



The Existence Of Adat Law Related To Land Right Transaction After Unification Of Indonesian Agrarian Law: The Problem Of Legal Transplant

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ARTICLE INFO	ABSTRACT
<p>Keywords: Transaction; Land; Legal Transplant</p> <p>How to cite: Joesoef, I. E. (2018). The Existence Of Adat Law Related To Land Right Transaction After Unification Of Indonesian Agrarian Law : The Problem Of Legal Transplant. <i>Veteran Law Review</i>, 1(1), 20-31.</p>	<p>Legal transaction related to land still facing some problem in its implementation after government of Indonesia appointed Law No. 5 Year 1960 concerning Basic Regulations on Agrarian Principles. The main problem is, in one side, such Law No. 5 Year of 1960 is based on the Adat Law concept as the Indonesian Living Law, and the other side is, in modern practicing of transaction of which using Western Law concept as global main stream which are transplanted into the National Positive Regulation including National Positive Land Law. The legal questions are how about the existence and its implementation of Adat Law concept especially the conception of land right transfer ("Terang, Riil dan Tunai") concept and how should the government to take legal transplant of such concepts simultaneously (Adat Law and Western Law) which giving the legal certainty for both parties under National Positive Land Law. This conceptual article will elaborate how to make a good academic of legal transplant as Otto Kahn-Freund says that the laws should suit with the society of which the laws is made.</p> <p>Copyright ©2018 VELREV. All rights reserved.</p>

1. Introduction

Land transaction such as land purchasing,¹ strata title indent,² and its mortgage (collateral)³ still facing some legal problem in its implementation since legal political of government taking unification of law in agrarian field in 1960. Article 5 of Law No. 5 Year of 1960 concerning to Basic Regulations o Agrarian Principles (UUPA) stated that agrarian law prevail upon land, water and space is Adat Law as long as appropriate with national interest, based on

¹ Law No. 5 Year of 1960 concerning to Basic Regulations on Agrarian Principles jo Government Regulation No. 24 Year of 1997 concerning to Registration of Land.

² Law No. 20 Year of 2011 concerning to Strata Title.

³ Law No. 4 Year of 1996 concerning to Mortgage of Land and Its Building.

the unity of nation, Indonesian socialism and regulation.⁴

Such transaction cannot be separated with development in Indonesian especially in infrastructure field for instance: development of metropolitan cities, port, base of rail, public road, mining, forest, farming, etc. The law applies of which based on Western Law conception which different concept with Adat Law (individual capitalism versus communal religious).

The above mentioned situation implies that Indonesian Agrarian Law adopted the "legal pluralism" conception. The question is what kind of legal pluralism as stated by Indonesia Parliament Decree (TAP MPR RI No. IX/MPR/2001) concerning to Agrarian Reform and Natural Resource.⁵ There are two interpretation, at first, the pluralism based on "dual systems theory" that merge two legal system (Adat Law and Western Law) together, autonomous, interaction each other, existence in the society and implemented in Indonesian legal formal framework.

We call it "state-law pluralism" of which State Law dominate Adat Law. Secondly, legal pluralism refer to situation that in society there are several law obeyed by the society. The existence of such several law not depend on State Law. Notwithstanding, theoretically, Indonesia tend to under the "weak legal pluralism" or "state-law pluralism" of which the adoption of Adat Law not merely by making rules or regulation but also through judge made law (jurisprudence).⁶

There are, of course, two conceptions of law, of which implemented in practicing of land transaction di Indonesia simultaneously, at first conception of Adat Law such as "Terang, Riil dan Tunai" (real, cash and carry transfer), "Asas Pemisahan Horizontal atas tanah dan bangunan" (Horizontale Scheiding - Horizontal Split Principle upon land and the building), secondly conception of Western Law such as "Sepakat" (Consensus or Indent), "Asas Accessie atas kesatuan tanah dan bangunan" (Accessie Principle), "Satuan Rumah Susun" (Strata Title). These difference conception will be matter for the buyer or the seller whose enter into land transaction.

