PATHWAYS TO CUSTOMARY RIGHTS RECOGNITION IN INDONESIA: PAST, PRESENT, AND FUTURE CHALLENGES

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To Whom This May Concern:

THE 12th ASIAN LAW INSTITUTE (ASLI) ANNUAL CONFERENCE ON 21 MAY – 22 MAY 2015

I wish to inform you that **Dr Rudy** from **Constitutional Law Department, Faculty of Law, University of Lampung** has been invited as a participant at the 12th Asian Law Institute annual conference in Taipei hosted by the National Taiwan University on 21 – 22 May 2015.

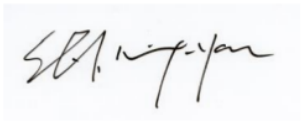
This conference is envisaged to examine several wide-ranging sub-themes consistent of recent development of law in Asia. More details on the conference can be found at the website: http://law.nus.edu.sg/asli/12th_asli_conf/

As the conference will be held over two days, he/she is expected to arrive in Taipei before 21 May 2015 and leave after 22 May 2015. All the costs of the conference will be borne by the participant.

Please kindly consider this letter for the purpose of securing an entry visa or securing financing.

Thank you.

Yours sincerely,



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Law 2.0: New Challenges in Asia
12th Asian Law Institute Conference

Thursday and Friday, 21 & 22 May 2015, Taiwan

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ABSTRACT

Indonesia has been struggling to establish unified modern legal system since independence from colonial rule. Since then, western law, transplanted since colonial time, had been face to face with customary law, resulted in the legal pluralism establishment. This never-ending contest has become an arch in Indonesia law development, resulting in the rise and fall of customary law and rights. In the same time, the past two decades have witnessed important developments in the constitutional law and the institution in the Asia, as often generally called a phenomenon of "constitutionalism", and Indonesia is among such phenomenon. The Indonesian Constitutional Court (Mahkamah Konstitusi, or MK), established in 2001, is one result of the phenomenon of constitutionalism. Since then, MK has taken an active role in the recognition of constitutional rights as set forth in The Constitution.

Within the context of constitutionalism and legal pluralism, this paper turns attention on the historical pathways to customary law and rights recognition in Indonesia, including the present development and future challenges. Using the historical approach beginning in colonial period to present, coupled with MK judgments, the study reveals of how the legal development had influenced the rise and fall of customary law and rights in Indonesia. The study also found that there is possible picture of how customary rights and constitutionalism can co-exist in the same vision in Indonesia pluralistic society. Finally, the study discusses deeply and technically the future challenges including the difficulty of customary rights recognition.

AN ARCH BETWEEN WESTERN LAW AND CUSTOMARY LAW

As often generally found in the Southeast Asia, Indonesia legal system had been formed through the process of legal transplantation since the colonial era. In this context, the history of Indonesian legal system is closely related to the Netherland legal system, while Netherland had been inherited the legal system mostly from French. The western legal development in Indonesia had been started from the colonial time.

During the colonial period, the Netherlands-Indies Government implemented the concordantie principle in the legal system throughout the territory of Indonesia. On the basis of this principle, every law that was passed by the Netherlands parliament would take effect in the Indonesian territory directly, with slightly changes if necessary. Almost 100 years of Netherland occupation had made the process of reception of colonial law had happened in Indonesia, even before the Independence Day.

While the transplantation of western law had been slowly progressing, Indonesia had adat law or commonly knows as customary law. Customary/adat rights and especially customary court has been existing for a long period, may be same period with the current communities in the archipelago.[1]

Within that context, western law, transplanted since colonial time, had been face to face with customary law, resulted in the legal pluralism establishment. This never-ending contest has become an arch in Indonesia law development, resulting in the rise and fall of customary law and rights.

