International Symposium
Pierre Bourdieu :

A Reflexive Sociology of Law and Society

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Sudijono Sastroatmodjo
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For the time being, there has been a predisposition to predominantly understand law as one of the autonomous knowledge having the characteristic of sui generis as elaborated by Roger Cotterel that one of the most fundamental characteristics of law from professional perspective is its intellectual alienation. In this sense, law has been imagined specifically in such a way as a doctrine and professional practice in which its internal ranking categories can be analyzed and understood without referring to social circumstances. Law disregards the huge contribution of modern science development which gets more complex. Consequently, the invention in quantum physic proclaiming that all matters have relative characteristics has not resuscitated the egoism of law formalism fanatics on how the world phenomenon is actually related to each other. Further, the studied knowledge is merely examined the indications from its phenomenon and has not been able to trace and understand the essence of it. If the stance is defended, law will lose its preexisting identity as the tool of human being to regulate social life to maintain order and prosperity of the society.

In the study about law, Meuwissen distinguishes three levels of its domain viz. philosophy of law, theory of law and science of law. Basically, those three levels are integral parts that could not be separated from each other, thus every study involving law as an object shall include them. Meanwhile if law is examined in one perspective, it will be alienated from the basis of knowledge and social. Its philosophy, in fact, represents all fundamental issues related to the study of law, not only the reality and method of its science or knowledge, but also critical behavior toward the influence of ideology of modern philosophy. In this respect, the theory is placed at the higher abstraction than science of law since it becomes domain of transfer from philosophy. Further, it reflects the object and method from various forms. Science of law from pragmatic perspective is the development of the most essential theoretical view in the study about its mechanism as a tool of social work to maintain order in the society.

Law is superiorly examined with interdisciplinary optical; thus it could be sensed as the study of not only constitution products, but also law functionality, on how it immensely contributes to maintain the social order. We should bear in mind that constitution is only one of the endeavors contributing to the maintenance of social order. The signs of the extension of law paradigm

and the collapse of it as a set of rule have appeared after its examination in multidisciplinary and interdisciplinary studies; the paradigm of the constitution could no longer handle the issues of social order that are constantly changing in line with the advancement of other branch of knowledge. The further inventions in technology and information have resulted in the constriction of world and the static law could not keep pace with the trend of global alteration.

What is currently required in the study of law is its enactment as an institution which is capable of following the update in a particular period. It has close relation with other aspects of life for instance in the context of morality, state, history, economy, culture and so forth. Tamanaha has disclosed its relationships by sparking off the idea of "mirror thesis"; that law is essentially the reflection of the society life utilized for maintaining the social order. In contrast, this perspective is completely different with legal-positivism fanatics who regard law only from the juridical optic and exclude it from moral aspects guiding the behavior of the society.

According to Satjipto Rahardjo the science of law in Indonesia actually has been left for some decades behind the political and social domain since 1945. Indeed the cogitation and theorization of law in this country exemplifies slow-moving response in the long run before the realization of the need of its knowledge and theory that could possibly explain the political and social dynamism in this country. The theoretical framework of law, in point of fact, must reach the further social dynamism. It must be able to give the prognosis of framework as the alternative reaction to the further political, economical and social change so that the study of law will not be greatly burdened with the fast-growing phenomenon.

The international symposium held by Faculty of Law Semarang State University is one of the committed endeavors in the domain of law science to take advantage the outgrowth of the emerging phenomenon in the world. In addition, the focus on the influential thinking of Pierre Bourdieu shall contribute to the development in the domain of law. Towards this end, the study shall follow the up-to-date advancement in a number of disciplines so as law can immediately respond that progress in a directed as well as precise manner.

This book is a collection of writings presented in international symposium concentrated its study on thinking, postulated by Pierre Bourdieu, a French sociologist and contemporary anthropologist who influences the development of multidisciplinary knowledge. I hope you find this proceeding useful particularly for the development of law science in Indonesia.

Sartono Sahlan[1]

1 Dean Faculty of Law Semarang State University

On November 30, 2012 an international symposium themed Pierre Bourdieu: a Reflexive Sociology of Law and Society had been successfully conducted by Semarang State University. In this event, the main speakers Yves Dezalay and Bryant Garth presented their paper entitled: Lost in Translation: on the Failed Encounter between Bourdieu and Law and Society Scholarship and the Irrespective Blindness. In addition, both reputable scholars also presented the results of their four books derived from their research. As far as history records, this symposium becomes one of the milestones of Bourdieu discussion in Asia. The discussion in symposium about philosophy as well as framework of social research method was first organized by the Faculty of Law, Semarang State University.