The legal problem arise from which in the implementation of law, for instance: how the bank institution will confiscate or execute the land and the building on it as collateral under mortgage facility of which there are different owner of such the land and the building,⁷ how the developer can sell the Apartment ("strata title") to the consumer with pre-payment (indent) of which the Apartment not yet construct or under contraction or in planning,⁸ or how to implement the Adat Law conception "Terang, Riil dan

⁴ Article 5 Law No. 5 concerning to Basic Regulations on Agrarian Principles and its general explanation point III (1). Adat Law as the origin law (with its nature based on communal and religious) that will be completed and fixed with nation interest in the modern state in connection with international world which based on capitalism, individualism and feudalism.

⁵ Sumardjono, M. S. (2009). *Tanah Dalam Perspektif Hak Ekonomi Sosial Dan Budaya*, Jakarta: PT Kompas Media Nusantara, p. 56-65.

⁶ *Ibid.*

⁷ Hutagalung, A. S. (2005). *Tebaran Pemikiran Seputar Masalah Hukum Tanah*, Jakarta: Lembaga Pemberdayaan Hukum Indonesia, p. 336.

⁸ Sumardjono, M. S. (2009). *Kebijakan Pertanahan Antara Regulasi dan Implementasi*, Jakarta: PT Kompas Media Nusantara, p. 135-145.

Tunai” (real, cash and carry transfer) upon land right such as the right of ownership (Hak Milik), the right of exploitation (Hak Guna Usaha), the right of building (Hak Guna Bangunan), the right of use (Hak Pakai), right of lease (Hak Sewa), right to clear land (Hak Membuka Tanah), right to collect forest produce (Hak Memungut Hasil Hutan),⁹ of which to be transferred to another person.

In this paper I would like to examine the implementation of the Adat Law conception “Terang, Riil dan Tunai” (real, cash and carry transfer) upon the land right to be transferred to another person. The legal problem are UUPA do not give the definition clearly of the Adat Law conception “Terang, Riil dan Tunai” (real, cash and carry transfer). As the case in the Court of the first degree at Jombang (Eastern Java) in 2014, where the Judge cancelled the purchasing agreement of the right of ownership (Hak Milik) of the deed issued by Land Deed Officer (PPAT) due to invalid agreement. The unacceptable agreement as a result of the payment of the transaction using the current account (rekening giro) payment, of which the seller cannot withdraw the payment at the receiving bank at the time of maturity. The other legal problem is, pass the maturity day, the payment was not in full payment (Rp. 200.000.000,-) but only a part of the agreed payment (Rp. 125.000.000,-).¹⁰

The legal questions are how about the existence and its implementation of Adat Law concept especially the conception of land right transfer (“Terang, Riil dan Tunai”) concept and how should the government to take legal transplant of such concepts simultaneously (Adat Law and Western Law) which giving the legal certainty for both parties under National Positive Land Law. The legal solution is, by making a good academic of legal transplant of those conception (Adat Law and Western Law) into the positive law of Indonesia Land Law. This research is normative with regulation and conception approach. By making a good academic of legal transplant as Otto Kahn-Freund says: it is very unlikely that the laws of one nation can suit another. It means that the laws should suit with the society of which the laws is made.

2. Analysis And Discussion

2.1 The Existence of Adat Law in UUPA

As stated in article 5 UUPA that Indonesia Agrarian Law based on Adat Law as long as appropriate with national interest, based on the unity of nation, Indonesian socialism and regulation. It means that Adat Law should be selected (“saneering”) from the un-original element. Of course, the tools of selected is Indonesian Ideology Pancasila and Indonesian Constitution. Adat Law is not merely its legal norms but also its legal conceptions, legal principles, legal institutions and legal systems. What kind of Adat Law adopt

⁹ Article 16 Law No. 5 Year of 1960 concerning to Basic Regulations on Agrarian Principles.

