



# Deconstruction of Customary Rights of Indigenous Peoples in Progressive Law

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**Abstract.** Deconstruction of Customary Rights of Indigenous Peoples is a term used to describe a model of understanding the customary rights of indigenous peoples based on the concept of progressive law. The paradigm used to examine the deconstruction of customary rights arrangements of indigenous peoples in this paper is the paradigm of positivity. The history of the regulation of customary rights of indigenous peoples is contained in Article 3 of Law No. 5 of 1960 concerning the UUPA where the concept of the right to control by the state which was originally interpreted as "regulating" then shifted to having absolutely. The state is caught up in the arbitrariness of taking people's land for the benefit of growth-oriented economic development, has changed the choice of social interests and values that is from common prosperity to prosperity of a group of people. The deconstruction of customary rights of indigenous peoples in the concept of progressive law provides an interpretation that the law that is built is a law that can prosper and make people happy. With the concept of progressive law, the customary rights of indigenous peoples can be fulfilled and protected. The government's efforts in fulfilling, protecting and respecting the customary rights of indigenous peoples of customary law communities are part of the state's responsibility, one of which is by building laws that are beneficial to humans, namely being able to realize welfare and happiness.

**Keywords:** Deconstruction · Customary Rights · Progressive Law

## 1 Introduction

### 1.1 Background Back and Problems

Deconstruction Right The Ulayat of the Customary Law Community is a terms used for explain sheet new philosophy, intellectual strategy, or model of understanding about right ulayat Public law custom. The term "de -construction" actually more close with definition etymological from the word analysis, the brave one unravel, release, open up. Deconstruction interpreted as method analysis developed by Jacques Derrida with disassemble Language structures and codes, in particular structure opposition so appearance, so that create one game without meaning end [1].

Draft law progressive leave from two assumption base. First, that law is for human [2]. It means that man Becomes determinant and orientation from law. Laws made must

could serve human, is not it otherwise. Because of that law no past institution from interest human. Function law determined by humans in realize well-being human.

constitutionality confession right ulayat Public law custom or often called right ulayat Public law confirmed in Article 28H paragraphs (1 and 4) of the 1945 Constitution which states: that: paragraph (1) Everyone has the right life prosperous physically and mentally, located stay, get environment life good and healthy as well as entitled get service health. Next in paragraph (4) is set that: Everyone has the right have right owned by personal and rights owned by the no can taken over by arbitrary authorized by anyone.

Implementation right ulayat this must accompanied with obligation, ok obligation Public as well as country. Related with Thing In this case, Article 28 G and 28 H of the 1945 Constitution are contained something instruction constitution give the attention that more big with give guarantee and protection right ulayat Public law custom, however right ulayat the no means Becomes absolute right \_ like law western land. Right this limited by Article 6 of the LoGA, which stipulates that that “ all “ right on soil including right owned by have function social “. Next in Explanation General II number 3 is set that: “ interest “ something Public law must submit to interests more national and country broad”, but Thing this no means that interest Public the law in question no noticed same once.

Based on Law NO. 5 of 1960 concerning UUPA, Article 3 confirms about existence confession right ulayat Public law custom. As the law that set confession right ulayat Public law custom, article 3 determine that Implementation right ulayat and similar rights that from Public law custom along according to reality still yes, must so appearance until in accordance with interest national and state [3]. Provision this stem from existence confession right ulayat in law land. Then in Article 22 of the LoGA that somebody could given right ulayat by their customary law association because has given permission for open and work the land in Keep going continuously. It means someone who is appreciated no just open or occupy first land, but more on the value of one's work to continue continuously strive land, that's which will give birth to property rights.

With see provision regulation legislation that regulates about right ulayat existing community during this could interpreted that is right ulayat Public law custom already fulfilled, protected and respected as form from not quite enough answer government and society.

Based on reason on then what will Becomes problem in paper this is.

1. How is history Ulayat Right in Regulation Indonesian Legislation ?
2. How Deconstruction Right Customary Law Communities In Progressive Law ?

## 2 Method study

### 2.1 Approach Paradigmatic

Paradigm used for study deconstruction Settings right ulayat Public law custom in paper this is a positivist paradigm. With approach history that is besides see interpretation provision Existing regulations also see understanding judge During this is exalting regulation as commander with the basis for creating certainty law it turns out many put aside factor justice desired social society. Law translated as rigid rules and must obeyed so

that enforcer law only Becomes funnel law. Adji Samekto state procedure enforcement law with paradigm positivist this:

Procedure, with thereby Becomes base important legality for enforce what is called justice, even procedure Becomes more important than talk about justice (justice) that alone. Inside context this, effort look for justice (searching for justice) can Becomes fail only because bump violation procedure [4]. More carry on said that use paradigm positivistic in modern law turns out many cause rigors so appearance so that search truth ( searching for the truth) and justice ( searching for the justice) no achieved because blocked by walls formal [4] procedural.