Faculty of Law adheres to the purposes for the advancement and education of agents as technocrats, politicians, activists, journalists, bureaucrats, and intellectuals. To these ends, it is the heart of power and knowledge. Further, its alumni are expected to give social influence in the realm of political battles in the state and the global competitive market. They shall uphold idealism and social capital as a weapon of war. In order to speculate the tendency of the faculty of law's alumni agents, observing their behavior is not sufficient. It should be explored in more detail within a certain timeframe research by taking into account the micro and macro aspects. The observation also requires historical context (ranging from Bologna school tradition, Roman law, tradition professorenrecht Germany), politics, economics, and culture.

The international symposium on Pierre Bourdieu: a Reflexive Sociology of Law and Society did not only discuss the themes presented by the main speakers. Yet, the forum also invited several speakers selected by the committee to present their papers. Dozens of articles were gathered to put together the writings of Dezalay and Bryant. This implies the arrangement of proceeding that was initiated by Dezalay and Bryant masterpiece, subsequently followed by other speakers' articles. By examining the context of Indonesia on Bourdieu's philosophy and practice research areas, deeper and sharper analysis can be developed.

At the opening session, this international symposium officially declared the establishment of a research institute named: Unnes Center for Contemporary Legal Studies. The institute is expected to follow up the recommendations

resulted from this forum by encouraging activities such as research, training, advocacy, and publishing scientific papers. Since Bourdieu is one of the main objects of study in this institution, his works will be the main reference for establishing a tradition of philosophical and intellectual in Faculty of Law, Semarang State University.

Social philosophical thoughts of Pierre Bourdieu (1930-2002) have given a great contribution to the development of jurisprudence. Through its theoritical perspective, jurisprudence is developed from correspondence with the concept of homoaeconomicus, symbolic violence, social capital, cultural social, habits, doxa, field and reflexive sociology. By using Bourdieu's view, scholars will find it easier to have in-depth analysis on the operation of a political domination, the movement of social agents, and the practical habits of law enforcers.

In its last development, jurisprudence takes a lot of considerable multidiciplinary study which does not only examine the norms, legislation, and the authority of apparatures. Jurispudence needs the other branches of disciplines, such as economics, politics, culture, technology, and social post-structuralism. Bordieu's social philosophy believes that the object of study of jurisprudence will clearly describe the collision of philosophy, science, theory, and practice in the legal framework. On the matter of its agents, there are fragments of habitues among academicians, judges, public prosecutors, lawyers, and law enforcers who build their own conduct and cultures. Each of these communities possesses the interconnected power that competes with each other in authoritarian discourse. Each of them has their own unique features to spread hegemony and form separated social scheme to shape a tradition of jurisprudence, to review legal practice, and to enhance research.

In Bourdieu's perspectives, media also plays a significant role in building the tradition of law and determining the conduct of the agents. By the means of television, pictures, and media's symbols, the culture is gradually formed. In other words, a symbolic system is built in a media filled with the conflict of interset which competes with each other to determine the model, fashion, workstyle, and ideology of law enforcers.

Bordieu's books and articles are: Homo academicus (1990), Distinction: A social Critique of the Judgement of Taste (1984), On Television (1999), Practical Reason: On the Theory of Action (1998), the Force of Law (1987), Sur L'Etat (1989), etc. Many of Bourdie's work are worthwhile for the development of jurisprudence. For the study of law and society, Bourdieu's thoughts are especially beneficial when being used to observe social interaction, the structure of society, and the culture of law itself, etc. Jurisprudence will not finally be about the study of acts, but also on the domain of socials, politics, and cultures. The power of law does not merely prevail over the nation, but also on the other informal institutions which have social authority such as churches, mosques, monasteries, temples, dan the other social agencies. In particular, Indonesia

has a special study of indigenous communally law well-known as custom law.

Bordieu's theories that discuss the social phenomenon factually and critically analyse the historical treatise of "Western" imperial with the model of influential westernization by the means of post-colonialism. The mechanism of law operation in Roman and American democracy or the other developed countries have after all influenced the historical stories of eastern and southern third world nations. By that means, law cannot be separated from the history of dominating power along with the agents who are there to compete with each other.

This is the proceeding of international symposium on a Reflexive Sociology of Law and Society by Semarang State University. Enjoy your reading.

Editor

Land Tenure Rights Owned by Foreigners In the District West Lampung

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Abstract

Mobility of foreigners from a country to the other country is increasing and unavoidable in the era of globalization. Foreigners entering Indonesia are intended to be tourists, workers, and investors. Some of them are interested to own land. It indicated quite a lot of foreigners controlling land in Indonesia. This study intended to examine the rules of the ineffectiveness of the prohibition ownership of property by foreigners in South Krui District, West Lampung regency.