¹⁰ Putusan Pengadilan Negeri Jombang Nomor 15/Pdt.G/2014/PN.JMB tanggal 9 Oktober 2014 dalam Tesis Yani, “Jual Beli Tanah Dengan Pembayaran Melalui Giro Dan Tanggung Jawab Pejabat Pembuat Akta Tanah Atas Konsepsi Terang Dan Tunai (Studi Kasus Putusan Pengadilan Negeri Jombang Nomor 15/Pdt.G/2014/PN.JMB tanggal 9 Oktober 2014)”, Program Kenotariatan Fakultas Hukum Universitas Pancasila, 2018.

is Adat Law of the Indonesian origin peoples community (“golongan pribumi”) as stated in general explanation point III (1) of UUPA rather than Adat Law of the Immigrant eastern Indie peoples community (“golongan timur asing”) as the opinion from C. Van Vollenhoven.¹¹

In connection with National Land Law system, Adat Law as the living law in Indonesia, have a functions 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 Adat Law will be decrease.¹² Simultaneously, new legal conceptions, legal principles, legal institutions and legal systems adopted by government in National Land Law such as registration of deed (land registration), principle of unity of land and its building (“asas accessie”), strata title, indent, mortgage, etc., of which based on Western Law.

Some scholar gives some different opinion concerning to the existence of Adat Law:¹³

- a. Hazairin stated that UUPA is not Adat Law Codification. It means that in case there are no legal norms in UUPA as positive law in National Land Law, upon the concrete legal case in the society, so the norm prevail to solve the legal problem are the Adat Law prevail, effective and valid at the territory of the legal problem arise.
- b. Boedi Harsono stated that Adat Law should be selected (“saneer”) from the un-original element. The tools of selected is Indonesian Ideology Pancasila and Indonesian Constitution.
- c. Sudargo Gautama stated that Adat Law is the un-written law (living law) which its variety from each territory so that arising the uncertainty what kind of Adat Law applies and of course gives the impact of legal un-certainty.
- d. Mahadi stated that Adat Law concerning land is prevail and exist with some limitation upon the existence of Adat Law. But such limitation should be interpreted so that make disappear of the Adat Law. Adat Law should be flexible toward harmonization in its implementation.

The variety of legal opinion from several scholars upon the existence of Adat Law as the basic of National Land Law gives the consequences that there are no standard guide for executive or officer or professional or legal actor, especially in case of Adat Law face against the positive law of National Land Law. Notwithstanding, it doesn’t mean that Adat Law should be against UUPA as positive law, but both should be synergy and harmonize toward the agrarian justice for the society.

2.2 The Implementation of Adat Law Concept (“Terang, Riil dan Tunai”).

In fact, Adat Law and Positive Law of National Land Law simultaneously implemented even if some scholar has difference academic

¹¹ Harsono, B. (1997). *Hukum Agraria Indonesia – Sejarah Pembentukan Undang-Undang Pokok Agraria, Isi Dan Pelaksanaannya, Jilid 1 Hukum Pertanahan*, Jakarta: Penerbit Djambatan, Edisi Revisi p. 171-175

¹² *Ibid*, p. 189-204.

¹³ Nurlinda, I. (2009). *Prinsip-prinsip Pembaharuan Agraria – Perspektif Hukum*, Jakarta: Rajawali Pers, p. 48-49.

opinion concerning to the existence in National Land Law system as mentioned above. In this circumstances, we can understand why UUPA as positive law of National Land Law doesn't give a definition to explain Adat Law concept "Terang, Riil dan Tunai". Under this conception, pre-requirement of validity of land purchasing based Adat Law need 3 element, there are: (a) "tunai" (cash), (b) "riil (real), and (c) "terang" (openness).

