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Legal Protection for Tanah Dati Right in National Agrarian Law

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Abstract
Tanah Dati Right is one kind of indegenous land right in additional to other right for the existingn customary land, It is prevailed in Maluku Province, especially in Ambon Island and Lease Islands. Law No. 5 of 1960 about Fundamental Regulation of Agrarian Principles (UUPA) dated on 24 September 1960 and its regulations do not arrange stipulate the existence of Tanah Dati. National Constitution of Indonesia, with its second amandment and Section 18B Verse (2), has mentioned that the State acknowledges and respects that unity of indegeneos law communites and their traditional rights by condition that they live in compatible ways with development of other community and also with the principle of The Unitary State of Republic of Indonesia. Emperical finding shows that there are still deviations against law stipulations. Avoiding from the reduction of certain objects from Tanah Dati Right, or the extinction of Tanah Dati, then central and local governments become the determinant factor for legal protection effort.
Keywords: legal protection, Tanah Dati Right, National Agrarian Law

1.1. Introduction

National Constitution of Indonesia (hereafter called as National Constitution) is the ultimate written fundamental law in the State *(the higher law of the land).* Being called so, National Constitution is used us the base to implement the government, either in central of local government.[1] Section 18B Verse (2) has stated that State acknowledges and respects that unity of indegenous law communities and their traditional rights by condition that they live in compatible ways that development of other communities and also with the principles of Unitary State of Republic of Indonesia. Section 28I Verse (3) asserts that cutural identity and right of traditional communities must be respected and aligning with the depelopment of age and civilization.

In pursuance of these sections above, it is clearly stated that the unity of indegenous law communities and their traditional rights, as long as they live in compatible ways with development of other communities and also with the principle of The Unitary State of Republic of Indonesia, will be legally recognized for their existence by the State.

To implement this Section 33 Verse (3) of National Constitution, , the government announces and put into effect of Law No. 5 of 1960 about Fundamental Regulation of Agrarian Principles (UUPA).

Section 3 of UUPA explains that: "Recalling the stipulations in Section 1, the implementation of hak ulayat and other similar rights in indegenous law communities, if in fact the right still exist, is then made in such ways that it is compatible whith the interest of nation and State, aligns with unity of nation, and avoids from cantrasting against the higher level of laws and regulations."

Therefore, UUPA has recognised existence of hak ulayat and other similar rights in indegeneous communities. However, this recognition onto hak ulayat is depending on two aspects, namely existence and implementation. In Conversion Stipulations, Section II, it has been explicitly mentioned that the outhorization of rights over land, indegenous land, and Western or Indonesian legalized lands is made similar to what is stated in Section 20 Verse (1), and then, these rights are converted to the proverty rights. This right that must be converted into proverty rights include: *agrarisch eigendom, milik, yasan, anderbeni, hak atas druwe desa, pesini, Sultanate grant, landerijn bezitrecht, altijddurende, erpacht, right for bussiness on farmer particular land and right for any names that will be regulated by Minister of Agrarian.* However, The Decree of Minister of Agrarian No. 2 of 1962 about the the Implementation of Several Stipulation of Agrarian Principle Law and The Decree of Minister of Agriculture and Agrarian No. 2 of 1962 about The Determination of Conversion and Registration of Indonesia Former Rights over Lands, are not touching with the definition of other rights with whatsoever name.[2] Sinse the effect of UUPA, the proverty rights are prevailed as stated in Section 20 Verse (1) expect the owner is not eligeble based on Section 21 UUPA.

Sections VII of Conversion Stipulations state that for *hak gogolan, pekulen*, or *sanggan* which are permanent will be converted into usage rights, and if any doubts whether these rights are permanent or not

[1]Juanda, *Hukum Pemerintahan Daerah Pasang Surut Hubungan Kewenangan Antara DPRD dan Kepala Daerah,* (Bandung: PT. Alumni, 2004), hlm, 1.
[2]Boedi Harsono, *Hukum Agraria Indonesia, Himpunan Peraturan-Peraturan Hukum Tanah,* Jakarta: Jmambatan, 1988. Hlm. 73-85 dan 103-108.

permanent, the case can be submitted to Minister of Agrarian for resolution.

Several section ini Cenversion Stipulations have shown be detail of rights over lands, ether those submitting to western agrarian law or those Obeying with Indonesian agrarian law, including indeginous land that is given explicit name, or grouped whith other rights in whatsoever namens. The names of other rights maybe further determined by Ministery of Agrarian.

