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Characteristic of Land Dispute Settlement in Indonesian District Court Based on Audi Et Alteram Partem Principle

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Abstract
Principle of judiciary implementation in Indonesia: impartial, open and honest. Land dispute settlement can be proceeded in the Civil Court guided by principle in Civil Procedure Law namely *Audi et alteram partem* (hear both parties). Land rights disputes are usually a matter of priority to be established as holders of legitimate rights over land with rights or without rights. Characteristic of land rights lawsuits are generally in the form of disputes of acts against the law and/or breach of contract, although in its development there are other types of lawsuits such as class action. The land dispute settlement is not easy, requiring special handling with characteristics depending on the status of the inherent rights therein. Settlement by kinship, deliberations outside the court and or if it fails then it can be preceded to litigation (court). In a fair litigation process for the parties, *Audi et alteram partem* principle should be used as the basis by the judge in deciding the dispute and until today the rule of Dutch law, HIR and RBG is still prevail. This article aims in order that government to regulate the principle of *Audi et alteram partem* in Law of the Republic of Indonesia Number 48 Year 2009 on Judicial Power or a new Civil Procedure Law which will replace the *Herziene Indonesisch Reglement* (HIR). To achieve these objectives then socialization is required, discussions involving academician, practitioners and government as well as legal awareness of society and law enforcers.
Keywords: civil procedure, dispute settlement, *audi et alteram partem* Principle

I. Introduction

One of the important principles in the rule of law is the guarantee of an independent judiciary, free from the influence of other powers to administer justice to uphold law and equity.[1] The implementation is undertaken by a Supreme Court and its subordinate courts within General Courts, Religious Courts, Military Courts, State Administrative Courts and by a Constitutional Court" (Chapter IX Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia).

The principle of impartial, fair trial and open trial is the essence of the principle in the Civil Procedure Law of *Audi et alteram partem* (hear both parties) which is the basis and foundation of a rule and is enforced by the judge in justice process for settlement of civil disputes, including land disputes. In reality the principle of *Audi et alteram partem* has not been regulated in Law Number 48 Year 2009 on Judicial Power, but abstractly (vague) implicit in *Herziene Indonesisch Reglement* (HIR) and *Reglement Buitengewesten* (RBG).

The principle of *Audi et alteram partem* is interpreted: "both parties are equally heard to their testimony before the trial".[2] This indicates that the parties are given equal opportunity as much as possible in the judicial process on a balanced basis, including in proportionally distributing the burden of proof by the judges hence providing equal rights and opportunities is one of the main conditions of justice values, therefore the essence of the principle of *Audi et alteram partem* is aimed at "justice" and "balance" to disputed parties.

As how the importance of the values of justice, and it would be no mistake if this article accommodates the theories of justice initiated by John Rawl concerning procedural justice that is basically determined the existence of equality of treatment before the law, equal opportunity before the trial, is equal to the principle "Everyone is treated equally before the law without exception". But is this principle also equal to the principle or principle of *Audi et alteram partem*? Aristotle wrote that "justice consists in treating equals equally and unequal unequally, in proportion to their inequality", (the principle that equal is treated equally and unequal is also treated unequally proportionately).[3]

The incidence of land rights disputes started from a claim or objection from one party to the status of the land, the priority (most entitled to the other) or the ownership of another party to the damages incurred to him by hoping to obtain a settlement dispute in accordance with the applicable rules of law. Land right dispute, usually a

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[1] Independent Judicial body is more *continental oriented* and more emphasize to institutional independency, see Bagir Manan, "Independent Judicial Power", 2013, XXVIII, Number 332, *Varia Peradilan*, p. 5
[2] Henry Campbell Black in *Black's Law Dictionary*, 1990, Sixth edition, St.Paul Minn, West Publishing co, p. 131, *audi alteram partem*: *hear the other side; hear both side.*
[3] Agus Yudha Hernoko, "*Penyelesaian Sengketa Kontrak Berdasarkan Asas Proporsionalitas*", 2009, Vol.24, No.1 Januari-April , *Jurnal Yuridika,* p. 14

matter of priority to be designated as the rightful holder of a rightful land status or land that has no rights.[1] Issues of settlement by interested parties to end land disputes often appear in practice.