Some scholar correspondingly gives different academic opinion in order to explain what is "Terang, Riil dan Tunai". This concept applies for transferring of land rights from one person to another person as under purchasing agreement, land-exchange agreement, grant agreement. UUPA only regulate that the on land right should be executed in front of Public Land Deed Officer (PPAT) in order to register such land rights at Land Register Office upon the changing the ownership of land right.¹⁴

Boedi Harsono in his opinion stated that in order to fulfill the need of modern society which its openness characteristic, the land purchasing institution under Adat Law facing the modernization and adjustment without changing its nature as the legal action in order to transferring land right, and in this circumstances followed by the payment of the price in cash ("tunai"), and such legal action by means of real action ("riil") and openness action ("terang"). Such legal action according to regulation in positive law of National Land Law concerning to land registration should be proved by deed issued by the land deed public officer (PPAT). This adjustment purpose to increasing the quality of evidence of legal action which implemented by Adat Law of which limited in personal scope and territorial jurisdiction.¹⁵

Legal action in case of land purchasing have a difference meaning between Adat Law and Western Law. Under Western Law, land purchasing as agreement of both parties by which the seller agreed to transfer the land right to the buyer and the buyer agreed to pay the price agreed. This legal action not automatically transferring the land right, it should be followed by another legal action what we call it "legal transferring" ("juridische levering" or "penyerahan yuridis") by issuing the "deed of transferring" ("transport acte" or "akta transport"), made in front of Notary Public. This deed should be registered by Public Officer.¹⁶

According to Boedi Harsono academic opinion, the legal action in order to transferring the land right under the land purchasing is not the case that agreement as conception of Western Law ("obligatory agreement"). Under Adat Law according to him, the land purchasing is the legal action in order to transfer land right from the seller to the buyer, and at the same time the buyer pay the price agreed by both parties. In cash means that the price agreed by both parties and the payment paid "in full" at the same time. In this circumstances, Adat Law do not acknowledge the "legal transferring" ("juridische levering" or "penyerahan yuridis").¹⁷

Another academic opinion concerning to the implementation of Adat Law concept "Terang, Riil dan Tunai" for legal action of land purchasing

¹⁴ Article 37 Government Regulation No. 24 Year of 1997 concerning to Land Registration.

¹⁵ Boedi Harsono, *op.cit*, hlm. 193.

¹⁶ Article 1457 and 1459 Kitab Undang-Undang Hukum Perdata.

¹⁷ Boedi Harsono, *op.cit*, hlm. 193.

originate from Maria S.W. Sumardjono. According to her so many case related to land purchasing. In this circumstances the buyer should be careful and cautiousness. In practice, many possibility of legal pursuit from third party (with or without the acceptable evidence) which proof the ownership of land right. Such legal action in order to transfer land right, in practices, for those of peoples in society, partly take such legal action in front of the land deed public officer (PPAT) under land registration as positive law (UUPA) and the other without deed issued by PPAT.¹⁸

As the explanation above mentioned, arise the legal question, how about the legal action in order to transfer the land right does not take in front of the land deed public officer (PPAT), is it valid or not? National Land Law conception based on Adat Law. Under this conception, pre-requirement of validity of land purchasing based Adat Law need 3 element, there are: (a) "tunai" (cash), (b) "riil" (real), and (c) "terang" (openness).¹⁹

- a. "Tunai" (Cash) means: the transferring of land right by the seller taking in the same time of payment by the buyer, and in the same time of which the land right had already transferred from the seller to the buyer. The price agreed by both parties should not be in full in cash,
- b. "Riil" (real) means: the intend to be express or to be say should be followed with real action, for example by receiving the money by the seller under agreement be executed in front of the leader of local village (kepala desa).
- c. "Terang" (Openness) means: the legal action on transferring of land right be executed in front of the leader of local village ("kepala desa") in order to make sure that such legal action is not against the in force law.

