

The Legality of Land Purchase that was Conducted Based upon Adat Law: A Case Approach at Denpasar Court

Dewa Nyoman Rai Asmara Putra, SH. MH

Faculty of Law, Udayana University, Bali,
INDONESIA.

dewarai786@yahoo.com

ABSTRACT

Judges are of ten regarded as the mouthpiece of the law. Yet the politics of law in Indonesia, still acknowledges legal pluralism, in the sense that while it recognize written law as codified law with the goal of unification, it also recognize common law called customary law which still remain valid and respected by the public to the extent not contrary to the national interest Indonesia.

The fact of recognition of customary law canals be found in some of the legislation that expressly recognizes the existence of customary law, even in national politics both in the Guidelines and in RPJP (Rencana Pembangunan Jangka Panjang – Long Term Development Plan), customary law as the basis of national law formation.

Due to the formation of customary law is used as the cornerstone of national law, it acknowledges and gives space to the living customary law to remain in force in the social life in the community.

Therefore the judge in handling and deciding the case must consider any written law in a legal sense legislation codified, and also should pay attention to the unwritten law which is also called customary law. Although there is such written law that governing and registration(Government RegulationNo.24 of 1997) which requires the sale of land made in front of the official officer(PPAT).

Keywords: Buying and selling of land is done according to law is legal

INTRODUCTION

Background Issues

A proverb stated that "judge is the mouthpiece Act", which means the judge in examining and deciding the case is too often basing solely on the law. This fact has proven that they have not been able to provide sense of justice and decency for justice seekers.

Prior to the enactment of Law No.5of 1960 on Basic Regulation of Agrarian often abbreviated with BRA and(hereinafter simply referred to BRA), as well as Government Regulation No. 24Year 1997on Land Registration, sale and purchase of land is already common practice in the community of them since long before the enactment of the national agrarian law. Buying and selling land carried out by local custom or customary law.

Legal issues in this study, is about the role of the judge in considering the unwritten law(customary law) in deciding case of buying and selling land that is only done according to customary law, as an effort to meet the values of justice and the values of decency that live in the community.

Customary law is a law of indigenou peoples in Indonesia that has existed since time immemorial, long before the independence of the Republic of Indonesia, which means before the Indonesian state is formed. The politic of our national law including the law of agrarian still noticed that the agrarian laws that have been established based on customary law. It may

be found in the BRA5, which essentially determines that the agrarian law that applies to the earth, water and air space is customary law, with regard to the elements based on religious law. Throughout the customary law is not contrary to the national interest and the interests of the Republic of Indonesia.

So the next legal issue is whether the purchase is done according to customary law after the enactment of the BRA can be justified under the law. The judge in hearing the case is bound by the provisions of applicable law particularly with regard to formal law. Before the verdict the judge must do three (3) important measures are: *mengkonstatir*, *mengkwalifisir* and *mengkonstituir*. In *mengkonstituir* action means the judge found the law on a case that is being examined. In case the judge determines the law, apply the adage "us Novitcuria" (the judge deemed to know the law). This adage is not as simple as saying "the judge deemed to know the law" but it can also mean that the judges deemed to know the law that can provide justice for litigants. All that has to be loaded in considerations of judgment. In this case the legal issue to be raised is whether the judge in finding that the law of the case being examined, can use customary law, as the law of life and meet the values of justice in society.

This is what drives the desire of researchers to conduct research to analyze court decisions relating to the case of sale of land made under customary law after the enactment of BRA and Government Regulation No. 24 Year 1997 on Land Registration. Because obviously the sale and purchase of land under customary law, are not eligible land purchase according to the legislation (Government Regulation No. 24 of 1997)

FORMULATION OF THE PROBLEM

1. How the judge considers a case that is related to the sale and purchase of land under customary law after the enactment of the BRA and government Regulation No. 24 Year 1997 on Land Registration?
2. Is the land sales conducted under customary law after the enactment of the BRA and Government regulation No. 24 of 1997 on Land Registration and can be said to be legal?

SCOPE OF PROBLEM

The scope of the problem in this research is how to include the consideration of the judge in deciding case that made the sale and purchase of land under customary law after the enactment of Act No. 5 of 1960 (BRA) and Government Regulation No. 24 of 1997. As well as the validity of sales purchase of land is done under customary law after the enactment Act No. 5 of 1960 (BRA) and Government Regulation No. 24 of 1997

OBJECTIVES AND BENEFITS

Research Objectives

In accordance with the above formulation of the problem, it can be said that the purpose of this study is as follows;

1. To find out how the role of judges in check, hearing and deciding a case to explore the values of law and the values of justice and the values of decency that live-in the community.

2. To determine whether the sale is conducted in accordance with customary law after the enactment of the BRA and Government Regulation No. 24 of 1997 can be said to be lawful

Benefits of Research

This research is expected to have benefits as follows:

1. For the law enforcement community, usable guidelines for dealing with cases of how judges in exploring legal values, the values of justice and the values of decency that live in the society, especially regarding the sale of land under customary law after the enactment of the BRA and Government Regulation No. 24 of 1997, as jurisprudence;
2. For the experts/academics can add insight that the judge should explore legal values, the values of justice and the values of decency that live-in the society, especially regarding the sale of land under customary law after the enactment of the BRA and Government Regulation No. 24 of 1997.

METHODOLOGY

Types of Research

This research is kind of normative research (doctrinal legal research) Sunaryati Hartono normative research suggests that usability is to conduct basic research (basic research) in the field of law, particularly when we are looking for a principle of law, legal the organic legal system, especially in the discovery and formation principles of the new law, new legal approaches and new national legal system.¹ This study is included to find the legal system is a legal system that is used by the judge in deciding the case of buying and selling land based on customary law.

