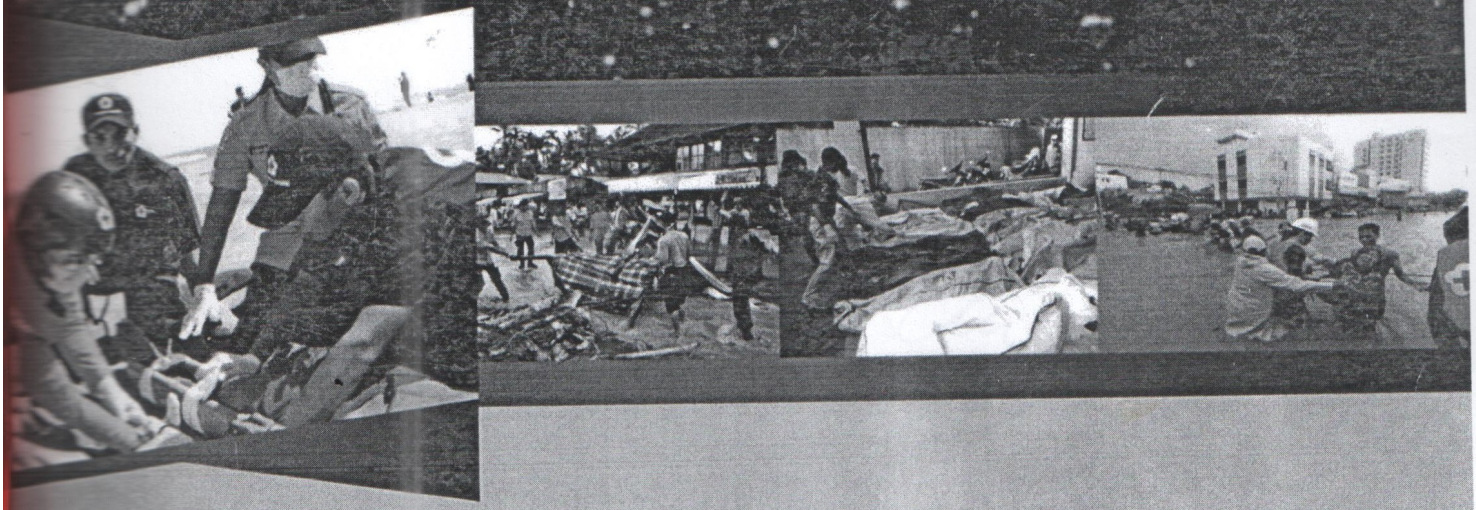
10TH INTERNATIONAL SEMINAR ON DISASTER:

COMMUNITY EMPOWERMENT FOR DISASTER MITIGATION AND REHABILITATION



PROCEEDING

ISBN : 978-602-8865-58-6

DEPARTMENT OF NURSING
FACULTY OF MEDICINE
UNIVERSITAS GADJAH MADA

KOBE UNIVERSITY

HALAMAN PENGESAHAN

Judul	: Where Is Our Local Wisdom : Community Resilience And The Limit Of Law
Penulis	: Rudy, S.H., LL.M., LL.D.
NIP	: 198101042003121001
Instansi	: Fakultas Hukum Universitas Lampung
Publikasi	: Prosiding Internasional
ISBN	: 978-602-8865-58-6
Tanggal Publikasi	: Maret 2014
Penerbit	: UGM Jogjakarta

Bandar Lampung, April 2017

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10TH INTERNATIONAL SEMINAR ON DISASTER: COMMUNITY EMPOWERMENT FOR DISASTER MITIGATION AND REHABILITATION

YOGYAKARTA, 27-28 MARCH 2014

PROGRAM & ABSTRACT

ISBN: 978-602-8865-58-6

DEPARTMENT OF NURSING
FACULTY OF MEDICINE UNIVERSITAS GADJAH MADA
YOGYAKARTA - INDONESIA
2014

10TH INTERNATIONAL SEMINAR ON DISASTER: COMMUNITY EMPOWERMENT FOR DISASTER MITIGATION AND REHABILITATION

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INDONESIA
Website: keperawatan.ugm.ac.id

First Edition : March, 2014

ISBN : 978-602-8865-58-6

In collaboration with :

KOBE UNIVERSITY

Kobe University Graduate School of Health Sciences, Kobe, Japan

FOREWORD

All praises are directed to Allah, God the Almighty, so the proceedings of 10th International Seminar on Disaster Management: Community Empowerment For Disaster Mitigation And Rehabilitation held by Department of Nursing, Faculty of Medicine, Universitas Gadjah Mada, Yogyakarta, Indonesia in collaboration with Kobe University Graduate School of Health Sciences, Kobe, Japan on 27-28 March 2014 could be arranged properly.

