

reconstruksi land

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Reconstruction of Land Right Protection

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Within Tradition Law Society In The Perspective Of Human Right

Land is one of very important natural resource; it means for human live, it is not as useful as agriculture production factor only which produce various food materials, moreover within agrarian country such as Indonesia, but also because it is social culture function.

HAM is such basic right that naturally adhered on human self, universally and eternal, therefore must protected, respected, maintained and it can not be ignored, reduced or seized by any person. It means that, any people who have obligation to acknowledge and respect human right of other people. This obligation also prevailed for state and government to respecting, acknowledge, protect, assist and assured their people rights without presence discrimination

Why was the right of land not give protection yet concerning society in tradition law? How did reconstruction of the land right give right protection concerning tradition law society? There were two problems in this article. By socio legal approach was used within positivism paradigm answered the problem in this article. It was aimed to find why the right of land was not given protection yet concerning society tradition law and reconstruct of Right land which could give protection concerning property right of tradition law society land in the perspective of HAM.

Keywords: Protection, Reconstruction of right land, tradition of law Society.

A. Introduction

1. Background and Problem

Right of land within tradition society law is such basic right. It means that the right is really useful as tradition law society existence, it symbolise respectability values, it is proud of tradition law society. Right accomplishment of land within tradition law society, political right of tradition law society able to grow and develop, **it means** political democracy within tradition law society also able to grow easier related to right of land within tradition society law, therefore constitution acknowledge, but land right must put within social function plan. State has authority to dominate land, it occurred balance of in using right and obligation also freedom and responsibility. Based on right to dominate became possess of, therefore in several area occurred authority misapplication by government, empirical reality occurred in several area **including** various weakness within regulation level legal formally, whereas not determined yet regulation specifically which regulate about admiration, accomplishment and protection about land of tradition law society.

1 Conflict about **right of land within tradition law society** occurred **in** Indonesian was showed that Indonesian law wasn't able yet to reach the purpose, it was for justice, usage and certainty, whether from formulation, implementation or maintenance proses, if it was related to Human Right protection by state, justice within conception of Pancasila legal state, there were emphasizing about the importance of balance among right and obligation between freedom and responsibility within Human right maintainance.

Accordance with reality above, in developing legal politic of property right which concern tradition law society land was needed to harmonize between state legal politic and tradition society law politic, therefore the law became harmonious, accepted by society, not in conflict with law within both national and international level. It constructs law that gives certainty, usage and give justice sense to society.

Initially, UUPA was aimed to place Indonesian state as legal governance expression from Indonesian society. UUPA formulators were committed to modernize tradition law and made it more compatible with new Indonesian state needs, as one of independence state member in the world. This case was stated distinctly that " prevailing agrarian law from earth, water and air was tradition law, but implementation form that tradition law must compatible with general interest of state within republic unity principle, with Indonesian socialism principle and principle which stated within UUPA and future regulation, as with religion rule requirement also" (Article 5 UUPA).

Based on land affairs law political history above, it **was impact** on right law political development about right of land tradition law society was one of them were occurred conflict with **right of land within tradition law society in** Indonesian.

From explanation above, therefore problem submitted within this writing included two cases, they were: (1) Why was the right of land not given protection yet concerning society in tradition law? How did reconstruction the right of land which able to give right protection concerning tradition law society ?

2. Research Method

Qualitative-constructive method by socio-legal approach was used in this research. Data investigation was followed by analysis of Mathew B Miles and A. Michel Huberman model. It was used to collect, reduce, present data and conclude/verification. Theories which were used explained phenomena of research invention. They were state law theory, legal working theory, Legal System theory, Prismatic Society theory,. Final purpose of this research made ideal land affairs legal construction which protected right concerning right of land within tradition law society.

This research including qualitative research tradition by operation study of Post Positivism paradigm¹. Through qualitative method was possibly the researcher to understand society personally and to see them as themselves expressed their world view². By qualitative method, research was able to find reasons from such social phenomena³, they also able to find undiscovered meanings behind both subject or object researcher. Related to qualitative research, population was not known clearly, because its research sample was case study.