Type of Writing Approach

In this study using several approaches:

1. Case Approach, namely the trace and by presenting his issues, legal consideration and the injunction of court decision;
2. Legal Approach, i.e. legislation trace regulations pertaining to the sale of land rights;
3. The approach to the analysis of the concept of law, which is intended primarily to analyze court decisions regarding the application of the law contained in legal reasoning (amar) in relation to his problem as well as the verdict.

Source of Law Material.

Legal materials in the study include both primary legal materials, secondary and tertiary.² In this study using primary legal materials such as, Denpasar District Court's Decision No. 166/Pdt.G/ 1988/PN.Dps. September 11, 1989, the High Court Decision No. 174/Denpasar/Pdt/ 1989/Pt. Dps. Dated January 18, 1990 and the Supreme Court of the Republic of Indonesia No. 2546K/Pdt/ 1990, May 22, 1993. These secondary legal materials, is to conduct research studies in the form of document library to find expert

¹Sunaryati Hartono, *Penelitian Hukum di Indonesia pada akhir abad ke- 20* (Bandung: Alumni Bandung, 1994), 414.

²Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif* (Jakarta: Rajawali Pres, 1990), 15.

opinions(doctrine). While tertiary legal materials, such as dictionaries, and other things that can support primary legal materials and secondary legal materials.

RESULTS AND DISCUSSION

Sources of Written Law and Not Written Law

Law enforcement in Indonesia today received tremendous exposure, because many controversial court ruling that H.ZainuddinAli, in his Sociology of law argues: "One of the main sources of conflict and violence in various areas of law enforcement is the condition in Indonesia is very weak.³We cannot close our eyes to the issues that have been widely circulate din the community that if you do not have much capital then do not expect to win the case. So many seekers of justice sense of injustice. Injustice can also because by lack of attention to the judge's sense of justice (propriety) and the laws which live-in society.

In the Civil Law system, or known by the legal system of law(statute law system), the main source of law is a positive law in the context of the codified law. The system was adopted and developed countries in the region that includes the continental mainland Europe such as Germany, France, and the Netherlands. Based on the principle of concordance during the Dutch colonial system is also followed in Indonesia until now.⁴Raised the question of whether the law was coded only the judge can uphold truth and justice? The proverb *Ius Novitcuria* also needs to know the interpretation that judges regarded to be able to fulfill a sense of truth and justice seekers of justice.

With regard to the proper law, means the judge in the case to determine the appropriate legal applied incases handled, the judge also should know the law. Among the applicable laws where the proper law to be applied to the case that is being handled. Before independence even before the colonial period in Indonesia, the prevailing local customs laws that are still among the diverse ethnic groups that are present there called customary law.⁵*UbiSocietasIbiIus* adage, which is often interpreted into "where there are people there is no law", it is appropriate to describe the lock state in Indonesia and those of us who never studied law. This adage expressed by Marcus Tullius Cicero(106-43 BC), a philosopher, jurist, and political scientist born in Rome. Cicero's words are more or less across the19days of the last century and are still relevant today. This is in line with what is proposed by Karl von Savigny Friedrich(1779-1861)is often regarded as the founder of history reveals, as well as the language of law arising in the public consciousness(common consciousness)of society that embodiesanorganicreality(organic being).⁶Law arose and existed before the State of Indonesia that is now known as customary law.

What is customary law, van Vollenhoven expressed as behavior rules that apply to Indigenous people and Orientals with sanctions (hence is "law") and the other part is in a

³ Zainuddin Ali, H., *Sosiologi Hukum*, cetakan ketujuh (Jakarta : Sinar Grafika, 2012), 73.

⁴Yahya Harahap, M., *Hukum Acara Perdata, tentang Gugatan, Persidangan, Penyitaan, Pembuktian dan Putusan Pengadilan*, cetakan kedelapan, (Jakarta : Sinar Grafika, 2004), 822.

⁵The term customary law is derived from the term "Adatrecht" which was first introduced by Snouk Hurgronje in various seminars in 1998, which was then perfected by van Vollenhoven. See, Moh. Koesnu, *Hukum Adat, (Dalam alam kemerdekaan Nasional dan Persoalannya Menghadapi Era Globalisasi)* (Kumpulan Makalah, Libra Press, 1996), 2.

⁶Lili Rasjid, *Dasar-Dasar Filsafat Hukum*, cetakan ke VII, (Bandung: PT Citra Aditya Bakti, 1997), 31.

state not codified(customary).⁷According Vollenvan Hoven, Customary Law can be found through field work by observing the habits of real in society, including the decisions set by the customs authorities in the community of those cases that exposed him to get settlement. Besides, most of the unwritten customary law. Salman OtjeSoemadiningrat found that the material contained in customary law has no written form.⁸Although there is no written law, but not in the form of unification and codification actually known now.

The arrival of the West, particularly the Dutch were based on the principle concordance, which resulted in dualism(pluralism) law in Indonesian till now. It can be seen in Article 131 paragraph(1) b. IS(Inlands StaatRegelings, Stb. 1925No.447) as the political foundation of Dutch colonial era law that recognize the validity of customary law to indigenous groups. Moreover, at the time of independence, the nation's political Indonesian laws till gives the right at common law, so many laws and regulations that give recognition to customary law. One of the min LawNo.5of 1960onBasic Regulation of Agrarian Principles are often abbreviated as BRA. Article5BRARules:

Agrarian law which applies to the earth water and space are customary law, to the extent not contrary to the national interests and the state, which is based on the unity of the nation, the Indonesian social welfare as well as with the regulations contained in this Act and the other laws, everything with regard to the elements based on religious law.