## 2.2 Framework Theory and Concept

According to Chris Baker, deconstruction is demolition a text for look for know and show the assumptions held text that. To do deconstruction according to Barker is To do demolition on hierarchical binary opposition, such as speech or writing, reality or appearance, and others that work ensure truth with method deny more couples \_ inferior in each of the binary [5] oppositions.

View above match with Barbara Johnson's view that states, goals deconstruction is uncover oppositions implicit hierarchical in text. Therefore, if a text deconstructed, destroyed no lah meaning, but claim that one form meaning to text more Correct rather than another meaning [6].

Deconstruction understood as a reading model. Deconstruction no understood as a mere " Deconstruction of Derrida", though, within will many using the terminology used by Derrida. Deconstruction here is very general, i.e. for understand law more deep. Reading in this article must understood as creator difference. A basic reading different from what do you want explained, and in essence he different from difference is condition main or is condition reading, and embodiment of course thus, that is different from what do you want readable, but at the same time he active and productive with the difference, and for the sake of difference that alone [7].

Draft law progressive is draft thinking Satjipto Rahardjo about happy law man and his nation, begins from something reality that law understood only limited formula law, and implemented with syllogism. Thinking law progressive appear because not satisfaction and concern to performance and quality enforcement existing law in society. Enforcement law carried out bring up problem that is not justice. Many cases law end with not justice.

In context law progressive law that in punish the perpetrators law sued put forward honesty and sincerity in enforcement law. They must have empathy and caring to suffering and experienced by the people. Interest people in Thing this well-being must Becomes orientation and purpose end in organizing law.

Draft law progressive leave from two assumption base. First, that law is for human [2]. It means that man Becomes determinant and orientation from law. Laws made must could serve human, is n't it otherwise. Because of that law no past institution \_ from interest human. Function law determined by humans in realize well-being human. Because of that if occur problem law so the law must reviewed return or fixed it, and not forced human for follow scheme law. Man be on top law and law as means for guarantee and protect interest human. Second, that law no is absolute and final institution, because

law there is in progress for Keep going become ( law as a process, law in the making) [8].

### 3 Results and Discussion

#### 3.1 History of Rights Customary Law Community

On date September 24 year 1960 was issued Law Number 5 of 1960 concerning Basic Guidelines According to the fifth dictum, the Agrarian Law can be called the Basic Agrarian Law. This law contains the intention to enforce a national agrarian law which according to article 5 of the UUPA is customary law, while in the law itself there is diversity. It can only be found in principle similarities between customary law areas [9]. Therefore, it can be said that there is 'bhineka Tunggal Ika' in the national agrarian law [10] or as people say, there is legal pluralism in Indonesian land law.

The politics of national land law is found in article 2 paragraph 1 which determines that based on article 33 paragraph (3) of the 1945 Constitution and article 1, the earth, water and space as well as the natural resources contained therein are at the highest level controlled by the state as an organization of power for the entire people. Furthermore, in paragraph 2 it is emphasized that the right of control of the state gives three powers. The first authority is to regulate and organize the designation, use, supply, and maintenance of earth, water and space or can be called agrarian/spatial use. The second is the authority to determine and regulate legal relations between people with earth, water and space or agrarian rights; and the third authority is to determine and regulate legal relations between people and legal actions regarding earth, water and space or agrarian transactions.

It is emphasized in paragraph 3 that the authority originating from the right of control is used to achieve the greatest prosperity of the people and paragraph 4 emphasizes that its implementation can be delegated to autonomous regions and customary law communities only as needed and does not conflict with national interests. In the practice of narrow and formal interpretation of the Right to Control the State, it causes many problems.

Adhering to article 3 which states that the implementation of ulayat rights and similar rights of customary law communities as long as the fact still exists must be in such a way that it is in accordance with national and state interests based on national unity and must not conflict with other laws and regulations higher. The government can state that a customary agrarian right does not have an owner because it cannot be proven by official evidence, namely a certificate of land rights and there is no other evidence that can be used to prove it, especially if the right is very necessary as a place to carry out business in the context of planting. National or foreign capital.