The proceedings contain the material presented by the speakers and abstract from participants who join in oral and poster presentation. It is our hope that the proceedings could give optimum contribution to the community.

Editor,

Sri Hartini, S.Kep., Ns., M.Kes

COMMITTEE REPORT

Assalamualaikum wr. wb.,

First of all I would like to welcome to Yogyakarta to all invited guests, speakers and all participants in order to attend 10th International Seminar on Disaster Management: Community Empowerment For Disaster Mitigation And Rehabilitation held by Department of Nursing, Faculty of Medicine, Universitas Gadjah Mada, Yogyakarta on 27-28 March 2014. It is a collaboration work between Department of Nursing Faculty of Medicine Universitas Gadjah Mada (Indonesia) and Kobe University Graduate School of Health Sciences (Japan).

This seminar is expected to provide an opportunity, in particular for those who are interested in community empowerment, to exchange information, experience, and expertise. We hope that scientific networks could be established among participants.

I thank to Kobe University Graduate School of Health Sciences for the continuity of collaboration and to all the speakers who come to Yogyakarta to share information and experiences to all of us today. I thank to all participants, to the committee of the seminar and those who have helped us so that this activity could be held properly.

Thank you very much.

Wassalamu'alaikum wr .wb

Elsi Dwi Hapsari, B.N, M.S., D.S
Chairperson

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PSYCICAL ACTIVITY AND COMMUNITY

Rei Ono
Physiotherapist, Kobe University, Graduate School of Health Science, Kobe Japan

The older people who suffer from by Tohoku earthquake (March 11, 2011) have some health problems. One of them is decrease the ability for activity of daily living, which results from inactive life style after disaster. This decreasing activity of daily living is occurring to not only frail elderly but also healthy elderly. Now physical inactivity is fourth leading cause of death worldwide. The pandemic of physical inactivity might be public health priority especially elderly. In the factors of physical inactivity, many complicated risk factors have been reported. Pain in movement, low physical performance, and low self-efficacy to activity were reported as risk factors in personal factors. Environment was reported as risk factor in public factor. The power of community is important factor of increasing/ maintaining physical activity in public factors and personal factors. I performed some trial to increase physical activity in elderly. In this session, I am going to introduce various trials in Japan and our trial to increase physical activity.

WHERE IS OUR LOCAL WISDOM: COMMUNITY RESILIENCE AND THE LIMIT OF LAW

Rudy[1], Malicia Evendia[2]
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Disaster study is an interdisciplinary field in which a more active involvement of legal studies is required. While lawyers have contributed to legal instrument design in such areas as administrative organization on emergency rescue and disaster relief, many legal issues in the disaster response phases and succeeding phases of post-disaster rehabilitation and recovery have been left almost untouched.

In the same time, the revival of local wisdom and adat tradition has been a recent key area in the international endeavors of law and institution building in Asia, in which Indonesia's legal development is importantly involved. Within the context, the revival of local wisdom since long ago has been linked to the community resilience as part of village community live hood, thus shall be considered as an important element for disaster management policy and law making.

However, while local wisdom may be fruitful for disaster management, a naive assumption of legal pluralism to naturally survive and integrated in the post-modern context can no more be defended, unless intentionally resorting to the formal measures in order to assert such informal norms against the intrusion of global standards. It is perhaps the responsibility of this paper to re-identify procedural and substantive norms for the law making on disaster management, especially the need for local wisdom integration into legal instrument, and what is the limit of legal positivism within the context of legal instrumentalism.

Keywords: *Local Wisdom, Community Resilience, Legal Development, Positivism.*

WHERE IS OUR LOCAL WISDOM: COMMUNITY RESILIENCE AND THE LIMIT OF LAW

Rudy[1]
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Abstract

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Keywords: *Local Wisdom*, *Community Resilience*, *Legal Development*, *Positivism.*

Like a beaver, law is both adapted to its customary environment and transforms that environment . . . Many of our customs began as laws and all successful law eventually becomes customary.