Article 5 of the BRA showed functional relationship between BRA with customary law.⁹Section5showsthat the political BRA national agrarian law is based on common law. This should be understood as a legal political and legal principle. Because it is not going to possibly change the entire national land law only governed by customary law, because the concept of customary law is unwritten law.

The formation of BRA actually intended to hold unification¹⁰ in the field of land law(agrarian) are based on customary law with regard to elements of religious law. This shows customary law reveals that such a large influence, including the codified law and unification efforts. With regard to the law of judicial power politics that acknowledges the existence of customary law or unwritten law, the judge must dig through and understand the laws that live in the community and must provide basic consideration over a judge's decision, either in the form of written law and unwritten law, is the beginning of act No. 14 of 1970 with regard to Principles of Judicial PowerisregulatedinArticle23 paragraph(1), as where amended by Act No. 35 of1999.Similarly,in Article25 paragraph(1) of Law No.4of 2004thatrepealof Law No.14 of 1970andits amendments, Article 25is affirming that court decision shall contain the legislation in question or the source of the unwritten law. Source unwritten law is customary law intended. Furthermore, reaffirmed in Article27 paragraph(1), as well as in his explanation emphasizes that because of the state of Indonesia still know the unwritten law, the judge serves as a formulator and diggers legal values that live among the community. For that the judge had to plunge into the midst of the community to get to know, feel, and is able to explore the legal senseanda sense of justice in society.

⁷C. van Vollenhoven,*Orientasi Dalam Hukum Adat Indonesia* (Karangan terjemahan Koninklijk Instituut voor Taal-, Land-en Volkenkunde (KITLV) bersama Lembaga Ilmu Pengetahuan Indonesia (LIPI), Jambatan Jakarta, 1981), 14

⁸Otje Salman Soemadiningrat,*Rekonseptualisasi Hukum Adat Kontemporer*, Edidisi Pertama, cetakan pertama (Bandung: PT. Alumni, Bandung, 2002), 17.

⁹Boedi harsono, *Hukum Agraria Indonesia*, Sejarah Perkembangan UUPA Isi dan Pelaksananya, Jilid I, Hukum Tanah Nasional, cetakan kesembilan, (edisi revisi) (Jakarta: Jabatan, 2003), 1.

¹⁰Budi Harsono, 2003, *Ibid*.p. 1.

Judicial Authority Law No. 48 of 2009, the State Gazette of 2009 Number 157 and The official explanation is contained in the Government Gazette No. 5076, there peel of Law No. 4 of 2004, providing an opportunity for the judge to explore life in customary law, including unwritten law is customary law. Article 5 (1) and (2) determine:

- (1) Judges and constitutional judges shall explore, and understand the values of law and sense of justice in society.
- (2) Judges and constitutional judges must have integrity and a personality that is beyond reproach, honest, fair, professional, and legal experience.

Article 10 paragraph (1) determine the Court prohibited to refuse in examining, hearing and deciding case filed on the grounds that the law does not exist or is less obvious, but is obliged to examine and hear.

Under Law No. 48 of 2009 about Judiciary Power determines that the judge shall explore, and understand the values of law and sense of justice in society. Therefore, judges in check, try and decide case cannot be removed with Article 5 (1) and article 10 either paragraph (1) or subsection (2) of the Law of Judicial Power. What is the law of life in the community as well as the provisions of Article 5, paragraph (1) or Article 10 paragraph (1) and (2), there is no time understanding it. In the official explanation of Article 5, paragraph (1) only explained that; This provision is that the decision of the judge and the judges of the constitution in accordance with the law and sense of justice, and the explanation of Article 10 stated quite clearly. Long before the Judicial Authority Law, according to Harmuhammad, in Tolib Setiady, said that "It was a lot of customary law experts who confronted the Ter Haar, but there is no denying that the views Ter Haar is a very deep and caring and understanding. This is evident from the words that every judge should decide this custom, it must realize the depth of the system or setel sel customary law, social realities (social werkelijkeheid) and the demands of justice and humanity to be able to do a good job.¹¹ This also applies to a case of sale of Land is done under customary law, without following the written rules and regulations.

In relation to Article 5 (1) and Article 10 of the Law of Judicial Power, Bambang Sugeng and Sujayadi, argued that the judge may not refuse to examine a case, even under the pretext that the law does not or is less clear. Prohibition for refusing examine cases due to the assumption that judges know the law (*ius curia Novit*), if in case he cannot find any written law, it shall explore, and understand the legal values that live-in the community.¹² In this perspective a good law should provide a more than just a procedural law. The law must be competent and fair; he should be able to recognize the public's desire and commitment to the achievement of substantive justice.¹³ This is consistent with what is proposed by Van Vollenhoven, of the notion that the law is a symptom of a society that is in constant motion, which is associated with other symptoms in relation to the influence of the mutual influence without stopping, no arrest except law it must pay attention to the needs of society.¹⁴ Thus the approach should be made to the law is not only a normative approach, but also an empirical approach. As it Gustrav Radbruch understanding the law as a science and

¹¹Talib Setiady, *Intisari Hukum Adat Indonesia, Dalam Kajian Kepustakaan*, cetakan ketiga (Bandung: Alfabeta, 2013), 12.

¹²Bambang Sugeng dan Sujayadi, *Hukum Acara Perdata, Dokumen Litigasi Perkara Perdata*, cetakan ke -1 (Jakarta: Kencana Prenada Media Group, 2011), 10.

¹³Philippe Nonet & Philip Selznick, *Hukum Responsif, Pilihan di Masa Transisi*, Penerjemah Refael Edy Basco, Cetakan Pertama (Jarkta: Penerbit MuMa, 2003), 60.