According to B. Ter Haar Bzn, the legal action of (a) "tunai" (cash), (b) "riil" (real) occur in the same time of which transferring of land right and the payment (cash) occur simultaneously in the same time ("kontante handling" or "perbuatan tunai"). The payment should pay in full as the demand of the leader of local village (kepala desa) and Adat Law society. The legal reason is it is difficult to state there are "honestly agreement" of which the seller will deliver the land to the buyer who pay the price in "partly payment". In case of "partly payment" paid by the buyer and arise a legal dispute, the partly payment deemed to be a full payment. The balance of which deemed to be credit agreement.²⁰

Ter Haar also says that the legal action should be (c) "terang" (openness) it means occur in front of the leader of local village ("kepala desa" or "penghulu"). The legal reason is in order to make the legal action of land purchasing is not against the Adat Law ("law and order"). the leader of local village ("kepala desa" or "penghulu") guarantee that the legal action is orderly (law and order) and valid. The leader also assist that such legal action will be publish and announce to the Adat Law society ("terang").²¹

¹⁸ Sumardjono, M. S. *Kebijakan Pertanahan Antara Regulasi dan Implementasi*, op.cit, p. 142-143.

¹⁹ *Ibid.*

²⁰ Bzn, T. H. (2017). *Asas-asas dan Susunan Hukum Adat*, terjemahan K. Ng. Soebakti Pesponoto, Jakarta: PT Balai Pustaka (Persero), (Vols. 14, p. 82-87).

²¹ *Ibid.*

The principle of land purchasing above mentioned than be adopted as positive law under National Land Law. Upon the question above mentioned that how about the legal action in order to transfer the land right does not take in front of the land deed public officer (PPAT) or without land deed, is it valid or not, there are several decisions of Supreme Court. Such decisions obviously stated that the legal action of transferring land right of which does not take in front of the land deed public officer (PPAT) or even not be executed in front of the leader of local village (“kepala desa”) or witness, “is valid”, as long as such legal action of transferring land right followed by occupy action on the land by the buyer.²²

Some decisions of Supreme Court concerning to land purchasing:²³

- a. Supreme Court Decision dated 14-03-1973 Nomor: 601/K/Sip/1973 which stated that pre-requirement elaborate in article 19 Government Regulation No. 10 Year of 1961 concerning to Land Registration, upon land purchasing, not determine the validity of such land purchasing but rather as the validity of land purchasing pre-requirement;
- b. Supreme Court Decision dated 12-06-1975 Nomor 952/K/Sip/1974 which stated that land purchasing is valid if comply with 3 element, there are: (a) “tunai” (cash), (b) “riil (real), and (c) “terang” (openness) as acknowledged by the leader of local village (“kepala desa”). The pre-requirement under article 19 Government Regulation No. 10 Year of 1961 concerning to Land Registration not underestimate the pre-requirement of land purchasing under Civil Law Code (KUHPdata) and Adat Law, but rather merely as the requirement for Agrarian Officer.
- c. Supreme Court Decision dated 16-06-1976 Nomor 1082/K/Sip/1976 which stated that: “According to Yurisprudensi Mahkamah Agung (Supreme Court) article 19 Government Regulation No. 10 Year of 1961 concerning to Land Registration, is not merely as administrative decision but also particularity for registration upon transferring of land right at “Kadaster” (registration office).

However, the land purchasing institution under National Land Law transformed from Adat Law. As explanation above mentioned, land purchasing under Adat Law is the legal action of transfer of right, it means that land purchasing which is executed with the Adat Law conception that are (a) “tunai” (cash), (b) “riil (real), and (c) “terang” (openness), so that at that time the right of land (ownership) had already transferred from the seller to the buyer. In the real situation, at the time of payment event if “cash advance” payment (“panjar”), accordingly at the time, the land right had already transferred from the seller to the buyer. In the real situation, the “cash advance” payment (“panjar”) is Land Law System, and the balance of payment is under the debt agreement (credit agreement).