In recent reality of life, Tanah Dati Right has been sifted to other hands through bequest arrangement or mainly by sale agreement. In other case, Tanah Dati Right has been devided into some portions. Even worse, the the sold or devided portions of Tanah Dati Right have been submitted for registration and certification to obtein proverty right.

Some problematic emerge from this overview. **First,** the existence of law communities and traditional rights and cultural identities is already recognized by consitution. Therefore, the State is required to give protection for these tradtional rights. Disregarding the rights means abolishing sense of justice. **Second,** is theoretical problematic. There is inconsistence between theories welfare law state thar are advocated by state of Indonesia. These theories not conform to the reality of legal protection. **Third,** is juridical problematic. UUPA dos not explain cleraly about rights over indegenous land. Other laws and regulations only concern with hak ulayat. **Four,** is sociological problematik where there is a distortion against Tanah Dati rules which may harm indigenous land law in Province of Maluku.

Based on this background illustration, a problem is formulated, namemly: How legal protection of Tanah Dati shall be given to provide justice to communities?

1.2. Methodology

This review talks about law norms. Therefore, research type is normative law research. Because the characteristic of review is normative, the approach used in this review is *historical approach.* This apparoach is used to understand norms and law agencies that once exist and prevail with communities, especially in local communities in Province of Muluku. This review also employs *philisophical approach* to analyze the living values in communities, mainly justicevalue.*Theoritical and conceptual* approach is utilized to analyze theorities and cocepts that are relevant to the problems lifted in this research.

1.3. Result and Discussion

1.3.1. The Essence of Legal Protection for Tanah Dati Right

Satjipto Rahardjo asserts that legal protection is to give shelter for human rights against harmful deed from others, and this protection is given to peoples such they can enjoy all rigts given by the law.[1]Adnan Buyung Nasution[2] also gives quite similar statement that legal protection is “pretecting the dignity of humanty from having their rights violated by others who bravely defy rules and norms of law”.

Based of these opinions, it can be concluded as follows. (1) Legal protection is to give shelter from human rights agains harmful deed from others, and also to protect the dignity of humanity, and also to give certainty to all law subjects either individual, group or communities, that their rights are protected in obvious manner.(2) Legal protection is to give protection for the law interest of law subjects and law objects from the possibilities of seizure and violation agains rights and obligations of law subjects. Therefore, legal protection contains two targets: (a) protection for law subjects; and (b) protection for law objects. At least, two factors underline the essence of legal protection for Tanah Dati Right.

First, Tanah Dati Rightis a traditional right of indegeneous law communities. Tanah Dati Right is a kind of indegenous rights prevailed in Province of Maluku for long period. It is not surprising if the existence of Tanah Dati has stood along with development of nation or indegeneous law communities. The existence of Tanah Dati remains strong despite the effect of successive rulers or colonial governments which one occupy Maluku. The existence of Tanah Dati is persistent regardless the powerful discretion of *Vereenigeng Oost-Indische Compagnie* (VOC) that once requires *hongi sailing* in exchange for plots that must given to any men selected from Dati association who accomplish the duty. These ploots are nowdays called as Tanah Dati. During colonialism of British, there is substantial effort to register Tanah Dati which it then can be charged for taxation. But the registration is falled because the colonialism shifts to the hand of Dutch. During Dutsch colonialism, registration is opened again for Tanah Dati, and it involves two steps, especially in 1814 and 1823.

Untill now, after Indonesia gets Independence as the sovereign state, and has managed toward reformation age, rules or norms of the law of Dati remain unwritten but these are still prevailed, acknowledged, respected and complied by communities or indegenous law communities. It can be said that Tanah Dati Right a kind of indgenous land rights that have been prevailed througout generations and represents a tradition right of

[1]Susanti Adi Nugroho, *Proses Penyelesaian Sengketa Konsumen Ditinjau Dari Hukum Acara Kendala dan Implementasinya,* (Jakarta: 2011), hlm. 11.
[2]*Ibid.*

indegenous law communities in Maluku.

Second, Tanah Dati Right can also be called as human right of indegenous law communities. Section 1 Number 1of Law No. 39 of 1999 about Human Rights has determined that "human right is a set of rights attributed to the essence and existence of human as the creature of God and which become their gift that must be respected, raised and protected by nation, law, government and every person for the interest of respectability and protection of human dignity". According to Bambang Sutiyoso[1], human rights is the gift of God, and therefore, there is no power or agency that can revoke the right from the holder. Neither individual nor power can seize this right or capture it into limit.