The research method used study normative juridical and empirical approaches. Data collection methods included observation and interviews of the informants who were the village head, district and community leaders at the sites.

Indonesian land legislation prohibits foreigners to own land property rights. Foreigners only allowed owning land leases and rights to use, but they are not interested. They chose to control land ownership by borrowing names, utilizing the power of attorney, the option agreement, and lease agreement, the power to sell, grant probate, or getting married to citizens. They benefit the economy for a moment. There are regulations that provide convenience of foreigners controlling land property rights. There is an absolute power agency, streamlining permit transfer of land rights and land certification.

The inference rule which is the prohibition of land ownership of property by foreigners is not exhaustive and not able to resolve the issue of land ownership of property by foreigners. Inability was due to the factor of legal and non-legal. Non-legal factors include social and economic factors.
Keywords: land tenure, property rights, foreigners

I. INTRODUCTION

According to Notonegoro[1], natural law theory can be divided into two.

[1] Notonegoro, *Politik Hukum dan Pembangunan Agraria di Indonesia*, Publisher Bina Aksara, Jakarta, 1984, p. 17-18.

The first focuses on the human being as a person, to give a final and give place to solid ground. Second, focuses on the nature of man as an individual. There is no man that no land and every man are equally entitled to the land. In reality not every human being has a direct relationship with the land.

That fact has been recognized since the original founders of the Indonesian nation. The formulation of Article 33 Paragraph (3) of the Constitution of 1945 which states "The earth and the water and the natural resources contained therein will be controlled by the State and used for the benefit of the people." has reflected the reality. The formula is imperative, as it contains an order to the State. Earth, water, and natural resources contained in it, which is placed in the control of the State should be used for the welfare of the people of Indonesia. The welfare of the entire people of Indonesia is the purpose of state control over land, water, and natural resources contained in it[2].

Setting the relationship between man and the land embodied in Law No. 5 of 1960 on Basic Agrarian Principles (further called BAL), in particular Article 2 paragraph (1), (2), and (3), as follows:

Paragraph (1) On the basis of the provisions of Article 33 of the Constitution and the matters referred to in article 1, earth, water and air space, including natural resources contained therein is at the highest levels controlled by the State, as an organization the power of all the people.

Paragraph (2) the head of the State referred to in paragraph 1 of this article gives the authority to:

a. Organize and hold the designation to use, supply and maintain the earth, water and air space.
b. Determine and regulate legal relations between people and the earth, water and air space.
c. Determine and regulate legal relations between people and legal actions regarding the earth, water and air space.

Paragraph (3) The powers are derived from the controlling right of the State referred to paragraph 2 of this article that is used to achieve the maximum benefit of the people, in the sense of happiness, prosperity and freedom in society and the state laws of Indonesia as an independent, sovereign, fair and prosperous country.

Based on that determined authority, the citizen of Indonesia (WNI) is the only one who can own the perfect soil, namely property rights. Further, only Indonesians could be the subject of land ownership.

Practices in the field are often found in West Lampung regency[3] beach with

[2] Muchsin, Imam Koeswahyono, et al, *Hukum Agraria Indonesia dalam Perspektif Sejarah*, Publisher PT Refika Aditama, Bandung, 2010, p. 39

[3] Now being the West Coast District (CDE). CDE is the youngest district in Lampung Province, resulting from the division of West Lampung (Lambar), which was passed on October 25th, 2012. The district has a population of 309, 788 people, and has an area of 2445.89 km2. Consists of 10 districts, which include: Bengkunat Belimbing, Bengkunat

the status of property rights that in fact, controlled by foreigners. Moreover, the land is used for coastal tourism businesses. If the rights to land eventually controlled by a stranger, it could have a negative impact both for the nation and the state, especially if there are no limits. Sovereignty of Indonesia might fall to foreigners. The purpose of building National Land Law for the welfare of the people will be in vain.

Based on the above background, the problem examined is: Why the prohibition land tenure arrangements property by foreigners cannot be effective in the South Coastal District of West Lampung regency?

II. METHODS

The research used normative juridical and empirical approaches. Methods of collecting data were through observation and interviews. Interviews conducted on informants namely village heads, district and community leaders at the sites. Data were analyzed by descriptive qualitative.