Furthermore, this research grouped into socio-legal research method⁴. According to Soetandiyo Wignyosoebroto⁵ called as not doctrinal approach, it was such study which view law as meaning through interpretation process, it meant any legal product determined by interpretation made and agreed by actors related within making process and legal implementation. Law could comprehend by participation, experience and total comprehension (Verstehen). This approach was used to comprehend law within its society context, it was such method that have non doctrinal characteristic.

Through socio-legal research method, legal object interpreted as a part from social subsystem among other social subsystem. Understanding law within its society context, it's meant there was connection which couldn't separated between law and society, as social basic. According to Tamanaha⁶, relationship of both law and society had the frame called "the Law-Society Frameworks", that have certain characteristic. That relation could be seen within two basic component. First component included from two main themes, it was idea that stated the law as society characteristic and idea that legal function⁸ as maintain social order. Second component was Law society relationship, including three basic elements, they were custom/consent, morality/reason, positive law.

¹ Guba and Lincoln detailed within paradigm of post positivism ontology was have realism 'critical' characteristic within modofocation epistemology , dualism or objective between researcher and researched was both entities that not totally independent. Within modification methodology, experimental. See Elin Indarti, *Ilmu Teori, dan Filsafat, Suatu kalian Paradigmatik*, Working paper are present within upgrading of *Metodology Undip*, 2015.

² Robert Bodgan and Teven J Taylor, *Kualitatif Dasar-Dasar Penelitian*, Terjemahan Khozin Afandi, Usaha Nasional, Surabaya, 1993, page 10

³ Sanapiah Faisal, *Varian-Varian Kontemporer Penelitian Sosial dalam Burhan Bungin (ed) Metodologi Penelitian Kualitatif*, Rajawali Press, Jakarta, 2001, Page.28

⁴ Within socio-legal research there are two aspects of researchs, first legal research, it was permanent research, there were several material within norm context, act regulation and second socio research, meant method and social science theories about law to assist researcher in take analysis. This Approach.

⁵ Soetandiyo Wignyosoebroto, *Op.Cit.* ,183

⁶ Brian Z. Tamanaha, *Op.cit.* page 1-2, also Suteki, *Kebijakan Tidak Menegakkan Hukum (Non Enforcement of Law) Demi Keadilan Substantif*, Pidato Pengukuhan Guru Besar Ilmu Hukum Fakultas Hukum Undip Tanggal 4 Agustus 2010), page. 41

Socio-legal studies was used, therefore this research studied legal principles about land during this time already presence injustice because unable in giving right protection of ulayat land within tradition law society in Mesuji. The reality that land affairs legal principles about right of ulayat land did not give right protection of ulayat land within tradition law society based on local wisdom value from making process (in abstracto) or the implementation (inconreto) wasn't run properly.

Social setting in this research was legal society of Mesuji tradition and other parties needed. Data collection used deep interview method, observation and document study. Data validation used Triangulation of resource. Data obtained was analyzed by combining inductive logical (primary data) and deductive logical (secondary data). Data legality technique was analysed by Triangulation of data analysis model from both Mathew B Miles and A. Michel Hubermn.

In determining informant was using purposive, until reach saturation point in the meaning of completeness and validation was enough to analyze interest. In this research, researcher determined main informant previously as the way opening to appoint other people who able to give information related to both problem and research purpose.

Main instrument of this research was researcher, because it was indept research. Supporting instruments were script book, recording tool, photo camera and others.

In order to obtain data was used literature study method and interview, also documentation. Data analysis used triangulation by using analysis technique of Mathew B. Mileas and A. Michel Huberman models⁷. By three lines, they were data reduction, presentation and conclusion/verification.

3.Theory Plan

There were two problems that ocured in this study. The first problem, why was the right of land not given protection yet concerning society in tradition law? It was analysed using legal system theory from Lawrence M Friedman also theory legal working from responsive legal theory of Philipe Nonet and Philip Selznick. Second problem, How did reconstruction the right of land give right protection concerning tradition law society. Theory Prismatic from Fred W.RIGGS.