Meanwhile, Section 6 Verse (1) explains that "in the namen of human right enforcement, any difference and demands of indegenous law communities must be attended and protected by law, communities and government. Verse (2) declares that "cultural identity of indigenous law communities, including hak ulayat right, must be protected in alignment with the development of communities". The acknowledgment of this collective human right is also given by Section 28 Verse (3) by extending the scope to include traditional community rights.

Tanah Dati Right is a right expressed by Dati association, and it is a traditional right owned by indigenous law communities. Standing above the realm of Tanah Dati, the member of Dati Association meets their subsistence. In other words, member of Dati Association will use and utilize Tanah Dati to meet their livelihood. Tanah Dati is a storehouse for all members of Dati Association, and can be said Tanah Dati is the heart of the life for all members of Dati Association. It can be concluded that Tanah Dati Right is a collective human right and therefore, State and government must give legal proctetion.

Analyzing the problem of research, legal theory suggested by Philipus M. Hadjon10[2] is used. There are two kinds of legal protection of communities: (1) preventive legal protection and (2) represive legal protection.

1.3.2. Preventive Legal Protection for Tanah Dati

According to Phlipus M. Hadjon[3], "preventive legal protection is where communities are given chance to submit the claim *(inspraak)* or opinion before the government settles on definitive decision. The aim of preventive legal protection is to prevent the occurance of dispute. Prevetive legal protection is significantly important to the governmental action that is based on freedom of action because carefulness must be considered befor making decision or exercising discretion to avoid from giving loss to communities. Therefore, preventive legal protection to Tanah Dati is important to the status of Tanah Dati before government makes definitive decision about it. Possibly, communities must be given times and chances to express their claim *(inspraak)* and opinion to eliminate the occurance of dispute in later days.

Two methods are considered such as: (1) taking inventory for Dati Register owned by the holders of Tanah Dati; and (2) taking inventory directly for Tanah Dati existed in the indigenous law region or association because this Tanah Dati may not have Dati Register.[4]

After inventorying completes, next concrete step is ascertaining law status of Tanah Dati by administering Tanah Dati into registration. It is because Dati Register is not explicitly ecpressing physical and yuridical data. Dati register only state the name of Kepala Dati and names of Tanah Dati. Data about place, boundary and width of the land are not included in Dati Register, but somehow the presence of these data will ensure law certainty of Tanah Dati.

Ironically, Section 9 Verse (1) of the Government Regulation No. 24 by 1997 states that Tanah is not considered as the object for land registration. It contrasts with with Section 19 UUPA that requires all lands in the region of the Unitary State of Indonesia Republic to be registered to obtais law certainty.

Land registration can give two benfits. The certificate of land right can be shown as the material evidence for law certainty of the right holder. The presence of the certificate may reduce the possibilities of dispute/conflict agains Tanah Dati. Therefore, The government shall revice Section 9 Verse (1) of Government Regulation 24 0f 1997 about land registration object such that is will synchronize Section 19 UUPA. Therefore, the government is obligated to organize land registration for Tanah Dati, and at same time, the State or government also gives legal protection to the peoples.

1.3.3. Repressive Legal Protection to Tanah Dati

As said by Phlipius M. Hadjon: "repressive legal protection is giving protection efforts through justice agencies, either general justice or public adminitration justice agencies". Therefore, this legal protection is aimed to solve

[1]Bambang Sutiyoso, *Reformasi Keadilan dan Penegakan Hukum di Indonesia,* (Yogyakarta: UII Press, 2010), Page, 167.
[2]Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat Indonesia Sebuah Studi Tentang Prinsip-Prinsipnya oleh Pengadilan Dalam Lingkungan Peradilan Umum dan Pembentukan Peradilan Administrasi,* (Surabaya: Peradaban, 2007), hlm. 2.
[3]*Ibid.*
[4]In most part of region, communities are Moslim, Dati Agency and Tanah Dati are existed but do not have Dati Register. For Ambon Island , two region with Dati Register, respectly Negeri Batu Merah and Negeri Hitumessing.

the dispute". 14[1] Therefore, repressive legal protection over Tanah Dati is legal protection efforts given by general justice or administration justice agencies to solve the case of Tanah Dati.

1.3.3.1. The Resolution of Tanah dati Dispute Through General Justice Agensies

In general, that the object of Tanah Dati dispute may be internal or external. Internal dispute occuring between the members of Dati Association, while external dispute is one member of one Dati Association challenges other member of other Dati Association, or when member of Dati Association stays against third party, that can be individual, law agency and government.