[1] Doctor of Laws (LL.D) Kobe University, Master of Laws (LL.M) Kobe University, Sarjana Hukum (SH) Universitas Indonesia. Head of Constitutional Law Department, Faculty of Law, University of Lampung.

Introduction

Exposed to multiple hazards, Indonesia is one of the most vulnerable countries in the world. In the last five years, the country experienced 6,421 disaster-related events, affecting 10.5 million people. Most recently, we saw the eruption of Sinabung and Kelud. Indonesia, with this condition, requires the comprehensive disaster management approach.

In the same time, disaster study is an interdisciplinary field in which a more active involvement of legal studies is required. While lawyers have contributed to legal instrument design in such areas as administrative organization on emergency rescue and disaster relief, many legal issues in the disaster response phases and succeeding phases of post-disaster rehabilitation and recovery have been left almost untouched.

After the fall of the New Order regime in 1998, the so-called "reformasi" (reformation) era began, and simultaneously the contained elements of adat began to surface, which came to be called "adat revivalism" or in some other word "local wisdom". The revival of local wisdom and adat tradition has been a recent key area in the international endeavors of law and institutional building in Asia, in which Indonesia's legal development is importantly involved. Within the context, the revival of local wisdom since long ago has been linked to the community resilience as part of village community live hood, thus shall be considered as an important element for disaster management policy and law making.

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When we turn our eyes to Asian developing countries, this instrumentalism of law takes place everywhere, particularly in the recent drive for law and judicial reform led by international developmental agencies, with a special emphasis on the maximization of "ownership" as well as contractual freedom as fundamental bases of economic growth. It is perhaps the responsibility of legal studies to re-identify procedural and substantive norms for the law-making on disaster management, to counteract the legal instrumentalism. (Kaneko, 2013)

Within the context, this paper will first defines local wisdom in the form of customary or adat law and how it is linked with community resilience by giving some cases from across Indonesia. Then, this paper will evaluate the difiiculty of local wisdom to enter the so called legal positivism. In the context of law and policy, the integration of local wisdom into legal instrument is deemed very important considering the need for legal ground of operationalization of local wisdom. At least, the case from Japan tell some hints for that integration. Finally this paper will try to suggest some solution for the local wisdom to survive in the period of globalization and positivization of law.

Defining Local Wisdom

Asian Crisis 1997 witnessed the fall of New Order and the beginning of democratization in Indonesia followed by the historic amendment of Indonesia 1945 Constitution along with the decentralization idea across the country. With greater political freedom and the implementation of decentralization, local claims to political authority and natural resources are being reasserted on the basis of adat, adat law, or adat societies. The decentralization gives some room for the implementation of local law as witnessed by the rebirth of many adat institutions and its law from Sumatera to Papua.

In addition, The fact that outside Java, locally respected community land rights remain widespread despite decades of hostile neglect on the part of the legislature. Another

is the successful revival in several regions of traditional units of local governance, such as the Minangkabau *nagari*, which have been neglected and far from state support for a generation. The revival of adat, following the decentralization policy in Indonesia since 1998, has been associated with the term "local wisdom". Conversations about local wisdom is often associated with local communities and with the varied definition. Local knowledge is local ideas full of wisdom, embedded and followed by members of the community (Sartini, 2004: 111).

The Ministry of Social defines local wisdom as a view of life and knowledge as well as a variety of intangible strategies carried out by local communities in addressing various problems in meeting their needs (Ministry of Social Affairs, 2006). Local wisdom in this term include all the elements of life, religion, science, economics, technology, social organization, language and communication, and the arts.

Another understanding of local wisdom also expressed by Zulkarnain and Febriamansyah (2008: 72) in the form of principles and specific ways embraced, understood, and applied by local communities in their interaction with their environment, then transformed into systems of value and customary norms. Meanwhile, Kongprasertamorn (2007 : 2) argues that local wisdom refers to knowledge that comes from the experience of a community and an accumulation of local knowledge. Local knowledge was present in society, communities, and individuals.

Thus local wisdom is traditional knowledge that become reference and has been practiced by generations to meet the needs and challenges in the life of a society. Local wisdom has been very meaningful in society both in the preservation of natural and human resources, and the preservation of indigenous cultures, as well as beneficial to life.