To comprehend legal working was needed usage social sciences in organizations and constructing the law. Therefore in constructing defense legal politic to right regulation of right land within legal society needed assistance from social sciences in order that law as such internalization from developing values within society.

B. Result and Discussion

1. Why was the right of land not given protection yet concerning society in tradition law?

Why the right of land wasn't given protection yet concerning society in tradition law " analyzed by using responsive legal theory of Philipe Nonet and Philip Selznick. Both Philipe Nonet and Philip Selznick ideas on responsive law tried to include elements and

⁷ Mathew B.Miler and A.Michel Huberman, *Analisis Data Kualitatif*, Jakarta, UI Press, page.22

social science influence into legal science influenced by using social science strategy. There was social science perspective that must be paid attention to legal working totally, therefore law did not only contained forcefulness and oppression elements⁸

Social science approach treated legal experience as something changes and contextual. By responsive law, Nonet and Selznick promising correct institutional, eternal and stable. Development model could be rearranged by focus on autonomous law, by refer to conflicts on that stage which rose not only risk repressive type return, but it also possible occurred larger responsivity. Responsive law was oriented on result, purposes which would be reached outside the law. Within responsive law, law arrested was negotiated, not appease through subordination.

Responsive law characteristic was found implicit values which include within regulation and policy. In this legal model, they stated disagreement concerning doctrine they called as basic interpretation and it was not flexible. By responsive law approach, it was expected to solve the problem occurred in society, therefore law really able to prosperous society of larger interest, not for them who have power.

Responsive HAM legal concept here was, that HAM legal making must process participatively by responsive substance about necessity and social aspiration due to reality of human right in Indonesia.

Participation process was required two things, were:

1. DPR put theirself as society formal political power, and not act self as Act conceptor, moreover monopolize issued process to evaluation of Act product. Participative process according to Habermas was required to expand political debate within parliament to civil people.
Political decision making did not state apparatus and society representative only, but also all of citizen who participate within collective discourse. Sovereignty citizenry wasn't substance which frozen in society representative association, but also include within citizen forum.
2. Required civil society organization became intellectual power to study and formulate legal need of civil people became intellectual power.

There were several reasons why land affairs law the implementation wasn't protecting property right concerning tradition law society land as follows:

- a. Philosophically, land affairs legal politic was Dutch inheritance law (Agrarischewet) which used both structure and modern legal culture of west people who prioritising individual interest and oriented on economy interest (profit oriented) and seek enjoyment (hedonism). That land affairs law construction was legal construction which used both structure and modern legal culture of west people who protecting individual right only. That construction wasn't due to structure and culture of tradition law society, therefore it was imposible to accomodate develop values within communal and social tradition law society.
- b. Substantially, national land affairs legal politic party in it's existence already used HAM perspective but the implementation wasn't yet. Regukation about acknowledgment of tradition law society laws was existed, but in implementation wasn't acknowledge and protected. In fact, within national land affairs legal politic,

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⁸ Philippe Nonet and Selznick, *Law and Society in Transition; Toward Responsive Law, hukum responsip*, Nusa Media, Page .231

there were article that arrange about tradition law society existence, it meant, there was acknowledgement to tradition law society, but in implementation it did not acknowledge and protect it. State precisely protecting business usage right owner and ignoring property right of tradition law society land. In fact, the existence tradition law society was still acknowledgeble; therefore it must be acknowledgeble in its implementation. For example, forestry Act and Lampung Governoor Regulationin conflict land of Mesuji.

- c. In implementation land affairs legal politic was presence the problem, for example: law couldn't work properly, land affairs legal politic wasn't used HAM perps\ective yet (in it's implementation), it damaged tradition law society. Then, national land affairs legal politic in implementation arose the problem; it was society who wasn't prosperous. In reality, state only protects ellipse interest and ignores tradition law society interest. Tradition law society wasn't free anymore to use the forest, in fact forest was as tradition law society living resource. If tradition law society cultivate forest as cut down the forest, such as engage in farming in the forest, take material in the forest, that action was called as legal violance. Land affairs legal politic concept in this case was legal politic of property right concerning tradition law society land, in implementation did not support society to be prosperous.