¹⁴C. van Vollenhoven, 1981, Po.Cit. p. 1.

normative¹⁵. Laws that address the needs of society is a living law, or law that is desired by the community itself.

VanDijkargues that for everyone who wants to pay attention to living in the vicinity, that in society there area large number of regulations such behavior and behavior that most people adjust to the rules for it¹⁶. Von Savignyargued that the law should not be prepared by forming the law intentionally. Law fundamentally shaped by customs and popular beliefs or by internal forces that work silently. The real law is always natural desire of the people. As with the language and manners, then the law is always evolving; legal to grow with the community and die with it¹⁷. Activities of mutual cooperation, mutual help, deliberation in order to solve a problem is a concrete example of the implementation of the cultural values of customary law. Even with these values was able to resolve the various conflicts in the conflict-ridden are as such as in Sampit, Aceh, Poso and Maluku¹⁸.

Fromvon Savigny's view that the law is true as people's wishes, legal grow, develop and die in the society, none other than customary law. It is because what is meant by customary law by the FD. Holleman, that the common law is a living norms accompanied by sanctions and if necessary can been forced by public or private agencies concerned to be obeyed and respected by the community.¹⁹ Similarly J.H.A. Logemanargued that customary law norms are alive and that is the norm of life together, which is a behavioral rules that must be followed by all citizens in the association of living together.²⁰ The above opinion by legal scholars show that customary laws a living law. Natural mind include the principle of divinity, humanely, unity and togetherness, populist and agreements, as well as justice and society. Therefore, the common law as the law with Pancasila philosophy. However, because the legal embodiment in different areas, the customary law is also the law of national unity (Bhineka Tunggal Ika).²¹ But when we look at today's developments in which national law is dominated by the written law(legislation), then the law of life it must also be seen from the two types of law in Indonesia, on one hand, customary law as the law of life as seen from the properties of customary law properties, nature communes(commun) (community), the nature of cash, and its concrete nature.²² of justice in the society whose laws still plural like Indonesia.

In the perspective of legal pluralism, the state law and not state law(customary law and religious law) has a position that each stand alone, but they all apply in time and space simultaneously. But theoretically that According to Griffiths, distinguishes two kinds of legal pluralism, i.e. strong and weak legal pluralism. A condition said to best rong legal pluralism ifeach is an autonomous legal system and do not depend on state law. If the existence of legal

¹⁵As for Gustav Radbruch, the study of law is a form of science that come from human and God. A science about what is just and unjust. Where Radbruch combine the two approaches, the normative approach and the empiric approach. Gusttav Radbruch in the book of Achmad Ali, *Menguak Teori Hukum(legal Theory) dan Terori Peradilan (judicialprudence)*, volume 1 (Jakarta: Kencana, Jakarta, 2012), 183.

¹⁶Van Dik, *Pengantar Hukum Adat Indonesia*, tejemahan A. Suhardi, cetakan keenam (Bandung: Sumur Bandung, 1964), 1.

¹⁷Soerjono Soekanto, *Persepetif Teoritis Studi Hukum dalam Masyarakat*, cetakan pertama (Jakarta: CV. Rajawali, 1985), 9.

¹⁸Alfarabi, "Rekonseptualisasi Hukum Adat", accessed 6 August 2014, <http://alfarabi1706.blogspot.com/2013/01/rekonseptualisasi-hukum-adat.html>.

¹⁹Hilman Hadikusuma, *Pengantar Ilmu Hukum Adat Indoinesia*, Cetakan ke II (Bandung: Mandar Maju, 2003), 15.

²⁰*Ibid.*

²¹Hilman Hadikusuma, *Hukum Pidana Adat* (Bandung : Alumni, Bandung, 1979), 20-21.

²²Talib Setiady, *Op. Cit.* p. 38

pluralism depends on state law, then such a state is called the weak legal pluralism.²³ Actually the latter circumstances is none other than a pluralism which is another form of legal centralism, because although formally recognize the existence of legal pluralism but superior legal permanent resident of the country.²⁴ In the context of the application of the applicable law in the Indonesian legal pluralism approach called weak legal pluralism. Even the customary law and religious law as the law of diversity that exists in Indonesia received less attention from the law enforcement, because they prefer to hold on to the State law(legislation).

Conscious or not every day we have implemented cultural values of customary law in various social and cultural activities in the community by implementing local wisdom. Activities of mutual cooperation, mutual help, deliberation in order to solve a problem is a concrete example of the implementation of the cultural values of customary law. Even with these values was able to solve various problems in society with a culture of peace, and not ready forward with the culture through the institution of litigation(judicial). Before people familiar with the written law as it is now, the way in which to resolve the dispute is based on the local customs(customary law).²⁵ But even so, the decision of a court is also a form of law through jurisprudence. B.Ter Haar BZN. suggests that the overall rules of customary law is manifest from the decisions of functioning law(in the broad sense) that has the authority and influence and that the implementation of the entry into force immediately and complied whole heartedly.²⁶ Decisions by Ter Haaris including the judge's decision. Soerjono Soekarno argued that the decision taken by the customs authorities and the chief judge must be seen as an individual legal rules which conclude the general legal principles that apply to the same cases.²⁷ Customary law contains determinants in an acceptable position or place within the framework of Indonesian culture. Functional characteristics of traditional legal culture contains the values of the dominant, which can strengthen the position of the national legal system of Indonesia. But on the other hand, stuck to the rigid nature making it difficult to function in providing assurance of justice and propriety to the community justice seekers. As a result, the judge in examining and deciding cases both civil cases and criminal matters most are still using colonial law, either substantive law or the law of procedural, except the Code of Criminal Procedure(abbreviated Criminal Code), by Law No. 8 of 1981. But even so, the common law has significant role, if the judge is not only based on the rule of law but the sheer courage to give justice and propriety in search of justice, according to Gustav Radbrug for the purpose of law is not only justice and legal certainty but also expediency. Even in customary law more emphasis on merit.