Studies on local knowledge and disaster mitigation in traditional societies in Indonesia is actually seen in relation to natural resources and human resources. In traditional societies, humans and nature is a unity because both are creations of the Almighty. Nature and humans are believed to have the same spirit. Nature can be friendly if a man treats wisely and otherwise would be upset if we destroy it. If natural disasters angry appearing in the form of floods, landslides, volcanic eruptions, etc., then the society in general also have the traditional local knowledge and ecological wisdom in predicting and mitigating natural disasters in their region. Local people who live on the slopes of Mount Merapi, Central Java, for example , has had the ability to predict the likelihood of an eruption. These include indicators of various kinds of wild animals coming down the slope out of the ordinary in normal environmental conditions (Alexander , 2009).

In the context of Law, local wisdom has been incorporated in the definition of customary law or adat law. In Indonesia, Adat is often considered to be one of the three major elements of legal plurality in Indonesia, consisting of national law, Islamic law, and adat law. In Indonesian law, adat, Islam, and the positive law of statutes are each considered being the sources of law. Having three legal system altogether, the legal system in Indonesia has been marked by the long struggle to construct modern legal system without neglecting the uniqueness of adat legal system as set forth by the 1945 Constitution.

Community Resilience

The term "resilience" has recently been introduced to disaster management dialogue. The word has become popular after the declaration of the Hyogo Frame Work for Action on World Conference for Disaster Reduction in Hyogo, Japan on 2005. The word resilience implies that people should accept damage from a disaster and have plans in place for recovery.

Disaster resilient communities are, first and foremost, communities that function and solve problems well under normal conditions. By matching existing capabilities to needs and working to strengthen resources, communities are able to improve their disaster resiliency. Community leaders and partners can help emergency managers in identifying the changing needs and capabilities that exist in the community.

The local wisdom is very related with the community resilennt. The character of accumulation of value in the context of local wisdom told us that local wisdom has been

attached in the community bone. The very example of this usually connected with nature conservancy. In this case, people always try to maintain and conserve the environment and its contents intensive. Baduy people with full propriety from generation to generation, among others, have successfully protected an area of 5,635 hectares of forest land in the upper watershed Ciujung Kendeng Mountains, Lebak District. The protective benefits have been enjoyed not only by Bedouin community itself, but also households and industries in the downstream receiving water supply from the current approximately 120 rivers and creeks Ciujung. Over the wisdom of the people Baduy gets Prudential Award 2004 in the category "Sustainable Biodiversity Initiative" of the Foundation for Biodiversity (Kehati, 2009).

The great disaster of Tsunami that stroke Aceh in 2004 also shows us that when the formal law cannot administer the law problem after Tsunami, Aceh adat law become an effective solution for many land and inheritance problem. For some reason, the adat justice system is more comprehensible and accessible than the formal justice system[2]. This condition also happens in Africa where the customary laws are so flexible in responding to the circumstances of the particular case[3]. These laws may differ from Western laws in failing to provide definitive answers to certain issues. But Western laws fail to provide definitive answers to other issues that customary laws regulate more fully.

The experience of tsunami and the experience of Africa Nation shall remind us to rethink when pursuing modern legal system without considering the local genuine of one country especially in the country where the diversity of customary law is evident[4]. For Indonesia, the limit of law and heterogeneity needs to serve as a starting point for any legal pluralism assessment and the search for institutional law building. Localities that have in the past chaffed under central arrangements that have led to stay silent to implement their unique legal system would now be in position to forge ahead through improved space to implement their local law while pursuing the genuine Indonesia legal system[5].

Beyond this contest, the solution for Indonesia is not simply replacement of a large number of traditional, religious, familial, and ethnic political authorities by a single, secular, national political authority as suggested by several legal scholars; but more to an adjustment among conflicting norms, in order to protect, rather than neglect, the national people living on the plural norms. While the struggles roads toward the ideal, final outcome like this is yet unclear. The question of adjustment is something more important to be addressed.

Local Wisdom versus Legal Institutional Design

Much has been written on the legal status of local wisdom or in legal term "customary law", but considerably less attention has been devoted to the question of determining the content of the customary law whose legal status is at issue. Like any other source of law, customary law presents the question of interpreting, applying, and enforcing the emanations from that source, but the most important is how its integration into the positive modern legal system.

