclaiming of the Ancestral-lands. It means that the regulation (PMA 5/1999) do not reflect the Customary Law in Indonesia. Actually there are many alternative agreement between the ILC and third parties in order to utilize the Ancestral-lands for prosperity of ILC. Under Customary Law there are several forms of the agreement to utilize Ancestral-lands by the ILC to get the results or benefits without must release the right to land owned by ILC to outsiders. In modern law it is known as PPP contract, and this PPP concept needs to synchronize with customary law with the role of the leader of Adat Law as the legal subject of PPP.

In the implementation of partnership between ILC and Business Entities need the role of ILC in the local government by appointed the representative of ILC at DPD. This representative of ILC is important in order to control the economy of comfort between ILC and

Business Entities under regulation of which the contract is running for long term. The representative of ILC at DPD also gave the ILC representative to anticipate the "Asymmetric Information" between ILC and Business Entities. It is expected that ILC representatives can channel their aspirations for the progress of their regional development as mandated by the Constitution. Therefore, natural resources (earth, water and natural resources contained in them) could be controlled by the State and are used for the greatest prosperity of the people and certainly in line with the spirit of Regional Autonomy.

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