2 Reconstruction the right of land which able to give right protection concerning tradition law society

According to Lawrence M. Friedman within Legal Theory System⁹, it includes three basic legal components; there were structure (institutional), substance and culture. In reconstructing national land affairs law must began from those three components. Reconstruction concerning substance and institutional structure was important, because it will determine that it will function or not within society law. Local rule of property right concerned new tradition law as reconstruction both substance and legal institutional structure. Through that Local Rule, protection concerning property right of tradition law society land could be implemented.

There were several reasons why land affairs law the implementation wasn't protected property right concerning tradition law society land as follows:

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⁹Lawrence M. Friedman, *Legal Theory System*, russel, sage foundation,,page 25

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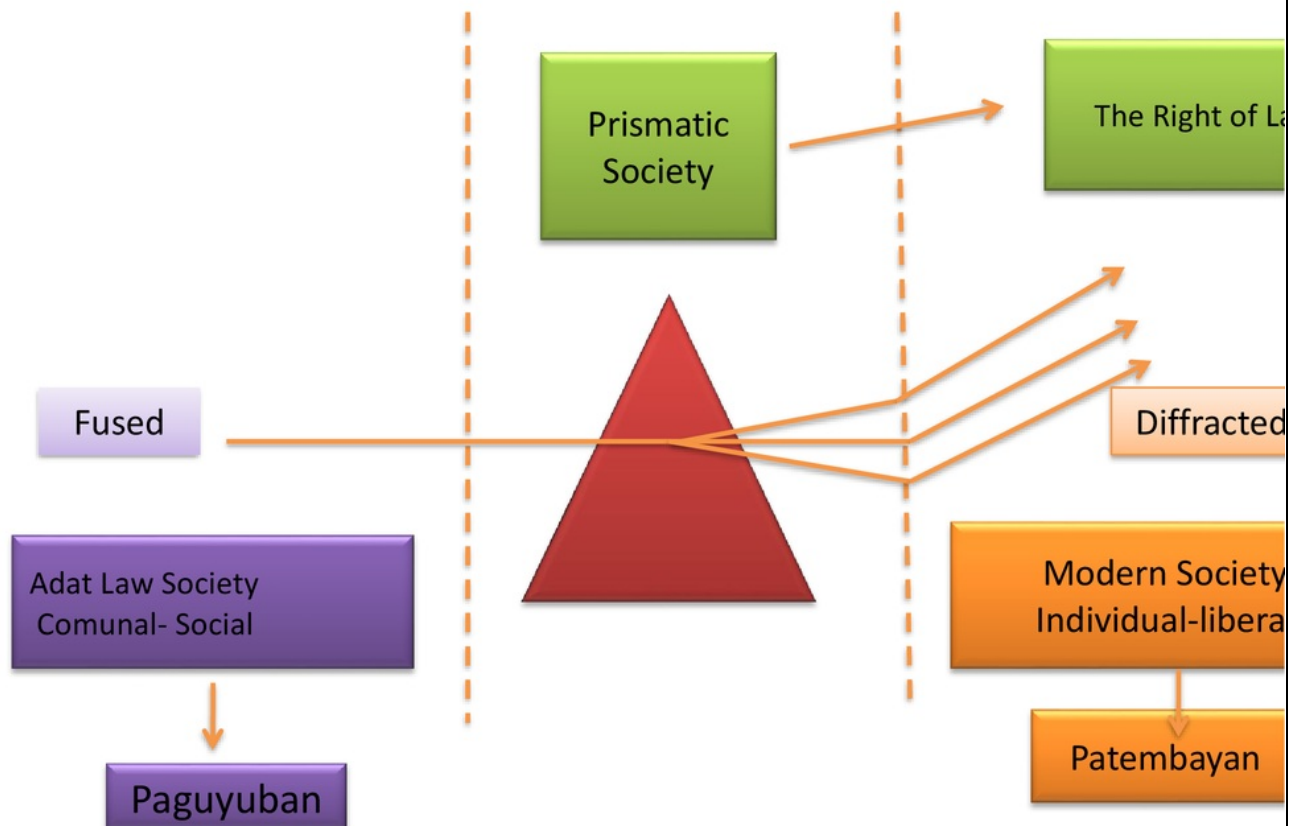
- 1) Construction of legal protection concerning property right of tradition society law that have HAM perspective was used Prismatic Society-FW Riggs concept
 Legal concept of Prismatic Society was legal concept as solution to settle two culture problems include in society.¹⁰ Within society include two cultures, it was which based on (gemainchaft) dan gesellschaft. Legal construction of property right concerning new tradition law society land was harmonious law which combine between national land affairs values and tradition law. Due to Prismatic society concept, that legal construction of property right concerning new tradition law society land was the solution to overcome problem faced.
 Legal politic of property right concerning new tradition law was such combination of both modern and tradition values which could leaving out concept dichotomy, it was individual-liberal and communal-social. That context was due to Indonesia law which based on Pancasila, which reject those both concept but take the positive value by acknowledge presence individual interest and all at once put public interest on personal interest. By those new legal politic, expected tradition law society could get the protection, therefore that legal politic could work properly and prosperous society.