III. DISCUSSION

The law serves to guide and not to handcuff. The law must be able to resolve the concrete problems in order to reach the substantive of justice. Substantive justice is justice not only in written legislation (positivistic)[4]. Fundamentally man's role is more important[5]. Progressive legal approach departs from two basic assumptions. First, the law is for man and not vice versa[6]. The presence of law is not for itself, but for something more spacious and big. When there is a legal problem, the law should be reviewed and improved. Human beings cannot be pushed to be included in the legal scheme. Second, the law is not an absolute and final institution. The law is very dependent on how people view and use it. In this case, men are the determinant. The law has a dependency with humans. According to Satjipto Rahardjo law is always in the process to continue to be (law as a process, law in the making)[7]. The law is not to the law itself, but rather the law for man.

Land ownership by foreigners is set in the BAL. BAL adopted the principle of nationality and citizenship. The principle of nationality and citizenship is in accordance with the principle of customary law. This mindset can be understood as BAL resting on customary land law.

Ngambur, Pesisir Selatan, Krui Selatan, Pesisir Tengah, Way Krui, Karya Penggawa, Pesisir Utara, and Lemong.

[4] Positivism is a way of thinking that is normative an-sich, based on the text of rules or laws are rigid, typically used as a way of thinking by the flow of the stream of legal positivism legal normative.

[5] Satjipto Rahardjo, *Membedah Hukum Progresif*, Publishers, Buku Kompas, Jakarta, third impression, in January 2008. p.xix

[6] Satjipto Rahardjo, *Hukum Progresif, Sebuah Sintesa Hukum Indonesia*, Genta Publishing, Yogyakarta, mold 1, July 2009, p. 5

[7] Satjipto Rahardjo, *Hukum Progresif*....., Ibid, p. 6.

Foreigners according to the conception of customary law are not residents of those indigenous people. Foreigners are prohibited from entering the territory of indigenous people. Actually they were only allowed to enter the lands of indigenous territories by providing something called custom fines. Based on traditional rulers permit, they can open up land for farming or for the young garden plants. Young garden plants are plants that do not require a long time to be harvested. They should only be managed on the land opened for one crop.

Land that has been opened has the right to be used. Foreigners should not have the land for property. Foreigners are allowed with the permission of customs authorities to take advantage of the forest such as for hunting, and so forth. They have to give up some of the results (usually a tenth) to the customs authorities. Foreigners who opened the land or took forest products without a license are sentenced under customary law (also known as land thief, thief of forest)[8].

The principle of nationality and the nationality of the Indonesian land law stated in the provisions of Article 9 paragraph (1) BAL. Only Indonesian citizens can have a full legal relationship with the earth, water and air space. Foreigners or Indonesians who are also foreigners (dual citizenship) are not allowed to have land for property. Foreigners in Indonesia are only allowed to rule the land with the right to use and the Right Hire for Building. Any act or agreement essentially causing the transition rights to land to foreigners is null and void[9]. Such actions contained in the provisions of Article 21 and 26 BAL.

Article 21 Paragraph (3) Foreigners who after the enactment of this law obtained property by inheritance-without-will or commingling of property due to marriage, as well as Indonesian citizens who have the right that belongs to and after the enactments of this law will waive the right to lose citizenship within a period of one year from obtaining such rights or loss of that citizenship. If after that period the property is not removed, then the right is void due to the law and the land falling in the State, provided that the rights of others continued to burden.

Article 21 Paragraph (4) an Indonesian citizenship who also has foreign citizenship cannot have property rights and land and for him the provisions of paragraph 3 of this article is applicable.

Article 26 Paragraph (1) Trade, exchange, grant, with probate administration, administration in accordance with customary law and other acts that are intended to move the property and its control is regulated by the Government.

[8] Harsono, Boedi, *Hukum Agraria Indonesia: Sejarah Pembentukan Undang-Undang Pokok Agraria, Isi dan Pelaksanaannya*, Publishers, Djambatan Jakarta, 2008, p. 190.

[9] Supreme Court Decision: date. 27 - 1-1976 No. 731 K/Sip/1973. In Case: Mas Darmono Soenodiwirjo to 1. Z. Abidin Iskandar, 2. Aban; 3. Adjun et al.

Article 26 Paragraph (2) Any trade, exchange, grant, giving the will and other acts that are intended for direct or indirect transfer of property to a foreigner, to a citizen who has Indonesian citizenship as well as foreign citizenship or to an entity law, except those specified by the Government referred to in Article 21, paragraph 2, was canceled due to the law and the land fell to the State with the provision that the rights of others continued to burden and all payments received by the owner cannot be reclaimed.