Related to internal dispute, the court hearing may be selected as a resolution when the mediation by Kepala Dati16[2]or other neutral party is not fair enough. External dispute usually emanates from the questioned claim of border of Tanah Dati/Dusun Dati. Dispute arises when the descendants of Dati owner decide to sell their Dati right to others, although selling Dati is not proper right of theirs. Recent implementation in the court shows that the submission of claim for Tanah Dati is not anymore handed over by Kepala Dati but by a lawyer who may not have comprehensive knowledge about the law of Tanah Dati. It may influence the investigation. The implication is that every resolved Tanah Dati dispute will reduce some portions of Tanah Dati itself. It must be avoid and therefore, preventive action of central or local government shall be important.

Another problem in the resolution of Tanah Dati dispute is that the case heard in the court is mostly repetition, which is unacceptable to the Court based on *ne bis in idem.* Previous cases are often exemined and decided by single judge, or some cases are just transferred to the court office to the court office in other region. Tanah dati dispute need complicated evidences because it always involves rules of indigeous law, and Dati Law is always not written, or implicitly taken for granted. Therefore, it is wiser to extend Tanah Dati dispute into the hand of Judge Assembly.

1.3.3.2. Resolution of Tanah Dati Dispute with Public Administration Justice Agencies

Besides using general justices ageincies, the resolition of Tanah Dati dispute may use public aministration agencies. The use of these agencies is begun with the dispute between Tanah Dati owner and the government represented by Land Agencies of Rgency/Town. In this case, Land Agency has issued a certificate of property right for Tanah Dati without acknowledgment of the owner of Tanah Dati. Therefore, the dispute objects is not Tanah Dati, but the certificate of property right. In Section 1 Number 4 Law No. 5 of 1986 which is then amended by Law No. 9 of 2004 about the the Amendment to Law No. 5 of 1986. It is stated that:"Public administration dispute is occured in the realm of public administration field between individu or civic legal body against Agency or Officer of Public Administration, at central of local level, due to the issuance of Public Administration Decision, including employment dispute based on the laws and regulations prevailed".

If certificate of property right and its substances stated in the formulated decision of public administration are considered, it can be said that sertificate of property right is a decision of of public administration. If individuals or civil law bodies are suffering from loss by the issuance of public administration decision, the suffered may ask for the resolution of dispute before public administration justice. This resolution is allowed by Section 48 of Law 5 by 1986 about Public Administration Justice which is renewed whith Law No. 9 by 2004 about Amendment to Law No. 5 by 1986. It is stated that: (1) If Agency or Officer of Public Administration has been given authority by or based on laws or regulations prevailed to give adminstrative resolution to public adiministration Dispute, it is then Public Administration Dispute shall be resolved with available adminstration efferts; (2) New judicial effort can be authorized to examine, to decide and to revolve Public Adminstration Dispute as stated in Verse (1) if all administrative sessions have been used.

Based on stipulation of Section 48, the resolution of Tanah Dati dispute through public administrative justice agencies may involve two methods: (a) dispute resolution through administrative efforts; and (b) Dispute resolution by submitting the claim to public administration justice agencies. This stipulation indicates that public administration dispute is not necessarily resolved through judicial path. Indeed, resolution through judicial path is only optional if adminitrative efforts do not produce a decision that satisfies the litigant. Therefore, resolution of Tanah Dati dispute with certificate of proverty right as the dispute object shall be better managed through administrative efforts.[3]

Section 48 Verse (1) of Law 5 of 1986 has explained that "administrative efforts will be the procedured by individual or civil law bodies if the Public Administration is not satisfying". If the resolution must be given by superior institution or other agencies through their decision, this resolution procedure is called as "administrative appeal". If agency or Officer of Public Administration shall make their own decision for resolution, this resolution prsedure is called as "objection".

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[1]Philipus M. Hadjon, *Loc Cit.*

[2]Kepala Dati is a person selected from the member of Dati Association who leads and takes care of Dati and Tanah Dati.

[3] Public Administration Law literature has provided several general terms to describe adminitrative efforts, such as *administrative beroef, quasi rechtspraak,* or *quasi administrative justice.* See also S.F. Marbun, *Public Administration Justice and Adiministrative Efforts,* (Yogyakarta: Liberty, 1993), Page 65; R. Wiyono, *Procedural Law o Public Adminstrative Justice,* (Jakarta: Sinar Grafika, 2007), Page 108.