In this circumstances, under National Land Law, such land purchasing constitute of legal action upon transferring of land right. It means having

²² Sumardjono, M. S. *Kebijakan Pertanahan Antara Regulasi dan Implementasi*, op. cit, p. 142-143.

²³ Tukgali, L. L. (2010). *Fungsi Sosial Hak Atas Tanah Dalam Pengadaan Tanah Untuk Kepentingan Umum*, Jakarta: Penerbit Kertasputih Communication, p. 288-289.

issued the land purchasing deed by land deed officer (PPAT) at the same time transferred the ownership of land from the seller to the buyer. For the reason that, hence the registration of land by the authority merely a declarative decision by means to firm to public that transferring right action upon land had already done.

2.3 The Legal Transplant of Adat Law Concept (“Terang, Riil dan Tunai”).

As the fact that Adat Law and Positive Law of National Land Law simultaneously implemented in National Legal System in Indonesia, especially in case of the legal action of transferring land right, it make some uncertainty for society to take such legal action. Some peoples take the legal action in order to transfer the land right in front of the land deed public officer (PPAT) or some peoples do not do it in front of PPAT or without land deed, some peoples execute in front of the leader of local village (“kepala desa”) or witness, and some do not execute in front of the leader of local village (“kepala desa”) or witnesses.

In this circumstances, we arrive finally at the most complex of all the desiderata that make up the internal morality of the law: congruence between official action and the law. This congruence may be destroyed or impaired in a great variety of ways: mistaken interpretation, inaccessibility of the law, lack of insight into what is required to maintain the integrity of a legal system, bribery, prejudice, indifference, stupidity, and the drive personal power. Lon L. Fuller says that just as the threats toward this congruence are manifold, so the procedural devices designed to maintain it to take, of necessity, a variety of forms. We may count here most of the elements of “procedural due process”, such as the right to representation by counsel and the right of cross-examining adverse witnesses.²⁴

Fuller also says that we may also include as being in part directed toward the same objective habeas corpus and the right to appeal an adverse decision to higher tribunal. Even the question of “standing” to raise constitutional issues is relevant in this connection, haphazard and fluctuating principles concerning this matter can produce a broken and arbitrary pattern of correspondence between the Constitution and its realization in practice. In this country it is chiefly to the judiciary that is entrusted the task of preventing a discrepancy between the law as declared and as actually administered.²⁵

As the explanation of Lon L. Fuller above mentioned, in case of the land purchasing, the transferring land right from the seller to the buyer without land deed or without witnesses but only both parties without the leader of local village (“kepala desa”), so that third party do not know such legal action. In order to give the transparency for third party upon such legal action, the transferring of land right should be registered in order to get the strong evidence what we call it land certificate. Under the positive law (UUPA) stated that without land deed issued by the land deed public officer

²⁴ Fuller, L. L. (1969). *The Morality of Law*, New Haven and London: Yale University Press, p. 81.

²⁵ *Ibid.*

(PPAT), such land purchasing cannot be registered since the land deed is absolute pre-requirement in the publicity principle.

Land purchasing which not registered and upon the land is not occupied by new owner in real, it could give the opportunity for the person with bad-faith to re-sell the land right to another party. This situation arise due to the fail to make law or fail to create and maintain a system of legal rules concerning to land law. Lon L. Fuller says that at least eight ways may mis-carry in order to attempt to create and maintain a system of legal rules:²⁶

- a. The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis, the other routes are;
- b. A failure to publicize, or at least to make available to the affected party, the rules he is expected to observe;
- c. The abuse of retroactive legislation, which not only cannot itself guide action, but under-cut the integrity of rules prospective in effect, since it puts them under the threat of retrospective change;
- d. A failure to make rules understandable;
- e. The enactment of contradictory rules, or;
- f. Rules that require conduct beyond the powers of the affected party;
- g. Introducing such frequent changes in the rules that the subject cannot orient his action by them; and finally;
- h. A failure of congruence between the rules as announced and their actual administration.