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¹⁰ Fred W, Riggs, *Administration in Developing Countris*, **The Theory of Prismatic** Society, Hought Mifflin Company, Boston, 1964

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Reconstruction Of Protection The Right Of Land Within Tradition Law Society In The Perspectif Of Human Right In Prismatic Theory by Fred W. Riggs



C. Conclusion and Suggestion

1. The right of land wasn't given protection yet concerning society in tradition law, it was

caused :

- a. Philosophically, land affairs legal politic was Dutch inheritance law (Agrarischewet) which used both structure and modern legal culture of west people who prioritising individual interest and oriented on economy interest (profit oriented) and seek enjoyment (hedonism). That land affairs law construction was legal construction which used both structure and modern legal culture of west people who protecting individual right only. That construction wasn't due to structure and culture of tradition law society, therefore it was imposible to accomodate develop values within communal and social tradition law society.
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2. Reconstruction the right of land which able to give right protection concerning tradition law

Society

- 1) Construction of legal protection concerning property right of tradition society law that have HAM perspective was used Prismatic Society-FW Riggs concept

Legal concept of Prismatic Society was legal concept as solution to settle two culture problems include in society. Within society include two cultures, it was which based on (gemainchaft) dan gesellschaft. Legal construction of property right concerning new tradition law society land was harmonious law which combine between national land affairs values and tradition law. Due to Prismatic society concept, that legal construction of property right concerning new tradition law society land was the solution to overcome problem faced.

Based on conclusion above it gives some recommendation as follows:

Recommendation proposed was as follos:

1. For the law making instituion or policy maker whether Government, DPR, DPRD, President and Regulator in indonesian to take development within regulation, because existed regulation, regulation wasn't protecting right concerning right land of tradition law societ. therefore both Government and regulator in Indonesian made Local rule of Right protection concerning right land By presence that Local Rule, therefore when there were annoyance concerning right of right land of state tradition law society able to protect because there were include the legal standing. It's meant by presence that local rule, right protection of right land of tradition law society could implemented. For entreprenour or investor should be when will open the area must ask explanation clearly not only to Government who give license but also

to tradition law society, therefore land that made business area wasn't made the conflict. When this case implemented properly, therefore will avoid the conflict with society.

2. For rule sanctioning institution, in this case have a duty to escort, controlling until pulled out regulation when that rule in conflict. Competent institution, in this case was Court of Institution or Supreme Court, both these institution must have sensitivity to the function as "consitution guardian". Department of Agrarian affairs and Room system, that have important role within legal working of right concerning ulayat land of tradition law society, must brave to applied responsive policy for right protection of right land withintradition law society .

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