Adat Law term was introduced first time by Dutch scholar Hurgronje and later developed and studied by Van Vollenhoven and Ter Haar. Arguing that Indonesians order

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[2] See UNDP. 1997. *Access to Justice in Aceh. Making the Transition to Sustainable Peace and Development in Aceh*. Report Paper.

[3] Gordon R. Woodman, Supra 8.

[4] Van Vollenhoven demonstrated that a forced introduction of codified law was unnecessary and impossible, but Van Vollenhoven's ensuing research led Ter Haar to conclude that formal law and adat should be brought closer together as he believed that it would eventually become impossible to maintain a strict separation of adat and codified law. See Laurens Bakker. *Diversity in Nunukan: The politics and Implications of Governmentally Affirmed Legal Autonomy in an East Kalimantan District*. Paper presented in 15th International Conference on Legal Pluralism, Depok Indonesia June 29th-July 2nd 2006.

[5] Apart from the discussion of model law choice, judicial reform shall consider the local norm in its process for the better outcome, See Kaneko, Yuka. *Catalistic Role of Legal Assistance between Formal Law and Social Norms: Hints from Japanese Assistance*. Journal of International Cooperation Studies, Vol.15, No.2008.3

their lives differently than Europeans do and that they already have legal norms which they believe to be right, Van Vollenhoven, Ter Haar, and their supporters eventually convinced the colonial government, in the late 1920's, to give up its uniform policy and to give more room for the Adat Law application[6]. In many respects, Van Vollenhoven was a pioneer of the critique of colonial transformations of local laws through ethnocentric and legalistic categories used by colonial judges and administrators. He and his students persistently emphasized the importance of understanding indigenous laws on their own terms.

In his scholar work Adatrecht van Nederlandsch-Indie, van Vollenhoven concluded that within archipelago, there were 19 boundaries of Adat Law and more than 250 Zelfbestuurende land-schappen dan Volksgemeenschappen, such as villages in Java dan Bali, nagari in Minangkabau, dusun and marga in Palembang etc[7]. It is dissapointing however, that Adat Law scholar in Indonesia nowadays has not renewed Van Vollenhoven work. This kind of work is deemed to be important to support the recognition of Adat Law within Indonesia legal system. The author will try to disscuss more upon this issue in last section.

Dutch legal scholar in their study of Adat Law had been influenced heavily by positivism mainstream in mid 19th centuries. Vollenhoven, in his effort to distinguish Adat Law with mere Adat, was using the sanction as the requirement to accept adat as law[8]; while Ter Haar was more accepting the decision by Adat leader as Adat Law. Therefore in Ter Haar opinion, Adat Law is part of Adat leader decisions[9]. While Dutch scholar were using positivism spectacle and tend to ignore the etic and moral value in analizing Adat Law, Indonesia's scholar such as Soepomo was using the spectacle of etic and moral in studying the Adat Law.

Seoepomo, as one of Indonesia's Founding Father, who was the great supporter of adat law, however, was able to provide the basic provision in Indonesia 1945 Constitution to protect adat law [10]. It can be argued that Indonesia 1945 Constitution greatly accommodated the law from the top and law from below. Following the adagium of "uti possidetis iuris formula", whereby successor states must respect the administrative layout set forth by the predecessor states, customary law itself survive and exist until now, manifested in the form of local wisdom across Indonesia.

Following the revival of local wisdom in the form of adat law or customary law, a naive assumption of local wisdom to naturally survive and integrated in the post-modern context can no more be defended, unless intentionally resorting to the formal measures in order to assert such informal norms against the intrusion of global standards In modern societies. Valid law is usually said to require democratic legitimacy, exemplified by an elected legislature. While for many thinkers this is enough to show that customary rules are an immanent part of any legal system, some would insist that instead custom is at best a source rather than a part of law and that a formal legal act such as a judicial decision is needed to convert custom into customary law. On the latter account, custom is not itself a valid part of law (akin to legislation) but at best the raw material out of which a legislature or a court might fashion genuine positive law.