A total failure in any one of these eight directions does not simply result in a bad system of law, it results in something that is not properly called a legal system at all.

As the advice of Lon L. Fuller above, the government should take "procedural and due process" or made the rules on standards such as "good faith" and "due care". In case of, especially in land purchasing in the society, how the government give the legal protection against the holder of land certificate. These will give the legal protection for the buyer in "good faith" and hold the land certificate against legal pursuit from another parties.

National Land Law up to now, there are two conceptions of law, of which implemented in practicing of land transaction di Indonesia simultaneously, there are Adat Law conception and Western Law conception. As Boedi Harsono opinion that in order to fulfill the need of modern society which its openness characteristic, the land purchasing institution under Adat Law facing the modernization and adjustment without changing its nature. For these, government attempt to take legal transplant both of Adat Law either Western Law.

One issue of legal transplant which attempted by government to adopt Adat Law and as well Western Law concept in to the positive law of National Land Law is how to give a legal certainty and guaranty for the holder of land certificate. Since the National Land Law adopt the negative publication system of land registration. In this system of registration government do not give a guaranty for data (both legal and physical data) of such land right

²⁶ *Ibid*, p. 38-39.

which be registered.²⁷ For those situation, government attempt to give the rule in new regulation concerning land registration,²⁸ on which stated that overdue 5 years of land certificate as statute bared upon legal action or pursuit against the land certificate. This clause is fairness enough for the good faith buyer as a holder of land certificate.

The other issue that government try to transplant both the Western Law and Adat Law conception is about the development of Apartment and Condominium especially in the metropolitan city. The concept of strata title for the development of such Apartment and Condominium originally transplanted from Western Law but adjusted and adapted or synchronized with Adat Law. The strata title conception which stated under Law No. 20 Year of 2011 concerning to Strata Tilte (Undang-undang Rumah Susun - UURS), in the implementation still face several legal problem for instance how about the purchasing of the right of strata title of which the Apartment and Condominium under-construction or not yet be developed by the developer, or how about of the "cash advance" payment ("panjar") or "indent" upon strata title purchasing?.

As the question of this conceptual article above mentioned, and for the case related to land purchasing, government does not give the explanation or elaboration under positive law (UUPA) concerning to conception that are (a) "tunai" (cash), (b) "riil (real), and (c) "terang" (openness). This, of course, arising a legal uncertainty for the society whose enter in to the land purchasing agreement. In this circumstances, government should take effort to solve the problem by taking legal transplant. Academically, as Otto Kahn-Freund says that the laws should suit with the society of which the laws is made.

Otto Kahn-Freund claimed that law should not be separated from its purpose or the situation of which it be made. He argue that we cannot take for granted that rules or institutions are transplantable and convinced that there are degrees of transferability.²⁹ It seems that Otto Kahn-Freund influenced by Carl Von Savigny thought, a philosopher of history law thought from Germany, he says that positive law originally comes from the spirit of its society (*volkgeist*).³⁰ Some academic measure to be examined, the measurement not only based on local characteristic and condition,³¹

²⁷ Harsono, B. Opcit, p. 433.

²⁸ Government Regulation No. 24 Year of 1997 concerning to Land Registration.