This era of globalization, is a common and classical problem if the emergence of land disputes always appear everywhere in every region of Indonesia, along with the increasing need of the society for matters related to land. Land disputes may arise as a result of disputes[2] between interested parties, including individuals and individuals; individuals with public legal entities/regional government/State Owned Enterprise/Regional State Owned Enterprise and private; private legal entities with private legal entities; and private legal entities with public legal entities that will be resolved entirely through the judiciary if the consensus is not agreed between the disputed parties. The emergence of land disputes occur because the factors are not satisfied openly, therefore parties conducted the ways or efforts to change unfair treatment to fair treatment.

This article is aimed to solve the problems of land dispute related to legal principles in the regulation such as Law of the Republic of Indonesia Number 49 Year 2009 on General Court, Law of the Republic of Indonesia Number 5 Year 1960 (State Gazette Number 104 Year 1960) on Basic Regulation of Agrarian, Government Regulation of the Republic of Indonesia Number 10 Year 1961 (Article 29), Regulation of the Minister of Home Affairs of the Republic of Indonesia Number 6 Year 1972 (Articles 12 and 14), Decree of the Minister of Home Affairs of the Republic of Indonesia Number 72 Year 1981 (Article 35) on Organizational Structure and Work Procedure of Provincial Agrarian Directorate and Regency/City Agrarian Offices (operational guidelines on technical guidance and legal dispute settlement in the field of land rights management). The principle of *Audi et alteram partem* is applied in trial proceeding to settle disputes which object is the right of land therefore justice and legal certainty can be enjoyed by both litigants.

The meaning of the principle of *Audi et alteram partem* that is regulated in *Reglemen Indonesia Regulation* (RIB) or HIR or RBG, is still vague and there is a lack of clarity hence in the settlement of land rights disputes, there may be obstacles in the trial proceeding, therefore there is a need for more strict regulation in order to achieve judgment based on *Audi et alteram partem*.

Mr. S.J. Fockema Andreae in *Rechtgeleerd Handwoordenboek* quoted by Sudikno Mertokusumo, the judiciary is an organization created by the state to examine and resolve legal disputes, as well as its functions called the judiciary.[3] Sudikno himself wrote that the judiciary does not only examine and settle legal disputes but also settle non-dispute issues (such as petition), such as the determination of heirs, adoptive adoption validation and this also includes the judiciary (as called voluntary courts).

Yahya Harahap wrote that the judiciary in Indonesia is divided into 4 (four) judicial environments, which start from the division of functions based on the jurisdiction delegated to each of General Court, Religious Court, Military Court and State Administration Court in Indonesia.[4] The General Court is regulated in Article 2 paragraph (1) of Law of the Republic of Indonesia Number 8 Year 2004 regarding the first amendment of Law of the Republic of Indonesia Number 2 Year 1986 jo Law of the Republic of Indonesia Number 49 Year 2009 on General Court. General Court[5] is one of the judicial authorities for the justice seekers in general, while the Special Court applies to certain factions, namely Religious Court, Military Court and State Administration Court. Given the differences in the judicial environment, it will also distinguish the character of its settlement of disputes.

The principle of law underlies (the basis of) legal norms and is manifested in the articles of a rule (legislation). The essence of *Audi et alteram partem* is justice and binding as legal norms, therefore dispute settlement is based on the character of the lawsuit (dispute) through the General Courts (District Court). Therefore, it needs an explanation on the shape or characteristics of land dispute settlement in the form of judgment based on *Audi et alteram partem*.

Dispute character which is objected to land right (land case) in the District Court, in the form of land ownership rights dispute whether as the property rights of inheritance legal relations for non-Islam believers, buying and selling or other civil law relationships, has the characteristics to be settled by deliberation firstly before being processed in court. However, in reality it is difficult to enforce because each party feels that they are on the right side, therefore the interested parties demand their rights to the other party to be strengthened by the decision of the judge. As an example it will be studied in decree of Supreme Court Number 4006K/Pdt.G/2001 date 21st August 2007.[6] Based on the exposure, the issues to be studied in this paper is what

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[1] Rusmadi Murad, 1991, *Penyelesaian Sengketa Hukum Atas Tanah*, First Edition, Alumni, Bandung, p. 23

[2] Dimiyati Gedung Intan, "*Penyelesaian Konflik Pertanahan di Provinsi Lampung*", 2011, Volume 2, Number 2, *Jurnal Keadilan Progresif*, Bandar Lampung University, p. 184