This is the problem remain that in Indonesia, customary law does not exist until recognized by legislation or courts. When confirming the existence of customary law, there are those who argue as follows: the decisions of the courts are the vital element needed to avoid "fictitious" customary law. Law must either be initiated by the legislators or

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[6] Daniel S. Lev, *The Supreme Court and Adat Inheritance Law in Indonesia*, The American Journal of Comparative Law, Vol. 11, No. 2 (Spring, 1962), pp. 205-224.

[7] Bushar Muhammad, I*ntrooduction of Adat Law, Compilation of Adat Law and Ethnography* (in Bahasa), Balai Buku Ichtiar, Jakarta, 1961, pp. 89-91. see also Ter Haar, *Principles and Structure of Adat Law*, Pradya Paramita, Jakarta, 1960.

[8] Austin conceives of positive law as general commands, enforced by the threat of punishment for disobedience, that are traceable to a "sovereign" some person or set of persons whom the bulk of the community habitually obeys and who does not habitually obey any other human. Austin positivism had been criticized and developed by Hart in his famous book the concept of law, see Ratno Lukito, *Sacred and Seculer Law*, Pustaka Alvabet, Jakarta, 2008.

[9] Ibid.

[10] Rudy. 2006. *Decentralization in Indonesia: Reinventing Local Rights*. Paper presented in 15th International Conference on Legal Pluralism, Depok Indonesia June 29th-July 2nd 2006.

interpreted by the courts.

Considering that Indonesia is so vast and possesses sizable inhabitants that live in thousands of islands, it would be more effective if disaster management capacity is build at the community level. The community is the first party that faces disaster risk. Since the capacity of the government for emergency response is still very limited, it is more economical and effective to build community's capacity for disaster response. For this purpose, volunteerism will be encouraged at all levels of the society.

Japan Experience on Customary Rights

The integration of local wisdom into Japan legal instrument has been evident in the property rights especially land usage rights. In the coastal municipalities in Iwate prefecture, not a few fishery villages had maintained unwritten communal customary rules for land use. Coastal lands as well as the adjacent coastal sea areas is Japan usually belong to a collective use for fishery purposes open to all community members having formal and/or customary fishery rights, whereas inland areas belong to each individual ownership of households having lived in the community for several generations, while a certain flexibility is left for new-comers who settled in for less than a few generations, especially for newly formed land areas that resulted from natural changes such as sedimentation after storms. These land users were put in a particularly weak position, lacking the protection under the formal ownership regime.

Truly, varieties of customary rights have been inherited throughout Japan since the pre-modern period, usually constituting the basis of livelihood of local citizens. Judicial precedents have acknowledged certain fundamental categories of collective uses or controls of land, forestry and other resources as customary rights interfacing with the formal regime of private properties. Above all, *Iriaiken*, or a collective control of land use by village communities, has been maintained nationwide, although their characteristics vary, from highly collective ones with remaining common rules for division and rotation of land use, to more individualized ones where common rules are only maintained for managing limited types of resources for common use such as water and pasture access.[i] Fishery rights are among typical customary rights inherited from the pre-modern period in Japanese coastal villages, in which *iriaiken*-like collective control on the common use of coastal land areas is extended to the coastal sea adjacent to the village, constituting the basis of exclusive enjoyment of fishery resources in such adjacent sea areas, as well as the right to participate in the offshore controlled fishery areas, established since the governmental circular issued in 1876 and succeeded by the present 1949 Law on Fisheries.[ii]

Thus, customary rights in Japan have been duly established in an interface with the formal property regime. However, the post-GEJE recovery process has revealed certain phenomena that oppose to this expectation. According to the author's fieldwork, in a fishery area at the waterfront of Miyako City in Iwate prefecture, for example, local fishermen who had already suffered enough due to the GEJE tsunami, have been tortured further by repeated claims and warnings by municipal officers who insist that the very area is municipal property, and that these fishermen should stop their illegal occupation either by eviction or by payment of rent to the government. This pressure seems to be related to the municipal government's already-made decision to construct a 17 meter-wide industrial road across this narrow area, for the purpose of establishing an industrial complex for marine processing industries and conveying tourists to nearby tourist spots. The fishermen who are the very target of this eviction plan were never invited to participate in the decision-making process, nor had access to the relevant information beyond occasional ordinary town-meetings for general information dissemination. The fishermen can never easily surrender to such a unilateral decision, since the loss of inhabitance in this area must result in the loss of inhabitance-linked customary fishery rights for participating in the offshore controlled fishing areas renowned nationwide for their richness of resources, which constitutes the very heart of making their living for fishermen throughout this region.