P.P.J. Buuren[1], relative to adminstrative appeal, declares that adminstrative appeal can be a medium to examine the validity of public administration action in form of Publik Administration Decision, either in term of law validity *(rechtmatigheid)* or law utility *doelmatigheid).*

If the resolution given by Provincial Land Agency is not satisfying the litigant, the case can be submitted further to Minister of Agrarian/Head of National Land Agency (now renamed with Minister of Agrarian and Spatial Order/Head of National Land Agency).

If the litigant who submit for objection or administrative appeal procedure is not satysfied yet and cannot accept the resolution, judicial path become optional. In order word, the resolution of public administration dispute must be processed through Public Administration Court. Pursuant to Secsion 53 Verse (1) Law No. 5 of 1986, it is stated that: "Individuals or civil law bodies who suffer from loss due to public adminstration decision can submit the written litigation to the authorized Court, from which the Court will determine wether Public Administration Decision is valid or invalid, with or without resitution or rehabilitation".

Understanding the stipulation in Law No. 5 of 1986 aobout Public Administration Justice jo Law No. 9 of 2004 about the Amandment of Law No. 5 of 2006, it can be concluded that the resolution of public administration dispute through judicial path includes two metods: (1) Submitting the direct written litigation to Public Administration Court (Section 48 Verse (1) Law No. 5 of 1986); (2) Submitting the direct litigation to Public Administration High Court. This procedure is only taken if administrative actions have not been satisfing in resolving public administration dispute (Section 51 Verse (3) Law No. 5 of 1986)

Related to first method, it is a method that is used only for the resolution of public administration dispute if administrative options are already taken, meaning that the litigant has used objection and administrative appeal procedures. Second method is alloweable if the litigant has passed all administration stage, but the resolution of dispute may not be satisfying.

Therefore, resolution of public administration dispute through judicial path must be made in sequence manner, started with Public Adminstration Court as first level justice, and finally Supreme Court. However, there is an exeption if public administration dispute is directly submitted to Public Administration Court (based on Section 51 Verse (3) Law No. 5 of 1986). Procedural law in Chapter IV Law No. 5 of 1986 may be used for this exeption. However, for the examination in Supreme Court and also for the examination of case review, Law No. 14 of 1985 about Supreme Court is used as law base.[2]In related to the examination at First level, the examination may be regular or fast (Section 99 and 99 Law No. 5 of 1986). The dispute of land certificate issued above Tanah Dati is examined by regular agenda.

The stage of dispute resolution is elucidated as follow. It starts with Public Administration Court and continues toward examination stage in Supreme Court and case review stage. First level court or Public Administration Court is organized in Public Administration Court of Ambon (covering law regions of Maluku and North Maluku). Appeal examination is conducted at Public Administration High Court in Makassar, while cassation is aministered in Supreme Court in Jakarta. It differs from the resolution of Tanah Dati dispute which only involves general justice agencies, which the appeal is examined in Maluku High Court in Ambon.

Therefore, time limit for the resolution of public administration disput due to issuance of certificate of property right by Land Agency/Officer or Regency/Town may be longer and extended, especially if judicial path is also considered.

1.4. Conclusion

Taking account the reviews and discussion, and also the answer of problems, it can be concluded that:

1. Tanah Dati is a traditional indigeneous land in Province of Maluku that has been exercised by rumatau or Dati Association throughout generations in long period, by submitting to Hukum Dati or Stelsel Dati. The dynamic of Tanah dati development is influenced by successive rulers or colonial governments from West once occupy Maluku, such as VOC, British Colonial Government and India-Holland Colonial Government. The existence of Tanah Dati is still presistent after Indonesia gets independence as sovereign state untill reformation age.
2. The Government is still not giving maximum legal protection to Tanah Dati that then becomes the object of right over Tanah Dati. Preventive legal protection may prevent the occurrence of dispute over Tanah Dati. Represive legal protection is helpful to resolve Tanah Dati dispute in general justice or public administration justice.

[1]Quoted by Phlipus M. Hadjon, *Review of Dogmatic Law Science (Normative) and Research Method (Controvercy) of Positive Law about The Existence of Tax Assesment Assembly),* Postgraduate Program. Universityof Airlangga, Surabaya, 2000, Page 12.

[2]In the agenda of examining cassation, Section 55 Verse (1) is available, and for examining case review, Section 77 Verse (1) of Law No. 14 of 1985 about Supreme Court is used.

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