[3] Sudikno Mertokusumo, 2011, *Sejarah Peradilan dan Perundang-Undangannya di Indonesia Sejak 1942 dan Apakah Kemanfaatannya bagi Kita Bangsa Indonesia*, First Edition, Atma Jaya University, Yogyakarta, p. 2 See also in R. Tresna, 1978, *Peradilan di Indonesia dari Abad ke Abad*, Third Edition, Pradnya Paramitha, Jakarta, p. 109

[4] M. Yahya Harahap, 1997, *Beberapa Tinjauan Mengenai Sistem Peradilan dan Penyelesaian Sengketa,* First Edition, Citra Aditya Bakti, Bandung, p. 12

[5] Sudikno, 1993, Hukum Acara Perdata Indonesia, Fourth Edition, Liberty, Yogyakarta, p. 20

[6] See http://mahkamahagung.go.id.

are the characteristics of land disputes settlement in the District Court of the Republic of Indonesia based on the principle of *Audi et alteram partem*?

II. Discussion

The discussion will begin with the meaning of the word “characteristics” as something/matter, is a characteristic or special feature that has been attached to the object and not easy to change. If this trait is changed or eliminated, it will eliminate the peculiar essence of an object. According to *Black’s Law Dictionary*, *Character: the qualities that combine to make an individual human being distinctive from others, esp. as regards morality and behavior; See character evidence under evidence: evidence: good moral character.*[1] *Good character: a person’s tendency to engage in lawful and moral behavior.*In Indonesian dictionary, "characteristics" indicates the presence of a particular feature in accordance with a particular character.[2] In English called characteristic: the special essence of something (object). It can be inferred that the characteristics are fixed, continuous and eternal, special feature of the object (subject/event/incident).

The word “principle” is the foundation (the truth which is the basis of thinking, acting and so on) or the foundation.[3] In the Black’s Law Dictionary, principle: a fundamental truth or doctrine, as of law.[4] Bryan A.Garner writes “principle”: a basic rule or doctrine.[5] The principle of *Audi et alteram partem* comes from the Latin word means “hear from the other side”, thereby the meaning of these words implies "hearing the disputing parties”, because its application is addressed to judges who are settling disputes/cases in court.

Prior to dispute is brought to court, the approaching steps to both parties to the dispute are carried out by deliberation firstly, if unsuccessful or failing then settled through a lawsuit to the court. A research has resulted finding on a model of land dispute settlement with mediation based on Law of the Republic of Indonesia Number 30 Year 1999, based on the decision of the Head of National Land Affairs of the Republic of Indonesia Number 34 Year 2007 and the mediation model based on the Supreme Court Regulation (PERMA) of the Republic of Indonesia Number 1 Year 2008, and in fact the mediation conducted in the society has not used the mechanism such as those in the prevailing laws and regulations that have not been described can settle land cases effectively, efficiently and has legal certainty.[6]

The judicial process based on the principle of *Audi et partem* of the party begun with the lawsuit registered to the District Court after all conditions were formally fulfilled, subsequently determined mediation proceedings with a single judge as mediator under the Supreme Court Regulation PERMA of the Republic of Indonesia Number 1 Year 2008 jo PERMA of the Republic of Indonesia Number 1 Year 2016 on mediation procedures in court. Article 13 PERMA of the Republic of Indonesia Number 1/2008 regulates a 40-day and renewable term of mediation, while in PERMA of the Republic of Indonesia Number 1/2016 the term of mediation is shortened to 30 days. Both parties are called to appear at the hearing and hear their testimony. This reflects the essence of *Audi et alteram partem*. During the mediation process, the appointed mediator based on the agreement of both parties had the task of encouraging the litigants to actively perform peace (Article 15 paragraph (2) jo paragraph (4)). If there was no peace, in the sense that one party was not present at the hearing after being summoned twice (Article 14) and because the parties were unwilling and difficult to be reconciled even though both parties remain present at the hearing (Article 18) the failure is notified to the judge and proceeds to the principal proceedings according to the Civil Procedure Law applicable to the composition of panel of judges. Therefore Article 14 confirms that mediation failed because one party was not present at the hearing after being properly summoned. If it is associated with Article 121 paragraph (1) HIR, the meaning of the “summoning” process will refer to the principle of *Audi et alteram partem*, but in practice it may cause problems due to obstacles in the notice of summons that does not reach the deserved party or any other problem, therefore its settlement is still guided by the provisions of HIR namely the opposing party (Defendant) is called once again to come to the court based on the last address of residence.