Desire of the public to judge according to the law judges who were living in the community as mandated by Article 5, paragraph 1 of the Law of Judicial Power, is the desire of each institution seeking justice through litigation(Judicial institutions). As part of the spirit of reform set out in Article 18. BNR Constitution of 1945, is a constitutional basis as there cognition of customary law community unit along with traditional rights, the law should live and develop according to the Indonesian nation's cultural attention arrestor law enforcement

²³Kurnia Warman, *Hukum Agraria dalam masyarakat Majemuk*, MuMa, Edisi Pertama (Jakarta, 2010), 61.

²⁴Sulistyowati Irianto, *Pluralisme Hukum dan Masyarakat Saat Krisis*, dalam *Hukum dan Kemajemukan Budaya*, Editor E.K.M. Masinambow, edisi pertama (Jakarta: Yayasan Obor Indonesia, 2000), 66.

²⁵Artadi, Ketut dan Dw. Nyoman Rai Asmara Putra, *Implementasi Ketentuan-ketentuan Hukum Perjanjian kedalam Perancangan Kontrak* (Denpasar: Udayana University Press, 2010), 2.

²⁶Hilman Hadikusuma, 2003, *Op.Cit.* p. 14.

²⁷Soerjono Soekanto, 2012; *Op.Cit.* p. 76

agencies to use in deciding case. It is not only the case in Indonesia, wherein the State of the United States is so advanced the development of the law, a Supreme Court Justice named Oliver Wendal Holmes, it is determined to fight for the world of law in general and in particular the world of justice free from the shackles of "formalism-positivism".²⁸ Where're still bound by the principle of legality in Article 1, paragraph 1 of the Criminal Code. (Penal Code) Specifically regarding criminal cases.

In this connectionist may be said of the judges not as the mouthpiece of the law on those cases in court. But should also include the conduct of legal discovery and renewal. An ideal judge is someone who has high intelligence through higher levels of education, should also have a sensitivity to the values of justice that grow live, and thrive society, capable of integrating into the positive law of religious values, because Indonesia is based on belief in the Almighty, also into the values of decency, manners and customs more on customary law living in the community, through a decision on the case at hand. Because in fact the quality and the crown of a judge is situated on the quality of decisions made. The task of the judge is heavy but noble, well run properly because the judge is there preventative of God in the world that can determine a person's life and death. Gustaf Radbruch, argued that the law has a dimension of justice, legal certainty and expediency,²⁹ so the court ruling should be able to reflect these 3 things. Gustav Radbruch, understands the science of jurisprudences an empirical and normative culture. So the legal approach and even then made of the two terms, so as to reflect fairness, no reduce legal certainty and can meet the elements of expediency.

Judge task is heavy, because it is responsible not only to the parties seeking justice but also to all the people (meaning of the trial's open to the public) and even to God.³⁰ "Meaning of Chief Judicial Decision" By Justice Based on God" the head of this decision essentially gives strength executorial.³¹ Therefore the Indonesian judges no longer have to wear Legism to understand, examine and decide the case in which only focused on the law, (as funnel Act), other than the law there is no law."The judge may not refuse to hear cases referred to it by reason of incomplete, unclear Act".

This article gives the judge the possibility of legal digging grow and grow and live in the community. Besides, also the actions of judges based on Law No. 19 of 1964 on Basic Provisions of Judicial Power (Gazette-State 1964 No. 107) repealed by Act 14 of 1970 Nomoo of the Basic Law of Judicial Power, amended by Law No. 35 of 1999 on the Amendment of Act No. 14 of 1970, replaced by Act No. 24 Tahun 2004 and replaced by Act No. 48 of 2009 about Judiciary Power. Far before the Judicial Authority Law enacted, Djodjodigoeno promoted to that; whether our justice will be based on the legal fact that we encounter in our own communities or on legal fact law of a foreign society? Moreover he said that whether the future of our justice in the field of popular law (ius civile) will be based on national law or on Dutch legal facts as colonial law which is now listed in the codifications: BW and WvK Indonesia? Also it has been said that the matter is an insult to our own national

²⁸Penerapan dan Penemuan Hukum Dalam Putusan Hakim, *Laporan Penelitian Putusan Pengadilan Tinggi Tahun 2011* (Jakarta: Komisi Yudisial Republik Indonesia), IX.

²⁹*Ibid*, p. 88

³⁰Based upon article 224 HIR/258 R.Bg, a court decision header has to read "Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa" (For the sake of Principle of one God). This sentence not only contain execution power but also as an obligation for judges to act responsibly before God. Every decision reading must be conducted after a vow to the God therefore it is not something that can be recklessly conducted by others and must be in accordance with the first principle of Pancasila.

³¹Bambang Sugeng dan Sujayadi, *Pengantar Hukum Acara Perdata, & Contoh Dokumen Litigasi* (Jakarta: Kencana, 2012), 9.

laws.³²This view is very clear that the law requires growing, live, and grows the native Indonesian law can be used by the court in deciding a case, because according to the sense of justice and propriety in mind a nation of Indonesia.

