

## **Reconstruction Of Protection The Right Of Land**

### **Within Tradition Law Society In The Perspectif Of Human Right**

Land was one of very important natural resource, it's meant for human live, wasn't as the function as agriculture production factor only which produce various food materials, moreover within agrarian country such as Indonesia, but also because it's social culture function.

HAM was such basic right that naturally adhered on human self, universally and eternal, therefore must protected, respected, maintained and wasn't ignored, reduce or seized by any person. It's meant that, any people was have obligation to acknowledge and respecting 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 the right of land wasn't give protection yet concerning society in tradition law? How reconstruction the right of land which able to give right protection concerning tradition law society ? was two problematic within this article. By socio legal approach was used within positivism paradigm will answer the problem in this article. This article was aimed to found why the right of land wasn't give 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 HAM.

Keywords: The Right of land ,Tradition law Society, Protection,Reconstruction

## **A. Introduction**

### **1. Back Ground and Problem**

Right of land within tradition society law was such basic right, it's meant that the right was really useful as tradition law society existence, that symbolise respectability values, proud of tradition law society. Right accomplishment of land within tradition law society, therefore political right of tradition law society able to grow and develop, it's meant political democracy within tradition law society also able to grow easier. related to right of land within tradition society law, therefore constitution acknowledge, but right about that land must put within social function plan, therefore state have authority to dominate land, therefore 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 was still include 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.

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 process, if 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 maintenance.

Seen the reality above, therefore in develop legal politic of property right concerning tradition law society land was need to harmonised 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. Law construct was law that give 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 modernizing 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 for 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, 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 was include two case, it was: (1) Why the right of land wasn't give protection yet concerning

society in tradition law? How 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 analysis of Mathew B Miles and A. Michel Huberman model that used to collected, reduced, present data and conclude/verification. Theory used was explained phenomena of research invention was state law theory, legal working theory, Legal System theory, Prismatic Society theory,. Final purpose of this research was make ideal land affairs legal construction which protecting right concerning right of land within tradition law society.

This research including qualitative research tradition by operation study of Post Positivism paradigm<sup>1</sup>. Through qualitative method was possibly the researcher to understand society personally and seen them as theirselves expressed their world view<sup>2</sup>. By qualitative method, research able to found reasons from such social phenomena<sup>3</sup>, our able to found undiscovered meanings behind both subject or object researcher. Within qualitative research tradition wasn't known population, because it's research sample was case study.

Based on stand point above, therefore this research grouped into socio-legal research method<sup>4</sup>. According to Soetandiyo Wignjosoebroto<sup>5</sup> called as not doctrinal approach, it was such study which view law as meaning through interpretation process, it's meant any legal product will 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 it's society context, it was such method that have non doctrinal characteristic.

Through socio-legal research method, legal object will interpreted as a part from social subsystem among other social subsystem. Understanding law within it's society context, it's meant there was connection which couldn't separated between law and society, as social basic. According to Tamanaha<sup>6</sup>, relationship of both law and society was have the frame called "the Law-Society Frameworks", that have certain characteristic. That relation could be seen within two basic component. First component include from two main themes, it was idea that stated the law as society characteristic and idea that legal function was maintain social order. Second

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<sup>1</sup> Guba and Lincoln detailed with paradigm of post positivism ontology was have realism 'critical' characteristic within modification 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 Methodology Undip, 2015.

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

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

<sup>4</sup> 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.

<sup>5</sup> Soetandiyo Wignjosoebroto, *Op.Cit.*, .183

<sup>6</sup> 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

component was Law society relationship, including three basic elements, it was custom/consent, morality/reason, positive law.

Socio-legal studies using, therefore this research will 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 wasn't 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. Within data collection used deep interview method, related observation and document study. Data validation by using 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 analysis interest. In this research, researcher determine 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 instrument was script book, rrcording 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 models<sup>7</sup>. By three lines, it was data reduction, presentation and conclusion/verification.

### **3.Theory Plan**

Effort to revealed problem include within problem formulation was used several theories as thinking plan which could be used as analysis point. First problem Why the right of land wasn't give protection yet concerning society in tradition law? analysed using legal system theory from Lawrence M Friedman also theory legal working from responsive legal theory of Philipe Nonet and Philip Selznick.. To analyzed second problem “”How reconstruction the right of land which able to give right protection concerning tradition law society. To theory Prismatic from Fred W.RIGGS.

To comprehend legal working was needed usage social sciences in organizw 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 the right of land wasn't give protection yet concerning society in tradition law?**

Why the right of land wasn't give protection yet concerning society in tradition law "

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

analyzed by using responsive legal theory of Philippe Nonet and Philip Selznick. Both Philippe Nonet and Philip Selznick ideas on responsive law was tried to including elements and social science influence into legal science influence by using social science strategy. There was social science perspective that must be paid attention to legal working totally, therefore law wasn't only content forcefulness and oppression elements<sup>8</sup>

Social science approach was treat legal experience as something changes and contextual. By responsive law, Nonet and Selznick was promising correct institutional, eternal and stable. Development model could be rearranged by focus on autonomous law, by refer to conflicts on that stage which rise not only risk repressive type return, but also possibility occurred larger responsivity. Responsive law was oriented on result, purposes which will 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 not flexible. By responsive law approach expected could assist to solve the problem occurred in society, therefore law really able to prosperous society of larger interest, not for them who in 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 wasn't 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 studied and formulated legal need of civil people became intellectual power.

There were several reason 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

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

acknowledgment of tradition law society laws was existed, but in implementation wasn't acknowledge and protected. In fact, within national land affairs legal politic, there were article that arrange about tradition law society existence, it's meant, there were acknowledgement to tradition law society, but in implementation wasn't 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 acknowledge, therefore must be in it implementation also acknowledge. For example was Forestry Act and Lampung Governoor Regulationin konflik 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), therefore damaged tradition law society. Then, national land affairs legal politic in implementation was rise the problem, it was society wasn't prosperous. In reality, state only protecting ellite interest and ignoring tradition law society interest. Tradition law society wasn't free anymore to used 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. Therefore, land affairs legal politic concept in this cae was legal politic of property right concerning tradition law society land, in implementation wasn't made society 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 System<sup>9</sup> was include three basic legal components, it was 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 will determine that it will function or not within society law. Local rule making of property right concerning 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 reason why land affairs law the implementation wasn't protecting property right concerning tradition law society land as follows:

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<sup>9</sup> Lawrence M. Friedman, *Legal Theory System, russel*, sage poundation,,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.<sup>10</sup> 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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Fred W, Riggs, *Administration in Developing Countris*, The Theory of Prismatic Socitey, Hought Mifflin Company, Boston, 1964

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



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### C. Conclusion and Suggestion

1. The right of land wasn't give protection yet concerning society in tradition law, this is

because :

- 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, there were article that arrange about tradition law society existence, it's meant, there were acknowledgement to tradition law socety, but in implementation wasn't acknowledge and protect it. State precisely protecting business usage right owner and ignoring property right of tradition law society land. In fact, the exixtence tradition law society was still acknowledge, therefore must be in it implementation also acknowledge. For example was Forestry Act and Lampung Governoor Regulationin konflik land of Mesuji.
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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 therefore could deliver 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 sactioning 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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