Based on the review of the above chapters it is related to obstacles in the mediation trial process, and mediation is declared failed, the hearing was submitted to the panel of judges who examined the case with the agenda of reading the lawsuit. The parties were summoned to the hearing according to the time and the appointed day (Article 121 paragraph (1) HIR), then the Defendant was given an opportunity to answer the lawsuit (paragraph (2)). The essence of *Audi et alteram partem* is implemented and accommodated in this stage. If the Defendant fails to attend at the appointed time, then the law provides an opportunity to be called once again (Article 126 HIR). Once properly summoned, the Defendant still remain absent with the record of the

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[1] Bryan A. Garner, 2009-2014, *Black's Law Dictionary,* Tenth Edition, West Publishing co, St.Paul MN, p. 282
[2] Tim Penyusun Kamus Pusat Bahasa, Dendy Sugono, 2008, Pusat Bahasa Depdiknas, Jakarta, p. 639
[3] Lukman Ali, Anton M. Moeliono, et.al., 1994, *Kamus Besar Bahasa Indonesia*, Third Edition, Balai Pustaka, Jakarta, p. 788
[4] Henry Campbell Black, *Op. Cit*., p. 1193
[5] Bryan A. Garner, *Op.Cit.,* p. 1386
[6] Sri Hajati, Agus Sekarmadji and Sri Winarsih, 2014, *Model Penyelesaian Sengketa Pertanahan Melalui Mediasi dalam Mewujudkan Penyelesaian yang Efisien dan Berkepastian Hukum*, Volume 14, Number 1, *Jurnal Dinamika Hukum*, Jenderal Soedirman University, Purwokerto, p. 48

summoning process already in accordance with the legal procedure, it shall be terminated *verstek* by the judge (an exception from *Audi et alteram partem*). Such obstacle may be possible in practice if the Defendant is not present at the hearing because he has never received a summons to appear in the hearing (there is a problem in the summoning process), hence the Defendant is considered defeated and terminated as *verstek* (Article 125 HIR). When summoned once again (Article 126 HIR) whether he will still be present, while the Defendant's name is not found and has been entrusted through the local village head. Therefore, the timing of the summons should be timed or extended in order to settle the problems in practice based on local propriety, therefore land disputes related to the principle of *Audi et alteram partem* can be settled fairly. In other countries such as Singapore which adopt Common Law legal system, the validity limit of the summon letter is set for 6 months and can be extended (for the Defendant having one area within the court) while if the Defendant is located outside the jurisdiction then the period is up to 12 months.

The next stage is replying the answer (pleading) between the Plaintiff and the Defendant, the Defendant's reply is not a requirement because it is the right of the Defendant. Article 121 paragraph (2) in HIR provides for Defendants at the time of the summoning to include/answer the Plaintiff's claim by letter. The Defendant's reply can be in the form of denial and acknowledgment,[1] the principal claim answer of the case as well counterclaim (reconvention). In the exception/rebuttal of the authority to adjudicate, decided by interlocutory verdict, while the exception is otherwise terminated along with the principal claim. Article 135 in HIR regulates to "promptly examine carefully and fairly upon hearing both sides" if there is no objection to the authority of adjudicating, while Article 136 of the HIR provides a counter-denial in the form of an exception. Subsequently each party was given an opportunity to respond to the lawsuit, in the form of a reply (the Plaintiff's response to the Defendant's reply) and a clause (response to the reply of the Plaintiff). Replying the answer to determine the subject of the dispute is considered sufficient by the judge, thus the parties are given the opportunity to prove. The essence of Audi *et alteram partem* is being accommodated in the stage of replying answer process.

The next process: the stage of proof, each party is given the opportunity to submit evidence in front of the court and attended by both parties. At this stage the principle of burden of proof under the provisions of law (Article 163 HIR/283 RBG) regulates for any party that "postulates having a right or to uphold its rights or deny the rights of others or to indicate an event, shall prove". The parties are given the opportunity to present evidence to strengthen the arguments of the lawsuit and denial of the lawsuit. Upon this stage, the essence of *audi et alteram partem* is implemented in the process.