Judicial Decision Endorses Buying and selling of Land According to Customary Law

The process of case investigation before the ruling court, must go through certainty ages in an effort to dig and gather facts for cases heard by the judge/judges. The stages of the case investigation process begins with the obligations of the litigants to take the path of mediation as provided in the Supreme Court Regulation No. 01Year2008. If the mediation process succeed, meaning the case be completed, and if the failure of mediation experience continued with the process of case investigation process as it should be, the plaintiff start of reading, answer the lawsuit and if there needs to be account ability and forth from the defendant or the plaintiff “*rekonvensi*” convention, answers from the plaintiff, the defendant 'closing argument from onwards, verification and final conclusion of each party. After the stages pass through the inspection process as it should then according to Article 178 Hetherziene Indonesisch Rechtsreglement abbreviated HIR which applies only to Java and Maduraor Article 189 Rechtsreglement buitenges ten abbreviated RB gare applicable to areas outside Java and Madura, determine if proceedings have been completed, the judge is obliged to pronounce the verdict. In the decision, the judge shall consider all processes ranging from the lawsuit, the defendant answers the plaintiff on the lawsuit, answer to the charge, closing argument, evidence, final conclusion, as well as legal consideration either the written law and unwritten law.

Land transactions in customary law as an unwritten law, is a kind of reciprocal agreement that is real wealth in the legal field, is a form of legal actions that are cash, land is the object of the agreement. This means that the delivery of objects in the form of land as an object of the agreement (as the feat) running the receipt of cash payments(as a counter-achievement). This term is called “selling” (Indonesia) “Sande” (Java).³³

In the common law the word “sale” contains 3 meaning which are, *Jual Gadai*(Indonesia), *AdolSande*(Java), *ngajualakad/gade*(Sunda), which handed over the land to receive the payment and the right to demand the return of land to redeem notes. Selling Release, (Indonesia) *Adolplas*, *runtemurun*, *patibogog*(Java) *menjualjaja*(Borneo) is handed over the land and receive payment in cash, without any right of the seller to redeem back.

While the *Jual tahunan*(Indonesia) *Adoloyodan*(Java), meaning that the land handed over to receive a payment of money in cash, with the promise that the land was returned to its owner(who handed) without returning the money, after few years in accordance with the agreement.³⁴

Judging from the three (3) types of sales in the customary law of sale which are common as is done now is what is called the “selling off” In the concept of Article 1457 Code Civil Law determined that the sale is an agreement by which the parties bound themselves to submit an item, and the other party to pay the promised price.

In connection with the transition(sale) of land rights, Article 37 paragraph(1) Government Regulation No. 24 of 1997, specify:

³²M.M. Djojodigoeno, *Harapan Hukum Adat Indonesia* (Yogyakarta: Yayasan badan Penerbit Gajah Mada, without year), 5.

³³Iman Sudiyat, *Hukum Adat Sketsa Asas* (Yogyakarta: Liberty, 1981), 28.

³⁴*Ibid.*

Transfer of rights to land and property rights to the apartment units through buying and selling, exchange, grant, revenue in the company and other legal acts of transfer, unless the transfer of rights through auctions can only be registered if it is evidenced by a deed made by PPAT authorized by provisions of the legislation in force.

This article is similar to what is specified in Article 19 of Government Regulation No.10 Year 1961 on Land Registration. Which is now repealed by Government Regulation No. 24 of 1997.

From the above it can be said that there is a difference between buying and selling according to the customary law of sale are required by Article 10 of Government Regulation No.10 of 1961 in conjunction with Article 37 Regulation No. 24 of 1997, in terms of land registration.

In this case it can be said that if the sale is further registered in the land office (Agricultural) to return the name to the name of the buyer, the sale shall be evidenced by a deed made by a Land Deed Official (PPAT), and not was quite simply the legal act cash/cash and handed one for the hand at that time, as was done according to customary law. Under the provisions of the article above, suggests that after the enactment of Government Regulation No. 24 of 1997, that the transfer of rights to land (including sale), must be proven with the word of the Land Deed Officer (PPAT).

Under the applicable regulations with respect to the registration of land rights, namely Article 10 of Government Regulation No.10 of 1961 and Article 37 paragraph (1) Government Regulation No. 24 of 1997, if the sale is further registered with the Land Office (Agricultural) to return the name to the name of the buyer, the sale shall be evidenced by a deed made by the official Deed Land (PPAT), and is not enough merely to legal action cash/cash and has been submitted at that time, as was done according to customary law.

Registration of land as mandated by Article 19 of Law No.5 of 1960 on Basic Regulation of Agrarian Affairs. While the definition of land rights is as specified in Article 16 of the BRA, and specifically in this study with respect to the sale of the property, the property in question is in accordance with the provisions of Article 20 of the Brawer ruling:

- (1) Property rights are hereditary rights, the strongest and most people are able to possess the land, keeping in mind the provisions of Article 6.
- (2) Property right can be switched and transferred to other parties.

In accordance with that title in this study is a review of the Denpasar District Court. That District Court Decision No.166/Pdt.G/ 1988/PN.Dps. September 11, 1989, High Court decisions Denpasar No.174/Pdt/ 1989/Pt. Dps. Dated January 18, 1990 and the Supreme Court of the Republic of Indonesia No.2546K/Pdt/1990 Date May 22, 1993.

Subject in this Case:

1. I Made Darma, residing at No.6 Jalan Denpasar reclaiming as Plaintiff
2. Haris Kamido, residing in Housing ITDAMXVIU dayanaas First Defendant the Convention;
3. Mohamad Saleh, residing in the Padang Udayanaas the second defendant/plaintiff Rekonfensi

Object Case:

A piece of land along with house property contained in SHM No.5614/1981 dated October 7, 1981, Figure Situation 1584 dated July 10, 1981, IMB Number Pem.1/24/80 dated January 12, 1980, is located in the vast 154.M2 Padang sambian, Badung regency.