UU no. 5 of 1960 concerning the UUPA as the law that set confession right Public law custom or Right ulayat Public law custom. Right ulayat Public law custom in law soil national, regulated in Article 3 of the UUPA which reads: as following:

“With remember provisions in Article 1 and 2 implementation rights tenure and rights similar that from society society law custom , throughout according to the statement still yes , should such appearance until suitable by importance national and State, which is based above association nation as well as no can opposite by other laws and regulations \_ tall.”

Article 3 this more carry on explained in Explanation General number II/3 and Explanation Article by Article.

Explanation General Number II/3 reads as following:

“Related with connection Among nation and earth as well as water and state power as intended in Articles 1 and 2 then in Article 3 held provision about right ulayat from units Public law , what is meant? will seat right it’s in its proper place inside natural patriotic mature this. Article 3 that determine that : \_ “ Execution ” right ulayat and rights similar that from communities law custom , as long as according to reality still yes , must so appearance until in accordance with interest national and the State, based on on unity nation as well as no can contrary with more laws and regulations \_ high.”

Provision this first of all based on confession existence right ulayat that in law new agrarian. As is known even though according to reality right ulayat that exists and applies as well as also noticed in the judges ‘ decisions, not yet once right the recognized by official inside law, with consequence that inside doing rules agrarian right ulayat it was at the time colonialism before often overlooked. Contact with called right indigenous inside Constitution tree Agrarian, which in essence also means acknowledgment right that, then basically right ulayat that will noticed, as long as right that according to reality of course still is in the community the law in question. For example in gift something right on land ( eg right community law the relevant custom previously will heard his opinion and will given a “ recognitie”, which indeed he entitled accept it as holder right ulayat it.

In explanation chapter by chapter explained that: “What is meant” with “ right” ulayat and rights similar it “ is” what’s inside library custom called “ beschikkingsrecht. Next see Explanation General (II number 3)”. Beschikkingsrecht is the name given by van Vollenhoven to mention right ancestral [10].

Based on Article 3 of the LoGA along with the explanation that, right ulayat from Public law custom recognized by law agrarian national with two conditions, namely [10]:

First, conditions existence ( its existence) namely: rights ulayat recognized “ as long as” according to reality still exists “. This thing means that, in areas that were originally there is right customary, however in development next, right owned by individual become very strong so that cause loss right customary rights \_ ulayat no will turned on back. Likewise in areas that do not once there is right customary, no will born right ulayat new.

Draft right controlled by the original country interpreted as “ set” then shift Becomes have by absolute. The country is stuck in arbitrariness in take soil people for interest development growth - oriented economy, has \_ change choice interests and values social that is from prosperity together Becomes prosperity group of people [11]. Draft dominate from arrange Becomes have cause many occur case [12]. For first time through decision number 001-021-022/PUU-1/2003 regarding case Testing of Law No.20 of 2002 concerning electricity against the 1945 Constitution of the Republic of Indonesia, the Court constitution give a new interpretation that Right Mastering the country includes definition that the state formulates policy ( beleid), do setting ( regelendaad), doing management ( bestuurdaad), do management ( beherdaad), and perform supervision for destination big prosperity people.

During the New Order era Suharto (1966–1998) land reform replaced with term revolution green. With power Suharto in the New Order era system political land changed from populist Becomes capitalist, that is with remove strength political community and focus power politics and the economy of the country so that government free running a political program law land capitalist. New Order Government no put problem land as problem development, but only Becomes problem routine bureaucracy development. UUPA in the New Order era no Becomes parent from all regulation land, even there is Constitution implementers that contradict the UUPA, such as Law No Foreign Investment, Law NO.11 of 1967 concerning mining and Law no. 5 of 1967 concerning Terms tree Forestry.

In government Suharto occur gift licenses mining, forestry, and plantation companies giant international and national. Age government Soe Harto (1966–1998) has freeze soul and spirit of the LoGA and its land reform agendas, with interpret Right Dominate from the State (HMN) with ignore contents Article 2 paragraph (4) that HMN is “ used” for reach big prosperity people in the sense of nationality, prosperity and independence in an independent, sovereign, just and prosperous Indonesian society and legal state”. Next on Age Suharto is is legal, institutional, and territorial separation Among agriculture people, plantation big, and forestry, back as already \_ run by the government Dutch colonial. Redistribution programs land (1962–1965) under the LoGA targeted lands in the sector agriculture people and not target state lands controlled by plantations. On the other hand, the LoGA continues existence plantations colonial with convert erpacht Becomes Hak Guna Usaha (HGU).

Based on reality on could said that policy land and management resource natural still no changed from policy in the New Order based on study before regulation legislation more siding to financier big, patterned marked centrality \_ with great authority \_ to country, no give proportional setting \_ to recognition and protection right ulayat Public law customs, rights people could broken for dizziness investment financier big [13].