Answering legal issues/problems, the authors will link with the Decision of the Supreme Court of the Republic of Indonesia (MARI) Number 4006K/Pdt.G/2001 date 21st August 2007.[2] Subject of case : Plaintiffs are the heirs of the late J. Manullang and Lusiana Br. Purba, total of four poeople as the Plaintiff I-IV, sued a 490 sqm land inheritance to Washington Penjaitan (Defendant) who has committed "unlawful" acts of the Defendant without permission The Plaintiff has unlawfully installed a triplex plank on the ground written in red paint states: "This land pertapakan sold contact telephone 568014" (Number 568014 is the Defendant's home phone number, Jalan Sawojajar Number 2, Medan) which photo plank will be delivered as evidence later in the stage of proof.

In the case above the Defendant did not want to vacate the land inheritance of the Plaintiffs, therefore there is a Plaintiff's claim lawsuit containing: 1) In the provision: requiring the Defendant to dismantle the zinc (gate) and vacate the land; 2) In the principal claim: The Defendant's action is against the law, the act causes material and immaterial loss, declares the land as the plaintiff's and his heirs (J. Manullang). Furthermore, the Defendant proposed an "exception" which in essence, that the Plaintiff's claim is lacking of party/Defendant is incomplete, therefore Regent of Deli Serdang and the Land Office should also be sued.

At the *judex facti* stage in the Medan District Court, Decision Number 338/Pdt.G/ 1998/PN.Mdn., dated 15th February 2000 which is content of the decision as follows: In the Exception: Refuses the Defendant's Exception. In main Case: Declare the Plaintiff's lawsuit is not acceptable; Punish the Plaintiffs to pay the cost in this case, until it is estimated to Rp.173.000, - (One hundred and Seventy Three Thousand Rupiah).

If the decision is reviewed, the authors have opinion that: 1) The decision of the PN is not appropriate because in its content of the decision is written on one side "rejects the Defendant's exception" and on the other side states "the Plaintiff's claim is unacceptable". A very contradictory matter, should the exception be rejected then the lawsuit can be accepted and in reality in the case the lawsuit is unaccepted. Normally, if the lawsuit is unaccepted by the virtue of *obscuur libel*, the Defendant's exception is correct. Another consideration, *judex facti* is more to determine the argumentation of the Defendants who benefited hence the element of the balance right does not appear as a result of only focus on one party, if interpreted it only heard one party's argument while overridden the other. Therefore, it appears in this phase that the essence of *Audi et alteram partem* is ignored/violated. Similarly, the evidence presented by the Plaintiff has been overridden even the Plaintiff's lawsuit is declared *obscuur libel.*

[1] Sudikno Mertokusumo, *Op.Cit*., p. 94
[2] See http://mahkamahagung.go.id.

2) *Judex facti* legal considerations are also mistaken in the statement that "the difference in land area is used as an excuse to declare non executable" even though the difference is due to natural soil changes, such as over 26 years (since 1973-1999) roads, land mutations and others. According to the law it is not mandatory to mention in the lawsuit. It can be examined here that if the Plaintiff specifies in the lawsuit, merely to enlighten that the land area may change due to natural conditions and other activities related to the state of the land. 3) *Judex facti* is incorrect in the case of inter alia: (a) Not subject to the decision of Supreme Court Number 2373K/pdt/1986 date 18th February 1988 regarding the cancellation of decision due to incomplete consideration in terms of formal requirements of evidence; (b) Not applying jurisprudence Number 01/P/1992 date 4th June 1993 on *Audi et alteram Partem* that is more to determine/hear the statements of one of the parties that memohon (the Defendant) for a Local Examination (PS) trial and which is used as a justification is the result of PS as much as 282.39 sqm (different from the Defendant's evidence, written 270 sqm) therefore concluding and declaring non executable, *obscuur libel* lawsuit and unacceptable. 4) *Judex facti* does not apply Article 197 RBG namely Court Record did not contain testimony of expert witness of the Plaintiff regarding the inconsistency of the Defendant's evidence in the register of land certificate issued by the Regent of Deli Serdang Stage II Regional Head (Exhibit T-4) which has no legal or illegal (false) power. It can be reviewed: this evidence is considered by the judge to be unimportant and not binding on the judge because in a civil case, the expert's testimony as addition. If it is consistent with the principle of *Audi et alteram Partem*, it will be interpreted that the judge sided with one party because only hear from the Defendant's side, while Plaintiff's side was not heard/determined. This can certainly be interpreted as violating *Audi et Alteram Partem*, which means ignoring the evidence of one party. In addition *Judex facti* has also violated the Decree of the Minister of Justice and Article 284 RBG, violating Article 195 paragraph (2) RBG, violating Article 23 paragraph (1) of Law Number 14/1970 (judgment must contain the reasons), violating simple principles, fast and low cost (Article 4 paragraph (2) of Law Number 14/1970). Since the Plaintiff's claim is not accepted, there is still a possibility for the Plaintiff to file a lawsuit again because the lawsuit has not yet been concerned with the principal claim of the case.