I Wayan Darma (Plaintiff) on June 6, 1988, bought a plot of land within existing house on it corresponding object above case of Haris Kamido (First Defendant) for Rp. 12,500,000, - (twelve million five hundred thousand dollars) done before a Notary/PPATI Gusti Ngurah Putra Wijaya SH. In Denpasar. Therefore the deed of sale has been published No. 166/Dps.B/1988 dated June 6, 1988. So the purchase is in accordance with the provisions of Government Regulation No. 19 of 1961. However, after the Plaintiff would occupy the land with the house is the house is occupied by Mohamad Saleh (second defendant).

Furthermore, the facts revealed during the trial that Mohammad Saleh (II Defendant/Plaintiff) occupies the land and the house is also for purchase of Haris Kamido (First Defendant) on January 6, 1982, Buying and selling is done in customary law. According to the second defendant *Konpensasi*/Plaintiff *rekonpensasi*, Because land and house in question is using the credit facility BTN, the Credit Agreement No. 249/C/K.6/Dpr/ 1975 dated 20-12-1979, the title deed and building permit is still in Bank BTN and will be taken after getting the money acyl these sales and will be submitted to the Convention second Defendant/Plaintiff the Convention. *Konpensasi* second defendant/plaintiff *rekonpensasi* also had made a buy-sell agreement under hand on the ground and the house is worth Rp. 5,000,000 (five million dollars), which was signed by the Seller Haris Kamido (First Defendant) and the buyer Mohamad Saleh (II defendant /Plaintiff *rekonpensasi*) sufficient sealing of Rp. 25, -

Consideration Judge of First Court Decision

The judges in considers that in this case there has been two (2) times the buying and selling of the same object, namely:

- a. Buying and selling first occurred on January 6, 1982, the Defendant I/original owner/seller, the second defendant/purchaser, for Rp. 5.000.000, -(five million dollars) followed by submission and domination by object of the second defendant.
- b. Buying and selling both dated June 6, 1988, the First Defendant to the Plaintiff for Rp. 12,500.000, -(twelve million five hundred thousand dollars), without submission object of sale.

Regarding the sale of the letter a .considered as follows:

1. That the formal judicial sale does not comply with the provisions of regulations Agrarian Minister Number 10 and 11 of 1961 and Article 19 Government regulation No. 10 of 1961.
2. That the sale letter dated January 6, 1982 the seller/First Defendant based on the evidence that there is a legal owner of what it sells. The first defendant is entitled to sell the land with the house in 1982.
3. That on January 6, 1982 the First Defendant/Sellers, home owner claimed to have received money from the sales price of the second defendant/Buyer Rp. 5.000.000, - (five million dollars) and recognizes also at that time had also submitted (Levering) the object of dispute to the second defendant/buyer.
4. Whereas the cash payment of the price and delivery (Over dracht) the object of sale at the same time, following the procurement of deface to of the object at the same (1982) until now continuously open until today (1989). Thus buying and selling between the Defendant I and Defendant II in material already completed a sale and purchase; in terms of substantive law the buyer has become the owner of what is purchased based on cash payment. Judges also consider the views TerHaaras customary law experts,

and referrals to Section 1320(a requirement for the validity of the agreement) and Article 1457 onwards (on sale) Code Civil Code. Also consider Defendant II also has added several rooms/room on the house in question.

5. That the letters of the second defendant turns proof of sale between the Defendant I and Defendant II did not heed the written procedures and legal procedures in the Regulation of Agricultural Ministerial Regulation No. 10 and 11 of 1961 jo. Article 19 of Government Regulation No. 10 of 1961. That the written rules in effect for the rule of law to conceal the Buyer to the Seller which may later denied the sale that in casu, witnesses and officials Village and Seller/Defendant I have confirmed fully carried out the sale date is January 6, 1982. So with regard to the attitude of the First Defendant, the rules are written when disregarded, it is not going to be able to rule out the sale as cash like in causations occur. As in the formulation of a rather well-established law of the Supreme Court can be said that "the provisions of article 19 of Government Regulation No. 10 of 1961 does not intend to waive provisions of the Civil Code or the provisions of the unwritten law of the sale (the opinion of the Supreme Court in its Decision No. 136K/Sip/1971 dated May 27, 1972 published in the Supreme Court Jurisprudence 1973 pages 155-158).
6. That jurisprudence based on the above that actually originates in the written law in Article 1320 ff. and Article 1457 ff. Civil Code and also sourced from the doctrine that views Ter Haar, the Court found the sale of goods dispute between Defendant I and Defendant II was a legitimate sale and can therefore determine that the second defendant is the legal owner of goods disputes.
7. Furthermore, it also considered that the sale and purchase between the First Defendant by Plaintiff on January 6, 1988 is the date of the sale and purchase without the object. Because at the time of sale and purchase between the First Defendant to the Plaintiff in the ground state of the second defendant as the owner since the purchase it was conducted long before January 6, 1982.
8. That in view of the Plaintiff and the First Defendant is a fellow native of Indonesia, which is required in the sale of the requirements to delivery of the goods purchased and the cash price, in casu the plaintiff as the purchaser has never received the handover of land with the house, then buying and selling plaintiff by Defendant I was not perfect and void.
9. Furthermore, it also considered that the sale and purchase between the First Defendant by Plaintiff on January 6, 1988 is the date of the sale and purchase without the object. Because at the time of sale and purchase between the First Defendant to the Plaintiff in the ground state of the second defendant as the owner since the purchase of it was conducted long before January 6, 1982.
10. That in view of the Plaintiff and the First Defendant's fellow native of Indonesia, which is required in the sale of the requirements to delivery of the goods purchased and the cash price, in casu the plaintiff as the purchaser as never received the handover of land with the house, then buying and selling plaintiff by Defendant I was not perfect and void.
11. That the Plaintiff claims to submit a title deed referred to by the judges declared rejected, on the basis that the certificate it self may be filed by the Plaintiff *rekonfensi* by submitting an application to the Agrarian office or local land office.