²⁹ Mistelis, Loukas A. "Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform - Some Fundamental Observations", Reproduced with permission of 34 International Lawyer 1055-1069 (Pace Law School Institute of International Commercial Law - Last updated February 13, 2001). (2000). Mistelis, "Regulatory Aspect", 1066, in his paper, cited Ewald than concluded the theory Kahn-Freund as: "*legal institutions may be more-or-less embedded in a nation's life, and therefore more-or-less readily transplantable from one legal system to another; but nevertheless at one end of the spectrum law is so deeply embedded that transplantation is in effect impossible.*"

³⁰ Chand, H. (1994). *Modern Jurisprudence*, Kuala Lumpur: International Law Book Services, p. 125. Carl Von Savigny mengatakan (Hari Chand on page 125: "*Law is based on a common conviction of the people. Law has no independen existence. It is based on the (volkgeist) common conviction of the people. Law is as a product of the people's life...*"

³¹ Nelken, D. (2006). "Signaling Conformity: Changing Norms in Japan and China", Mixed Reception: Culture, International Norms, and Legal Change in East Asia Comment, (Cite as: 27

nevertheless by examination the external solution. In this legal transplantation Alan Watson concluded in order to response Otto Kahn-Freund:³²

- a. The transplanting of individual rules or of a large part of a legal system is extremely common;
- b. Transplanting is, in fact, the most fertile source of development. Most changes in most systems are the result of borrowing;
- c. To a truly astounding degree law is rooted in the past;
- d. The transplanting of legal rules is socially easy;
- e. A Voluntary reception or transplant almost always – always in case of a major transplant – involves a change in the law, which can be due to any number of factors, such as climate, economic conditions, religious outlook;
- f. No area of private law can be designated as being extremely resistant to change as a result of foreign influence;
- g. The time of reception is often a time when the provision is looked at closely, hence a time when law can be reformed or made more sophisticated. It thus gives the recipient society a fine opportunity to become a donor in its turn;
- h. Reception is possible and still easy when the receiving society is much less advanced materially and culturally, though changes leading to simplification, even barbarisation, will be great;
- i. Foreign law can be influential even when it is totally misunderstood;
- j. The previous two conclusions, in fact almost all so far, show the importance of authority for transplants and for law in general;
- k. A nation which is inventive in law may be largely free from accepting transplants even at a time when foreign influence is very important in other matters in the society. But this is not always the case;
- l. Law like technology is very much the fruit of human experience;
- m. Peoples develop along their own lines and to show marked cultural progress and inventiveness in one field is no indication that similar progress will be made in others.

3. Conclusion.

The existence of Adat Law as the basic of National Land Law gives the consequences that there are no standard guide for executive or officer or professional or legal actor, especially in case of Adat Law face against the positive law of National Land Law. Notwithstanding, it doesn't mean that Adat Law should be against UUPA as positive law, but both should be synergy and harmonize toward the agrarian justice for the society.

Adat Law and Positive Law of National Land Law simultaneously implemented even if some scholar has difference academic opinion

Mich. J. Int'l L. 933), Michigan Journal of International Law. Copyright © University of Michigan Law School, p. 972.

³² Watson, A. (1993). *Legal Transplants: An Approach To Comparative Law*, 2nd Edition. Athens, Georgia: University of Georgia Press, p. 95-101.

concerning to the existence in National Land Law system as mentioned above. In this circumstances, we can understand why UUPA as positive law of National Land Law doesn't give a definition to explain Adat Law concept "Terang, Riil dan Tunai". Under this conception, pre-requirement of validity of land purchasing based Adat Law need 3 element, there are: (a) "tunai" (cash), (b) "riil (real), and (c) "terang" (openness). In this circumstances, so many legal problem arise from this since.

As the fact that Adat Law and Positive Law of National Land Law simultaneously implemented in National Legal System in Indonesia, especially in case of the legal action of transferring land right, it make some uncertainty for society to take such legal action. Some peoples take the legal action in order to transfer the land right in front of the land deed public officer (PPAT) or some peoples do not do it in front of PPAT or without land deed, some peoples execute in front of the leader of local village ("kepala desa") or witness, and some do not execute in front of the leader of local village ("kepala desa") or witnesses. Some academic measure to be examined, the measurement not only based on local characteristic and condition, nevertheless by examination the external solution. In this legal transplantation we can refer to Alan Watson concluded in order to response Otto Kahn-Freund theory.

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