Subsequently the Plaintiff filed an appeal legal action as a result of its dissatisfaction with the decision of the District Court (PN). At the appeal stage/Court of Appeal decided: The District court Decision has been upheld by North Sumatera Court of Appeal in Medan with Decision Number 308/Pdt/2000/PT-Mdn, date 24th October 2000. At the "appeal" stage, Plaintiff was on the defeated party therefore appeal filed is accompanied by "memory appeal". Subsequently it is answered by Defendant with "counter memory appeal" in accordance with the rights and opportunities afforded by *judex facti* (Court of Appeal). Based on the description, it appears that the essence of *Audi et alteram Partem* is implemented in the appeals process in the Court of Appeal.

Since the Plaintiff/Comparator was defeated, therefore the Comparator filed a "cassation" with the following reason: the decision of PT Number 308/Pdt/2000/PT-Mdn, incorrect/mistaken because in addition to its consideration, among others, written: "Regent of Deli Serdang has issued two different land titles, namely land certificates on behalf of J.Manullang Number 199933/A/III/8 dated 19th October, 1973 (evidence of Plaintiff P-1) and land certificate on behalf of Washington Panjaitan Number 45670/A/III/8 date 21st April 1973 (as evidence T-4), hence the Regent should be withdrawn as Defendant therefore evidence of the Defendant as legally valid; In fact the regent did not issue letter Number 45670/A/III/8 date 21st April 1973 on behalf of Washington and the correct one was on behalf of A.Siramo and the correct date was 23rd April 1974." Thereby the letter of evidence is false and illegitimate as evidence (is an expert statement from the Deli Serdang Land Office of the Plaintiff) and evidence for the Plaintiff, thus continued to await the judgment of a criminal court regarding the falseness of the Defendant's letter of evidence. The essence of *Audi et alteram partem* appears in cassation and cassation memory as well and contra cassation memory filed by the opponent (Respondent of cassation).

The legal considerations of the Supreme Court: 1) The reasons of the appellant/ Plaintiff/Comparator are not justified; 2) District Court considerations: there is a difference in the wide of disputed land between argued in the lawsuit and the Defendant's reply (490 sqm wide in written lawsuit, in the Defendant's written reply is 270 sqm wide and from a local examination is 280 sqm wide; 3) Hence if there is a difference greater than 200 sqm, it raises a clear presumption that the Plaintiffs did not know the land of the dispute; 4) In the decision of Court of Appeal: an official who issued evidence of the Plaintiff or the Defendant did not participate in the case; 5) Judex facti's judgment did not conflict with the law or Act therefore petition of the cassation must be rejected. The judge adjudged: reject the petition of cassation because *judex facti* has decided properly and correctly.

Based on the authors' study, the Supreme Court decision is confusing because the object of the dispute becomes non-executable because of land size difference mentioned in the lawsuit is greater than 200 sqm from the local examination result as the basis/truth measure, whereas there is no rule/jurisprudence that determines the execution to be non-executable due to land size difference mentioned in the lawsuit from the local examination (PS) result, while none evidence of each party is suitable and correct with the local examination result therefore it is necessary to be overridden, this is causing the process of civil dispute settlement becomes hindrance, therefore with legal action of Judicial Review this case will be able to settle.

The conspectus of “no rules/non-executive concept due to the wide difference of land dispute” can be seen from the view of Yahya Harahap who wrote that, the object of the dispute becomes non-executive because: 1) The Execute’s property is not existed 2) Judgments are declarative; 3) The object of execution is under the third party; 4) Execution of tenants; 5) The object of execution are guaranteed to third party; 6) The land to be executed does not have clear boundaries; 7) Changes in land status belong to the State.[1] Based on the concept above that is applied to the case, the land size difference element of does not establish as non-executable.