Based on history political law land above, impact to development political law right ulayat Public law custom. Law No. 5 of 1967 concerning Terms tree Forestry which is systematic express power government then ignore and displace the existence of other living systems in Public law custom that has right ancestral. Conflicts that occur Among Public law custom in various areas in Indonesia. Forest is the place where Public law custom look for life and livelihood. Forest no could separated from its people. Reality above \_ impact on life social, economic Public law custom. Based on case the above, can explained that the rules used in protection right ulayat Public law custom based on centralized [14] and deep law \_ formation law which character top down, that is law made \_ for interest elite and ignore interest Public law adat. Understand what is embraced law land the is understand modern law that prioritizes certainty and benefit no justice that becomes ambition society. Besides that because political law right ulayat in law state land no protect right on soil ulayat Public law custom, then rights Public law custom Becomes is lost like cases that occur in several areas in Indonesia.

### 3.2 Deconstruction Right Customary Law Community According to with Draft Law Progressive

Draft law progressive leave from two assumption base. First, that law is for human [2]. It means that man Becomes determinant and orientation from law. Laws made must could serve human, is n't it otherwise. Because of that law no past institution \_ from interest human. Function law determined by humans in realize well-being human. Because of that if occur problem law so the law must reviewed return or fixed it, and not forced human \_ for follow scheme law. Man be on top law and law as means for guarantee and protect interest human. Second, that law no is absolute and final institution, because law there is in progress for Keep going become ( law as a process, law in the making) [8].

Relation with revitalization law could conducted when only, because law progressive no only centered on rules, but on creativity perpetrator law ( police, prosecutors, judges and lawyers) in actualize law in the right time and space. Here perpetrator law could do ' meaning creative law to existing regulations, without must wait change regulation regulations [15].

Lack of regulations good even bad no must Becomes barrier for the perpetrators law for presenting expected justice society. The method with interpret to something regulation in accordance with the right time and space. Progressive law is law respond interests and needs society. With thereby law progressive could resolve lags and gaps law, so can To do breakthroughs law and when need To do rule breaking [16], so destination law that is make man happy materialized.

Next in draft law progressive there is spirit, liberation [17], which means:

1. Liberation to type, way thinking, principles, theories that have been this used.
2. Liberation to the culture of enforcement law. ( administration of Justice) which has been this powerful and felt hinder effort law for complete problem.

The two spirits above describe that importance rule breaking in system enforcement law. With that spirit hope the judge will be brave go out from patterns the standard that has been done. Like always use law Constitution in complete problem. According to Satjipto Rahardjo is also Suteki, yes three method in To do rule breaking, namely [18]:

1. Use spiritual intelligence for get up from slump law, give message important for our for brave look for Street new ( rule breaking) and not let self restrained old way, run clear old and traditional laws more many hurt the sense of justice.
2. Search meaning more in should Becomes size new in operate law and state law. Each party involved in the process of enforcement law pushed for always ask to heart conscience about meaning more law.
3. The law should run no according to principle logic only, but with feelings, care and involvement ( compassion) for weak group. Search justice no possible only can seen from only normative aspects, but also aspects of sociological, moreover already concerning aspect social justice ( social justice) and constitutionality something law.

Progressive law besides have assumption, spirit, also has progressive character in Thing as following [19]:



1. Aim for well-being and happiness humans and therefore looking at law always in the process of becoming ( law in the making)
2. Sensitive to changes that occur in society, good local, national as well as globally
3. Reject the status quo when cause decadence atmosphere corrupt and very detrimental interest people, so cause resistance and rebellion that lead to interpretation progressive to law.

So that the character above could materialized, then law progressive must have system law that transcends formalism triangle ( form, material and process) framed with perspective meaning ( hermeneutics) [20]. If the law no use perspective meaning, then law will stuck and happened deadlock in look for truth and justice substantial, especially in enforcement the law. Because of that if enforcement law still formalism so justice and truth (substantial) coveted by the seeker truth and justice no will materialized.

With interpret law with draft law progressive expected built law is law that can prosperous and happy human. Draft law progressive that law no something final can revitalized when just with method To do rule breaking (make breakthrough law), and in walk law no based on logic just but based on feelings, empathy and caring to people looking for justice. With draft law progressive in reconstruct law so built law is useful law for man that is could realize welfare and happiness.

Basics in reconstructing the Law of Rights customary law community is destination existing national in UU NRI 1945 Constitution of the Republic of Indonesia alenia fourth specifically protect all nation and all spilled Indonesian blood.