Actions and agreements which basically transfer land ownership to foreigners is smuggling law and contrary to the BAL. Actions and agreements as in some other countries are also prohibited and null and void. In Thailand, the person whose name is borrowed/endorser (nominee) threatened with criminal sanctions two years in prison and a fine of 20,000 Baht[10].

Provisions held distinction between Indonesian citizens and foreigners in the land ownership is in accordance with the principles of the customary law. According to the International Private Law, restrictions on the rights of foreigners on land can be accounted for. Opinion Andrew Hayes Roth, quoted Sudargo Gautama, there seems to be universal agreement that a country is allowed to prohibit people other than citizens of the country itself to acquire objects remain in the national territory. Based on his research, Hayes-Roth can formulate a law, which he called "Rule number 6". Based on the general principle of international law, the privilege was given to foreigners to participate in the economic life of the country in which he resides, not to include the ownership of all or certain objects, both moving objects and fixed objects[11].

In terms of Public International Law, Republic of Indonesia as an independent and sovereign state has the right holding provisions that restrict foreigners to control the land with certain rights. Proprietary cannot only be possessed by the foreigners, but also Right of Cultivation and Right to build[12]. Pursuant to Customary Law, Explanation of Article 42 of the BAL and Government Regulation 41/1996 on the House Ownership Residential Housing or Stranger by the Domiciled in Indonesia and Regulation of the State Minister of Agrarian / Head of BPN 7/1996 jo 8/1996 on Housing the House Ownership Requirements or Occupancy by Foreigners[13], foreigners can only have a right to use land, with limited authority.

Ideally, normative prohibition of land ownership by foreigners[14] explained above shall be implemented. However, if it is observed closely, the actual arrangement is still not complete. Satjipto Raharjo gives terms that are not final

[10] Maria SW Sumardjono, *Alternatif Kebijakan Pengaturan Hak Atas Tanah Beserta Bangunan bagi Warga Negara Asing dan Badan Hukum Asing*, Publishers, Buku Kompas, Jakarta, 2007, p. 19.

[11] Harono, Boedi, *Hukum Agraria Indonesia*:...Op.Cit., p. 223.

[12] Article 30 and 36 BAL

[13] Harsono, Boedi, Loc.Cit.

[14] Article 9 paragraph (1) and Article 26 Paragraph (1) & (2) BAL

or unclear[15]. The law is not always clear. There is lack of ability in providing the answers confronted thousand issues. He did not provide immediate clauses used directly to solve these problems. Schoften says something imaginary when people assume that the law had arranged everything thoroughly[16]. The law is flawed since it was enacted. Many factors contribute to the existence of the disability. Moreover, the law can also be kriminogen, meaning to be a source for crime[17]. This is in line with the opinion of S Poerwopranoto[18] in his guide about the law of the land that during the land trade to foreigners, a stranger tried to break it.

Progressive law believes that the law is an institution that never stops moving the discovery of authentic moral. Legal quality is always in the making[19]. Therefore, everything that inhibits the process should be eliminated. Any legislation that has been made was never regarded as something final and perfect. Each rule is considered not final because the inability of the law to follow the development of human manners that are always moving and changing. Just as humans, the law must also follow the movements and changes in society.

Article 26 Paragraph (1) BAL mandates that the trade, exchange, grant with probate administration, administration shall be in accordance with customary law and other acts intended to transfer ownership and supervision set by government regulation. Government regulation until today does not exist. The Government Regulation 24 of 1997 on Land Registration on the regulation of surveillance of transitional land ownership is meant to move land to foreigners. Article 9 Paragraph (1) BAL is followed up by Article 26 of the BAL and it is still not final. Such provisions have not been able to resolve land

[15] Between the idea and the article law was immense distance that causes the gap between ideas and laws. Formulating the regulations attached too many things, such as grammar, rich vocabulary and others. So no, it is wrong when people say that the law is a "language game". Language as a means to convey the idea of a message contains a lot of limitations. That is why the rule still requires a component called an explanation. Indeed, all of the written text requires interpretation, not just clauses briefed by law. So it is a mistake to say the legislation or law is clear. Further described the legal reserve even favored to bring and maintain public order, had to admit that in itself is also relentless turmoil. In a certain period, life could have been relatively calm; while at other times quiet and order it to be breached to create a better order. Although designed to create order and at a certain time is relative order is reached, but the success of it contained the seeds of failure. Now more and more people understand that in order stored seeds of disorder, so the expression "order emerges from disorder" (order out of chaos). Empirical evidence on the matter, which stems from the sciences of physics and chemistry, now also venturing into the realm of social sciences and law, see (Satjipto Rahardjo, *Biarkan Hukum Mengalir*, Jakarta: Buku Kompas, 2008. p. 133).