According to the authors, from what is described in the legal considerations, judges at the *judex facti* stage tend to only consider the Defendant's party whereas the statements/arguments of the Plaintiff's claim and evidences are overridden, such as: expert testimony explaining the illegal evidence of the Defendant (T-4) and although only as additional evidence but the judge shall be obliged to consider. Although in judgment of evidence instruments becomes the jurisdiction of the judge and applies the principle of independent judge, the judge should be fair and balanced. The judge can develop theories of proof assessment/principles of law of evidence (including propriety, benefit) without reducing objectivity in deciding cases. If at the evaluation stage of proof assessment is reviewed, the essence of *Audi et alteram Partem* is not implemented in the case therefore it can be ascertained that the judgment is not based on the balance of the parties, which it is inferred that the value of justice in *Audi et alteram partem* is disregarded and overridden which ultimately has altered judge's decision becomes less/not presenting sufficient legal considerations (*onvoldoende gemotiveerd*).

The consideration of evidence assessment matter is indeed under the authority of judge, but from the meaning of *Audi* which means “to hear”, does not mean to be interpreted in a narrow sense but applies also to the process of proofing with all activities that exist in the process such as balanced treatment between the Plaintiff and the Defendant, a balanced treatment in considering evidences of the Plaintiff and the Defendant trial proceeding, the same treatment and impartial to one of the party in the process of assessing evidence in trial and other matters related to proof. It is also necessary for judge to implement the principle of benefit in judgment by describing overriding reasons of evidence from one party (the defeated party) to achieve justice.

In the state of Indonesia which adopts the civil law system, prioritizing the written law as a source of law and its practice where almost all judges in Indonesia in interpreting Article 163 HIR regarding the burden of proof tend to be similar, but the judge should not be too heavily imposed on the Plaintiff because from the side of justice and the appropriateness of the judge also need to consider other parties, meaning that the imposition may also be given first to the Defendant.

The State of Netherlands (Year 1974) in terms of the burden of proof adopted the provision that the judge must decide the case through the interlocutory decision. The decision contained what the Plaintiff should prove and what the Defendant must prove, therefore the portion of balance to both parties in terms of proofing.[2] The provisions of this rule are also referred and implemented by judges in Indonesia.

An important matter that the judge should not forget in adjudging a case as well for a legal expert is on how important the mastery of law foundation/principle as one of the terms in addition to mastery of rule of law, legal system and legal finding.[3] The principle of law may assist to find law in law issue with unclear legal matter. “Every rule of law is based/rooted on the principle of law that is a value believed to be related to social order in proper and equitable”, the opinion of Marcus Priyo Gunarto, a professor of criminal law from Gadjah Mada University in a seminar. The judge’s decision to end a dispute should be based on objectivity in the process by accommodating/including and reviewing all facts presented before the trial with proportional evidence in accordance with the meaning implied in the principle of *Audi et alteram partem*, therefore the judge's decision can be accepted by the parties fairly and voluntary. The value of justice contained in the *Audi et alteram partem* should exist in a rule as the basis/foundation of logical and philosophical thinking, hence judges in implementing a case can be accomplished precisely and correctly.

After the proofing is completed and deemed sufficient by the judge in the sense of the disputed event to have actually occurred, then the judge provides an opportunity for the parties to make a conclusion of the disputed case. HIR does not regulate this matter, thereby customary law is applied in the practice of justice. Thereafter only awaits the judgment of the judge and for the defeated party may accept the decision voluntarily but if there is an objection to the judgment, then given the opportunity to file legal action of appeal to the Court of Appeal with a “memory appeal”, and to the Comparable given the opportunity to file “contra memory appeal”. The essence of *Audi et alteram partem* is implemented in the appeal process. In addition, either the Plaintiff or the Defendant in the position of concerned party may petition to the court that Court of Appeal may repeat the case to its investigation.[4] In Law Number 20 Year 1947 on Repeated Judicial Court for Java and Madura stipulates that it does not regulate the obligation to make appeal memory and counter appeal memory. In the law, by referring to the words “hear to both sides” it would appear that the essence of *Audi et alteram partem* implied

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[1] M. Yahya Harahap, *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata*, Gramedia Pustaka Utama, Jakarta, 1995, p. 307-335
[2] Muhammad Damis, 2016, Judge in District Court of Sungguminasa, Gowa Regency, South Sulawesi Province.
[3] Hukum Online News, “*Dua Asas Baru Bagi Hakim dalam Menjatuhkan Putusan*”, see www.hukumonline.com, accessed on 23rd Juny 2016.
[4] *Ibid*, p. 196

therein, but in its implementation the Court of Appeal submits its proceedings to the District Court if in a case it is deemed to be a deficiency in the matter of proofing.