Terms above is as national basis for protect whole nation and state. Protect word whole nation and state, meaning that the state protects whole Indonesian people without except. Related with protection right ulayat Public law custom so Public law custom must also protected. With thereby The opening of the 1945 Constitution of the Republic of Indonesia can also made base in reconstruct law, so that every citizens get protection from all disturbances, threats and so on, including inhabitant Public law custom.

Besides in The preamble to the 1945 Constitution of the Republic of Indonesia is as follows: has described in letter (a) above so base in reconstruct Legal Protection of Rights customary law community is stem body that is Article 28 H Paragraph (1) of the 1945 Constitution of the Republic of Indonesia.

Based on provision in Article 28 H Paragraph (1) that everyone has the right life prosperous born and inner, place stay and get environment a good and healthy life and have the right get service health.. Article the mean that every Indonesian has the right for choose Street his life. Right the as freedom for everyone for determine his life. People don't can forced to for follow Street other people 's lives. Next chapter the contain meaning that every Indonesian is free for maintain his life and his life.

Next Article 28 H paragraph (3): ' Identity culture and rights Public traditional respected in tune with development of time and civilization ''.

Based on description above could abstracted that life and life is absolute right owned someone. Because of that somebody no can and ca n't can forcing method his life to other people. In accordance with context the that somebody free in choose Street his life. But in choose Street his life as freedom or right in implementation must notice the freedoms and rights of others. Here \_ required there is balance Among right somebody with other people. In Public we who are based on Pancasila and the 1945 Constitution



of the Republic of Indonesia must create balance Among interest personal with interest general or society. Because of to make it happen balance life so in reconstruct law right ulayat Public law custom must notice balance Among interest Public law custom with interest other.

Provision chapter above could made base in reconstruct law right ulayat Public law custom. With thereby built law could create balance interests. If balance come true so a peaceful, safe, prosperous life will also be materialized.

## 4 Conclusions and Suggestions

### 4.1 Conclusion

The history of customary rights of customary law communities in land law is found in article 2 paragraph 1 which stipulates that based on article 33 paragraph (3) of the 1945 Constitution and article 1, the earth, water and space as well as the natural resources contained therein are at the highest level. Controlled by the state as an organization of power for all the people. Furthermore, in paragraph 2 it is emphasized that the right of control of the state gives three powers. The first authority is to regulate and organize the designation, use, supply, and maintenance of earth, water and space or can be called agrarian/spatial use. The second is the authority to determine and regulate legal relations between people and the earth, water and space or agrarian rights; and the third authority is to determine and regulate legal relations between people and legal actions regarding earth, water and space or agrarian transactions.

The concept of the right to control by the state which was originally interpreted as “regulating” then shifted to absolute ownership. The state is trapped in arbitrariness in taking people’s land for the benefit of growth-oriented economic development, has changed the choice of interests and social values, namely from shared prosperity to the prosperity of a group of people.

UU no. 5 of 1960 concerning the UUPA as a law that regulates the recognition of the rights of indigenous peoples or customary rights of indigenous peoples. The ulayat rights of indigenous peoples in the national land law are regulated in Article 3 of the LoGA which reads as follows:

Taking into account the provisions in Articles 1 and 2, the implementation of customary rights and similar rights of indigenous peoples, as long as they still exist, must be in such a way that it is in accordance with the national and state interests, which are based on national unity and may not be contrary to other higher laws and regulations.

Based on the history of land law politics above, it has an impact on the development of the legal politics of customary rights of customary law communities. Law No. 5 of 1967 concerning Basic Provisions on Forestry which systematically expresses the power of the government then ignores and displaces the existence of other systems that live in customary law communities that have customary rights.

The deconstruction of customary rights of customary law communities in the concept of progressive law provides an interpretation that the law that is built is a law that can prosper and make people happy. The progressive legal concept that the law is not something final can be revitalized at any time by doing rule breaking (making legal

breakthroughs), and in carrying out the law not based on logic alone but based on feelings, empathy and concern for people who seek justice. With the concept of progressive law, the customary rights of indigenous peoples can be fulfilled and protected. The government's efforts to fulfill, protect and respect the customary rights of customary law communities are part of the state's responsibility, one of which is by building laws that are beneficial to humans, namely to create prosperity. And happiness.

## 4.2 Suggestion

In order for the customary law of customary law communities to work properly, the law that is built must accommodate the values that develop in a society based on customs and community habits based on the value of local wisdom. By accommodating the values that develop in society, the law is a reflection of the values that develop in society. Laws that are built based on the values that develop in society can work well in society because the values are already rooted in society (not foreign). Laws whose material is from the values that develop in society are harmonious laws, will work well, because their values are a reflection of the real life of society.

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