The legal status of inhabitance of these fishermen is weak, lacking legal formalities such as ownership registration. Asked about the reason for the lack of such formalities, a fisherman implied that it was a local community rule which admits the entry of new-comers in a gradual way for a period of several generations, thereby resulting in a transitional form of inhabitance for a new-comer which lacks formal registration of ownership since his participation in the community is still in an immature stage. Although there seems much room for the potential that their customary rights for inhabitance linked to the fishery rights would be recognized at the court, they are basically hesitant to raise issues through the judicial process, largely due to their limited judicial access in terms of time and cost.

Asian and Indonesia Case

The aforementioned facts from Japan have identified the reality that disaster-affected people can easily be deprived of their property basis for their lives, only because their property rights do not come under the definition of "ownership." Parties having the title of "ownership," on the other hand, can enjoy the full status of recipient of public support such as subsidized land purchase even if they are absentee land owners, the very party who directly force the disaster-affected leaseholders out of their land. A similar tragedy has been reported in numerous case studies worldwide. In the post-Hurricane Katrina recovery after 2005, for example, it was reported that physical pressures of land-owners for the evictions of land and house tenants were a common phenomenon, especially reflecting the weak legal position of tenants in common law as a tentative occupant *in rem*, which depends on discretionary and unilateral cancellation by the owner, even under the case law of Louisiana State which has a partial civil law tradition (Lovett, 2005, p.24-27).

In a similar manner to the situation in Japan, the customary bases of livelihood of disaster-affected people are threatened in various other parts of Asia, partly because of a rigorous implementation of national ownership of lands for public use, and partly because of the rigorous promotion of "land law" reform which centers on the introduction of ownership title registration system led by international developmental financers such as the World Bank and the ADB. As many of these countries, in contrast to Japan, lack a formal recognition of customary rights under the property law regime, customary land use can be easily lost once such a land law establishes an absolute ownership registration disconnected from actual land use.

Katu people is one example of long road to recognition by the modern law[11].

→ Incorporasi local wisdom dalam konteks hukum → putusan MK

3. The Challenges Ahead

Eventhough several court judgments somehow show progressive effort by the court to protects and recognizes adat law, several problems remain unsolved. The author lists at least two main problems still exist in relating the adat law recognition: one is lack of comprehensive research and the other one is the lack of legislation on adat communities and adat law (local wisdom) in Indonesia. I will try to discuss each issue one by one.

First, The method of proving a local wisdom among Indonesia community is a question of evidence, thus very related with the how far comprehensive research has been conducted. Therefore more research upon the adat law and adat communities with its local

[11] Claudia D'Andrea, Kopi adat dan modal, teritorialisasi. Tanah air beta, sajogyo Institute, Yayasan Tanah Merdeka, 2013

wisdom are urgently needed in Indonesia. Indonesia's adat scholarship has been lacked of integrated research to support the documentation of adat law and adat communities' evidence. Van Vollenhoven and Ter Haar work on adat law has not been renewed until present times while adat law and adat communities rise and fall during the time. This kind of research is believed will be very important to support the adat law and adat communities recognition because it can give academic input in the drafting process of the legislation on adat communities and adat law. Right now the legislation drafting is halted because no measure upon how adat communities and adat law define in each territory. Thus, it is a matter of importance that the comprehensive study should be undertaken.

Meanwhile, the adat community recognition movement has been initiated by AMAN (National Adat Community Alliance) through the academic discussion on the legislation draft and many other activities. In addition to that, BRWA (Registration Body of Adat Territories) is starting to open the adat registration and to verify the adat territories. While this kind of movement has always been positive; the outcome of the movement however still needs to be carefully observed and evaluated.

Katu people struggle through the long process, the important point related with this discussion is how they strengthen the element of adat.

The condition of recognition in Indonesia is very different with other nation, for example Norway has not recognized special evidentiary positions for indigenous people, so the Saamimust prove their customs by ordinary evidence through oral and documentary presentations to the court. In the *Fluberg Pasture Case* the court based its decision upon the legal statements of eighty persons inhabiting the area. Interviews with fishermen in Finnmark indicate that should they be called as witnesses, they would support the position that the customary law prerequisites have been satisfied[12]. In case of Indonesia, legislation on adat communities legal standing is needed for court to accept the petition of adat law recognition.