[16] Lecture Materials Prof Tjip (Progressive legal interpretation).

[17] Satjipto Rahardjo, *Biarkan Hukum Mengalir*...Op.Cit. hlm. 141.

[18] S Poerwopranoto. *Penuntun tentang Hukum Tanah*, 1954.

[19] Satjipto Rahardjo. *Hukum Progresif Berhadapan dengan Kemapanan*. Jurnal Hukum Progresif. PDIH Undip. Semarang. 2005. p. 5..

senure ownership by foreigners. In 1982 the Minister Issued Instruction No. 14 of 1982 on the Prohibition of Use of Absolute Power in Transfer of Land Rights. Instruction is intended to prevent the smuggling of legal transfer of land ownership to foreigners. However, practice in the field of law smuggling persists. Foreigners simply control land property rights by nominee[20]. Maria SW Sumardjono[21] recorded six ways that are usually taken by a stranger to be able to control the rights to the land. The ways are taken over land ownership agreement and power of attorney, the option agreement, lease agreement, power to sell, grant probate, and a statement of the beneficiary.

According to the argumentation of L. M. Friedman and Hans Kelsen, the legal system in actual operation is a complex organism in which the structure, content, and culture interact. The effectiveness of law is influenced by three components. It means that people actually live up to the norms of the law as they should do. Given the incomplete legal norms on how people should act, the provisions of Article 9 and Article 26 of BAL may still be questionable in terms of its legal structure. The authority that controls or surveillances and prosecutes the citizens who lost their citizenship or any other citizenship has the right to the land. Citizens made an agreement with foreigners who essentially do the transfer of property rights to land. The practice, if entrusted with judicial responsibilities, would wait whenever there is a dispute in court, after the act. Original purpose of the prohibition referred to the control of land by foreigners has not been materialized. This is the evidence concerning the many cases of land ownership by foreigners.

In substance, the national law of the land as a sub-system of national law must be constructed again, for example by adding rules on the authorized parties to supervise, control and conduct concrete actions to prevent and resolve land ownership of property by foreigners. Fines or criminal sanctions shall be imposed to anyone including the officials or community members who help foreigners to dominate land ownership. Allegedly many notaries/sub-district and village heads provide services to foreigners who wish to acquire land property rights, in a way to help make the absolute power of attorney. Sale and purchase agreement of land ownership is conducted by borrowing name (nominee/strooman).

In order to maintain the principle of nationality and citizenship, a new policy is required. For instance, the nominee is threatened criminal sanctions and fines, or if any citizen (man or woman) is married to foreigners then buying land, thus his or her financial resources must be traced. If the source is funded by foreigners, it must be charged with high taxes. If the sources of funds from the citizens then the foreigners shall make a written statement that the land will

[20] A person named, or designated, by another, to any office, duty, or position; one nominated, or proposed, by others for office or for election to office.

[21] Maria S.W. Sumardjono, *Alternatif*.... Op.Cit. p.14-15.

not be claimed[22] as in the country of Thailand. For the parties (the Land Office officials Notary/ Officials Making Land Deed, district officials, and village sub-district) or anyone who proved to be petrified facilitate the nominee, it is charged to strict sanctions (both criminal and penalties).

Y. Dror in M. Irfan Islamy[23] said seven models of decision-making while Thomas R. Dey Nawawi Ismail noted nine[24] public policy formulations one of which is an incremental model. This model seeks to revise the formulation of rational policy models that experience difficulties in their implementation. Further, it seeks to modify an ongoing or past policy. To reconstruct the incremental model is widely used in developing countries since they are facing various problems and limited time to solve the problems. The problems are related to the resolve land tenure owned by foreigners.

Culturally citizens do not care about the condition of land ownership of property by foreigners. They are ignorant about people who borrowed their name to buy land, the person selling the land, or an intermediary who requested their services to find suitable candidates for the location of land, citizens in the location of the land, the authorities related to the transfer of property rights to land. In fact, the community gets the benefit from the related-transaction[25].

Empirically that phenomenon marks change views of citizens on the value of land[26] that has been shifted from the religious to economic value. Emphasis land ownership is not the values of honor, pride and personal success, self-identity and dignity, but purely economic value. On the economic value/pragmatic consideration the person only manages, uses and controls land property rights. This phenomenon is taken for granted by the community. That means citizens approve land ownership of property by foreigners, though *illegal*. Even though the establishment of such fact is not true, there is something wrong with the community (culture component); therefore, there is a need to improve the culture conditions.