12. That the plaintiff or the Notary/Land Deed Official(PPAT) have not carefully examined the legal status of the second defendant disputes that the object occupies in real terms. Strictly speaking there was not racing Plaintiff by Defendant II, in which the second defendant obviously controls the land/house at the time of Plaintiff wants to buy;

That based on consideration of the above, the Denpasar court finally ruled on the verdict reads as follows: the exception Reject exception of the second defendant in its entirety, as well as in *Konpensi* Rejecting plaintiff *konpensientirely*. Inrekompensi:

1. Accepted the laws uitrekompensipartly;
2. To declare invalid the sale of land and houses in Jalan Padang dispute Udayana Denpasar Sambian Padang No.10, dated January 6, 1982 between *rekompensi* Plaintiff/Defendant II *Konpensi* and *Konpensi* of the First Defendant;
3. To declare lawful in Jalan Padang Udayana No.10 mentioned above are the property of *rekompensi* Plaintiff/Defendant II *Konpensi*;
4. To declare null and void the sale of land and the house between rekompensi Defendant/Plaintiffby Defendant I *Konpensias* set forth in the deed of sale and purchase of the Land DeedOfficerNo.166/PS.B/1988 dated June 6, 1988.

Considerations of the Law High Court Decision

Denpasar High Court in its decision dated January 18, 1990No.174/Pdt/ 1989/PT.Dpsthel legal considerations(especially about the principal case) states:

In *Konpensi*.

Considering that the first judge's ruling that rejected the claim of the Plaintiff in the opinion of the High Court can be justified because it is evident that the Plaintiff/ Appellant without a thorough examination has been buying land/house disputes of the First Defendant is not entitled to sells ince the land/house has been sold to Defendant II in 1982anddirectlycontrolled/occupied by the first buyer.

In *rekompensi*.

Considering guarded by the High Court cannot be justified and has no legal basis because the transaction is conducted by the Defendants Plaintiff *Konpensi* while there is no legal relationship, so therefore the Plaintiff's claim against Defendant*rekompensi*/Plaintiff

Konpensicannot be accepted;

High Court Verdict Canceled the Denpasar District Court decisions and judge:

In *Konpensi*, in Case Refused Principal Plaintiff in its entirety; In*rekompensi*: Declare that Plaintiff's claim cannot be accepted.

After the appellate decision notified to the parties on February 15, 1990,then the Plaintiff *Konpensi* /Defendant*rekompensi*/comparator file an appeal orally 19 February 1990, published in the deed of cassation No. 7/Pdt/G/1990/PN. Dps. Made by the head of the Denpasar District Courtbailiff. Where the appeal is next, followed by the brief that contains reason or reasons for the appeal, which was received inkepanitraan Denpasar District Courton April 11in 1990.

Legal considerations of the Supreme Court further stated: Considering that the reasons for the appeal(memory /message of appeal) of the applicant's appeal I Made Darma accepted

Denpasar District Courton11 April 1990the appeal was received on 19 February1990,thusmemoryreception/treat is appealed has exceeded the time limit stipulated in Article 47paragraph(1) of Law No.14 of 1985, then the appeal must be declared unacceptable.

In addition to the case presented particularly the Denpasar District Court and the High Court decision of Denpasar, in terms of the verdict as well as legal considerations, it is clear that the sale and purchase was conducted rightfully under customary law lawful.

With regard to the provisions of Article10of Government Regulation No. 10 of1961,there were found, Article 10was held in order to show the registration of land rights, which aims for a strong proof to the buyer. But even so, does not mean that if the sale is not done in front of the Land Deed Officer, a transaction that meets the requirements of materials(both regarding the seller, the buyer and the land) become invalid, meaning not legal act resulting in the ownership of the land in question to those who have paid the price. Article 19 does nonspecifically say so.³⁵

Of the cases presented above both Denpasar State court ruling, as well as High Court decisions Denpasar, seen from the legal considerations and the verdict, and doctrine(the views of the jurists), indicating that the sale is conducted in accordance with customary law in accordance with the requirements specified is the buying and selling lawful, even that the sale was not conducted under the provisions of any written law as determined in the BRA and government regulations with regard to land registration(PP 10PP1961jo24tahun1997)applies. It also means that the judges in examining and deciding case has been dug legal values and the values of justice and even propriety that live in the community as required by the JudiciaryActnumber48of 2009.

CONCLUSIONS AND RECOMMENDATIONS

Conclusions

Based on the description above as are sult of this study is source dona court decision(study of the Denpasar District Court), can be summarized as follows:

1. The judge in handling, examining and deciding a disputed sale of land after the enactment of the BRA along with its implementing regulations, may make customary law as a legal consideration, if the common law sense of fairness in the society, because according to the applicable provisions of judges in examining and deciding a court shall adjudicate the legal values and the values of justice that lives within the community.
2. The court ruling stated sale and purchase of land under customary law, which is done in bright, cash, payment has been made and the delivery price at the same time, after the enactment of the BRA and its implementing regulations, can be said to be lawful.

Suggestion

This papersuggests tolaw enforcement officials, especially judges, tostillgive roomto thecustomary law, as long as theylive in the community, because the lawof lifethat growand thrive in society is the law that best fits the values and sense of justice or propriety of most members of the community concerned.

³⁵Effendi Perangin, *Hukum Agraria Indonsia Suatu Telaah Dari Sudut Pandang Praktisi Hukum*, cetakan kedua (Jakarta: CV. Rajawali, 1989), 28.