Furthermore, if the re-examination process at the stage of appeal has been completed and decided, then if one of the defeated parties does not petition cassation, the judgment is already *inkracht* and to be executed (execution). If the defeated party has objection, therefore the party may petition legal action of cassation and proceed to the Supreme Court for examination on enforcement of the law.

The petition for a cassation may be filed verbally/written within a period of 14 days after the notification of judgment to the petitioner (Article 46 of Law of the Republic of Indonesia Number 14 Year 1985 jo Law of the Republic of Indonesia Number 5 Year 2004, Law of the Republic of Indonesia Number 3 Year 2009). Article 47 of Law of the Republic of Indonesia Number 14 Year 1985 stipulates the obligation to file a "cassation memory" within 14 days after submitting a petition for a cassation. The opposing party shall be given the opportunity to file "counter cassation memory" within a period of 14 days from the date of receipt of the copy of the cassation memory (Article 47 paragraph (3) of Law of the Republic of Indonesia Number 14 Year 1985). At the cassation stage, it does not check facts or events, but check the law. Evaluation of proofing result "unconsidered" by the Supreme Court and the Supreme Court judges is bound by the court final stage (appeal), therefore cassation is not the third stage of court.

The decision of the cassation is final decision stage and has a permanent legal power. If the defeated party is still object to the decision of the cassation, then the party can only file extraordinary repeated (Judicial Review/PK). But if the opposing party receives the decision of cassation, then the judgment has been *inkracht* and immediately can be executed voluntarily or execution.

When examined on Judicial Review, the meaning of *Audi et alteram is partem* is contained in Article 68 paragraph (1) of Law of the Republic of Indonesia Number 14 Year 1985: "The petition of Judicial Review must be submitted by the parties or the heirs or a representative whom specifically authorized for it". This article provides an opportunity for each party to file a PK, as well as in Article 72 paragraph (1a), (2). Judicial Review is the last remarkable legal action to be imposed after the *inkracht* judgment and for both parties to respect and execute the decision. The defeated party must execute the decision that has been inkracht, voluntarily. If the person concerned does not want to carry out the contents of the judgment within the prescribed time limit, the action of execution is conducted. Its implementation is conducted by clerks and bailiffs led by the chairman of the District Court. In the process, the wining party submits a petition to the chairman of the District Court for a decision to execute. Furthermore, the chairman of District Court to summon the defeated party to be reprimanded (*aanmaning*) in order to fulfill the decision within 8 days (Article 196 HIR/207 RBG). If within 8 days and has been properly summoned but still unwilling/negligent to carry out the contents of the judgment, then the execution (Article 197 HIR) is executed. Thus the essence of *Audi et alteram partem* is being accommodated in the process prior to execution: by providing an opportunity to the parties to implement the content of the decision but not executed by the defeated party.

From the study above it can be illustrated that the implementation of *Audi et alteram partem* principle by the judge as law enforcer is easy to be disregarded, because the principle is abstract and general, meta-shaped rules and as the basis (implied) in the rule so that if there is a deviation/violation of the principle of law, then there is no legal consequence for the offender, and there seems to be no strict sanction against this provision from lawmakers other than the provisions of the code of ethics rules that judges may be subjected to judges. But for those parties who feel disadvantaged and feel justice cannot be achieved, definitely there is still a final legal action that can be taken to *judex facti* judgment that has been *inkracht* through extraordinary legal action that is Judicial Review.

III. Conclusion

Characteristics of land dispute settlement in the form of a lawsuit and based on the principle of Audi et alteram partem (hearing both sides) is binding and forcing the parties to the dispute. The attachment starts from the process of filing a lawsuit to the Court of the District Court, summoning, trial, answer, proof, conclusion, decision and execution of decision. Evaluation process of evidence as valid evidence and correctness at the stage of proof process is to be the jurisdiction of judge who will determine and decide the case. The settlement of land disputes has a characteristic or populist feature that is first settled through an approach by familial deliberation way to the disputing parties through mediators (third parties) such as community leaders/village heads and may also put the government agencies (example Director General of Agrarian) based on a formal procedure, called Non Litigation. In addition, it can be settled by legal means (lawsuit process to court) if the deliberation is unsuccessful/failed, called Litigation. The essence of *Audi et alteram partem* (hear both parties): "justice", can be implemented in the settlement of land disputes either through familial councils outside of court (non-litigation) and court (litigation).

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