This leads to the second point, on the concept of adat, the concept of adat and its future. Is "Indonesian adat" possible? As mentioned earlier, adat has a strong connotation of locality, and is often associated with ethnic groups such as Java, Bali, or Batak. Although this association has its root in the history of Indonesia, this character tends to strengthen the border of ethnic groups, resulting in exclusion of others within the same country. Thus the effort to make it an integrating logic was required after the independence of the Indonesian Republic, putting emphasis on "gotong-royong", or mutual aid as Indonesian ethos. Then, the discussion would then get into how this "Indonesian adat" could be developed in the future. Is it against democratization and regional autonomy?

Firstly, is the Nusantara thought exist and what it is actually? Did it come from a person or that it is a number of ideas that address a certain world-view, an ethnic Indonesian idea? To answer those questions, we have to address on the right base which is objective, and it is not an easy task to deal with. One of the main references to search and understand the Nusantara thought is to make a critical re□lection on the Indonesia culture. A historical investigation has shown that there have been various inherited ethnic cultures in Indonesia that are re□lected in the various number of local wisdom, beliefs, systems of rulership, health, subsistence, and systems of lineage. Apparently, all of this knowledge have rooted in the various individual ethnic culture. Abdullah in his book, Konstruksi dan Reproduksi Kebudayaan, says that the existence of the numbers of various ethnics in the broad Indonesian archipelago re□lect the complexity of the Indonesian culture (in Meliono, 2009).

A long process has developed local wisdom originally emerged from various knowledge of the Indonesian ethnics. It may appear in different forms of knowledge featuring certain skills and some information in theoretical and practical ways. Koentjaraningrat says that every phenomenon or cultural expression has always based on: (1) some ideas, propositions, values, and norms; (2) patterns activities or actions of the

[12] Peter Ørebecher etal, supra notte 28, pp 224-239

people in the society; and (3) artifacts (Koentjaraningrat, 2009:150); so

local wisdom has the same analogy.

The last point is the meaning of using the legal framework to explain the ongoing social change. There is a tendency to explain adat and recent reviving of it not as legal phenomenon, but as social, cultural, political, and so on. It is not only the legal anthropologist taking interest in adat, and according to them, adat is not so much about law but more about local politics, or ethnic identity, to name a few. Come to think of it, considering almost myriad implication of adat, it could be said that the aspect of adat as a social norm, or regulation is just "one of them". So, what is the advantage of utilizing the word "law"? This is not an easy question, but nevertheless unavoidable to make clear the scope of legal pluralism in contemporary world

While using *adat* as a basis for claims, *adat* itself has become a less than clear concept, par-ticularly with regard to common property rules. Rules on private property such as swidden are well defined while resources not individually claimed are more or less open access. In-formation obtained also showed that explicit regulations usually refer to a normative standard not always practiced (Anau et al, 2002).

Conclusion

should be noted that relating to the adat law recognition, Ter Haar constantly emphasized the necessity for courts to recognize adat law and its change and to give effect to it. However, in this modern era of legal certainty, court decision, whether it is general court or constitutional court, are not enough for giving the legal clothes for local wisdom. What most important is

In modern nations with centralized governments and written constitutions, some legal scholars and bureaucrats may fear that customary law presents a challenge to state sovereignty, But constitutionalism, and the idea of a constitution, can incorporate customary law as part of its fabric. Within the array of positivisme and legal pluralism, Indonesian Constitutional Court is trying to take leadership in the role of Adat Law recognition. Several problem still need to be solved for the recognition, however the progressive judgment from the Court open possibility how customary law, formal law and constitutionalism can co-exist in the same vision in Indonesia pluralistic society, not without risk of tension, but with the possibility of success under the name of constitutionalism.

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[i] Academic works have been accumulated by Japanese legal sociologists for the identification of various modes of *iriaiken* and judicial cases thereon, as well as the fate of *iriaiken* interfacing with the rapid economic development. See e.g. Kawashima, Shiomi, and Watanabe (1961), Nawada & Kurumizawa (1993), Hojyo (2000), etc..

[ii] Shiomi (1951) and Sato (1977) are among major works on fishery rights by Japanese legal sociologists.