[22] Thailand citizens (women and men) who are married to foreigners to buy land in Thailand then prove that the funds used to purchase the land from them and the foreigners made a written statement that the land will not be claimed by the foreigners Maria SW Sumardjono. *Alternatif* ... ibid, p, 33.

[23] Namely: 1) Pure Rationality Model, 2) Economicale Rational Model, 3) Secuential Decisition Model, 4) Incremental Model, 5) Satisfying Model, 6) Extra Rational Model 7) Optimal Model, in M. Irfan Islamy, *Prinsip-Prinsip Perumusan Kebijaksanaan Negara*, Publishers, Bumi Aksara, Jakarta, 1991. p. 35-36.

[24] Dey policy formulations put forward nine models: 1) a model system, 2) Elite models, 3) institutional models, 4) group model, 5) process model, 6) model of rational 7) model of incremental, 8) model of a public option, and 9) models of game theory (H. Ismail Nawawi, *Public Policy, Analisis, Strategi Advokasi Teori dan Praktik*, Publishers PMN, Surabaya, 2009, p. 125-129.)

[25] FX. Sumarja, *Problematika Kepemilikan Tanah Bagi Orang Asing, sebuah tinjauan yuridis-filosofis*, Publishers, Indepth Publishing, Bandar Lampung, 2012, p. 33.

[26] Yusriyadi, *Tebaran Pemikiran Kritis Hukum & Masyarakat*, Publishers Surya Pena Gemilang, Malang, 2010, p. 73.

The public does not have the legal awareness. The public does not understand the impact of land ownership rights owned by foreigners regarding Law No. 25 of 2007 on Investment that could threaten the business sector including aquaculture. Foreign investors can control islands and beaches anywhere in Indonesia. They blocked access to the community. Fishing communities cannot catch fish around the island which controlled by foreigners. Community and fishermen cannot access the foreign-controlled beaches anymore. Aquaculture land will be ruled by foreign businessmen who have big capital supported by their respective governments. There are so many foreign businessmen targeting Indonesia's natural resources as the possibility to force this nation[27].

Besides giving impacts to the communities, it also has an impact to the country. The state will be harmed. Some cases that appear in the control of land ownership by foreigners are always associated with the parties since the initiation has no good intentions and dishonesty. They want to control something that is not their right, to make ends meet. They get influenced from third parties and other parties (investors). The state will lose a considerable potential tax with the smuggling of law, property rights in land owned illegally by foreigners. In terms of defense and security will also be problematic since the land is controlled by foreigners and citizens cannot access it anymore. Moreover, some areas of coastal land controlled by foreigners is adjacent to or facing directly out to sea. It opens the possibility of undetected intruders entering Indonesian territory.

In addition to socio-economic factors, government regulations also contribute to the land owned by foreigners. Prohibition of using absolute power to transfer land rights only applies to the head of the village and sub-district. Notary/ Officials Making Land Deed (OMLD) allowed using absolute power. Absolute power is being abused by a Notary/OMLD to help foreigners gain land property rights. Regulations that permit the transfer of land rights also cause strangers easily obtain land ownership. Originally to transfer rights to land, a person must get permission from the authorities. This rule was changed that the owner of land does not require permission thus it facilitates land certification by foreigners allegedly control land property rights. The transition of land rights which has not been certified must be known by elders or village chiefs. For the time being, tribal/village chiefs do not know anymore the transfer of land rights. As a result, there is no control on the transfer of land rights. Regulations are not able to resolve land ownership of foreigners.

Based on description above, it can be explained that there is still lack of the ability of land control rules to prohibit ownership by foreigners. Further,

[27] As stated by Chairman Moeslim Shidiq Nusantara Fishery Society (NFS) Daily Suara Pembaruan Updates on April 5, 2007. See also Decision MK No. 21-22/PUU-V/2007, accessed December 23rd, 2010.

there are no adequate provisions which can be used directly to solve these problems, so that the rule of the prohibition land ownership of property by foreigners has no effective implementation. The same case happened in the South Coastal District; West Lampung (now entered the district of the West Coast of Lampung Province). Coastal lands in the District of South Coast are under the control of foreigners. Land tenure was performed through a lease agreement and the name of marriage.

West Lampung has assets of 220 km along the coastal areas and very potential to be developed into tourist beaches. There are 7 (seven) coastal tourism development potential, namely Cape Coast Faithful, Always Coast, Coastal Way Jambu, Jukung Labuhan Beach, Coastal Way Haru, Coastal Way Sindi, and Suka Beach State. Although so far only 40 percent of the land is managed, 3,000 foreign tourists (American, Australia and Europe) came to visit. In 2008 the Regents put tourism as a leading sector in regional development[25]. West Lampung regency consists of 17 districts with 195 pekon and 6 wards.

Coastal land ownership by foreigners through the model name or marriage loans indicated that the main concern is economy. Some other aspects are not considered very deeply, thus the model is not able to maintain some social values, and resources that are beneficial for agrarian economy. Model nominee and marriage loans should pay attention to the social, agrarian resources, legal and some aspects related to the use of land.

The model contract/lease of land for the building as regulated in Article 35 of the BAL also uses household economic indicators as a primary consideration. This model gives less certainty and legal protection and does not support the creation of well-ordered administration. Right to lease does not require registration to the Land Office. The advantage to the model contract/lease of land is prohibiting transfer of rights to a foreign national. Land owners are still able to maintain some social values society, and do not diminish the rights of land ownership. Model contracts/leases of land should pay attention to the legal and related aspects of land use.

There was appropriate thought to be applied in land use between local residents or foreigners or local government with the right to use above the ground property rights. Land use rights above property rights is the right to use and/or collect the results of someone else's land, giving authority and obligations specified in the agreement with the owner of the land, which has no agreement or lease agreement.

Right to use property on the land is an option that can overcome some of the weaknesses in the model of borrowing names, marriage, and contract/lease of land in land ownership[26]. This option meets the aspect of justice, expediency

[25] http://bloggerlampungbarat.wordpress.com/2008/10/13/objek-wisata-pantai-lampung-barat-belum-tergarap-optimal/, accessed December 23rd, 2010

[26] FX. Sumarja, Pengaturan Penguasaan Tanah Hak Milik Bagi Orang Asing; Dalam Pengembangan Wisata Pantai Di Lampung Barat, Praevia Journal of Ilmu Hukum

and the rule of law. Aspects of justice can be seen from two sides. On the first side, foreigners are given the opportunity to have the right to land and buildings. Second, the sustainability of the system remains protected because society does not have to lose their land rights thus the government still can protect the interests of its people. Aspects of expediency can be seen from the foreigners whose opportunity to have a right over land and buildings with a status on the ground Right to Use Property Rights is one of the means to fulfill his need to have a home stay or business. When the community can increase economic output, the case for the government would provide revenue to the state finance in the form of annual revenue and tax money. Aspect of legal certainty for holders of land rights, the provision of evidence in the form of rights that clearly indicates the type of rights over the land, the subject of rights, and the rights object (location, area, boundaries) in the form of land certificates.

The use of right above is a policy that has been regulated in Article 42 of the BAL, but cannot be implemented effectively so that called unsuccessful implementation. Therefore, the implications at the policy level are the need to immediately pass the Law on Property Rights, as has long been ordered by BAL or the Law over Land Rights as outlined in the national legislation program 2009-2014. Additionally, improvement should also be prioritized according to Government Regulation No. 41 of 1996 on House Ownership Residential Dwelling or Foreigners by the Domiciled in Indonesia. In implementing the policy, it is necessary to implement the provision of apparatus readiness HP (use right) above the ground property rights. Executive officers must be able to implement policies effectively. Monitoring and control need to be improved. Officials Making Land Deed (OMLD) needs to be re-examined. Furthermore, at the level of the environment it is necessary to accommodate public opinion on the policy of HP on land ownership through intensive socialization.

If the right to use can really be applied, it will have a positive impact on the community and the Government of West Lampung regency. The extension and renewal rights to use can increase the income to the local treasury or to the public holders of rights to land. Local Government and people of West Lampung in the future will get the benefit of an extension or renewal of land.

IV. CLOSING

A. Conclusion

The rules of prohibition land ownership by foreigners, which has since been enacted, had congenital defects, incompleteness, and the regulation is not appropriate, thus it is not able to solve the problems of land ownership by foreigners. Inability land tenure rules prohibit ownership by foreigners because in addition to the non-legal factors as well, namely the social and economic laws. Economic factors appear dominant in the land ownership by foreigners.

Magister hukum Unila, Vol. 5. No. 1. January-June 2011, p. 13.

They benefit economically, despite the short-term gains. Unavoidable smuggling legal and ownership prohibition by foreigners is not effective in its actualization.

B. Suggestion

Appropriate model to be applied in land use between foreigners with locals or the government is right to use above ground on the property. The rights about ground property rights are an alternative that is able to overcome some of the weaknesses in the model borrow names, marriage, and contract lease of land. This alternative meets the aspect of justice, expediency, and the rule of law.

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