In the same time, the past two decades have witnessed important developments in the constitutional law and the institution in the Asia, as often generally called a phenomenon of "constitutionalism", and Indonesia is among such phenomenon. The Indonesian Constitutional Court (Mahkamah Konstitusi, or MK), established in 2001, is one result of the phenomenon of constitutionalism. Since then, the MK has been trying to take an active role in the recognition of constitutional rights as set forth in The Constitution.

This paper is tracing back the pathways of customary rights protection and recoginition since colonial time. While many studies focus on the judgment related with those protection and recognition, this paper is trying to combine both the judgment and regulation on recognition and protection of customary rights. I use historical legal approach in this paper starting from colonial time to the present protection and recognition.

COLONIAL RULE AND DUALISM OF LAW

In 20 March 1602, the VOC had been established and got octrooi right of trade monopoly in Indonesia by Staten Generaal. In addition, VOC also got the right to establish fortresses, made arrangements with the kings of Indonesia, created administrative structure, and the power of printing and circulating its own money. [2]

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[1] Abdurrahman Saleh, Peradilan Adat dan Lembaga Adat Dalam Sistem Peradilan Indonesia, makalah pada Sarasehan Peradilan Adat, KMAN, Lombok, September 2003

[2] Soepomo dan Djokosutono, Sedjarah Politik Hukum Adat, Penerbit Djambatan, p. 1.; see also A.D.A De Kat Angelino, Colonial Policy, Volume II The Dutch East Indies, The Hague Martinus Nijhoff, 1931, p. 8; see also Drs. G.J. Wolhoff, introduction of Indonesia Constitutional Law, Jakarta, Timun Mas, 1955.

The nature of this trading empire showed essentially the same characteristics with the empires of commerce and trade in Indonesia Kingdom. The aims and objectives of the VOC was trade, but without competition. Therefore, portion of the profits were used to organize a civil-military government organization on land and at sea, which was able to occupied the trade centers, trade routes, and inland areas.

In the field of legal administration, B. Schrieke as quoted by Supomo and Djokosutono, wrote in his essay *de Inlandse Hoofden* (heads of state) that VOC stayed as a foreign body that truly beyond the Dutch East Indies people, and both communities were not united in the government structure.[3] This condition was the result of the VOC organization nature. The VOC was a trading organisation and it always most frankly admitted its mercantile character. Its policy aimed at making as big and as quick profits as possible in order that it might pay large dividends to its shareholders. Therefore its organisation, even the High Government of Batavia, was first of all a trading organisation. Apart from sailors, military men, a few judges, clergymen and schoolmasters, its personnel consisted of trade agents who were at the same time entrusted with diplomatic, administrative, and judicial.[4]

The VOC legal system was aimed mainly at the coastal towns and suburbs under its direct control and rarely reached the rural hinterland. Thus, the records of legal development of the Dutch East Indies only came from the travel records of the Governor General at the time. This is due to the fact that VOC did not develop political power unless forced, especially when Old Dutch law (Oud-Vaderlands Recht) could not control law and order.[5] Legal needs were met by making special rules or adhoc. Regulations had been in the form placards.

Even though little had been done upon the development of legal system, Governor General Van Diemen, in 1642, had instructed to collect and compile all placards of law. In 1642 the placards had been systematically compiled and published under the name "van Batavia Statutes" (statute batavia) and updated in 1766 with the name "Bataviase Niewe Statuten" (New Batavia statute).[6]

Statute of Batavia by some scientists is regarded as a codification of the law. The statute was applicable throughout the regions together with other legal rules of the customary community and outsiders. According to the law, European and indigenous populations remain in place under the rule of their own heads. The heads of the people were given the authority to punish its citizens.[7] Meanwhile, the set of applicable law for the indigenous people of Indonesia were adat law or commonly known as customary law. It should be pointed out that the VOC never managed to occupy the entire Indonesian archipelago. The power was limited to the city of Batavia, and a few other cities around the cities with direct control. Outside the direct control areas, the Indonesian kingdoms survive as a country that seeks to master trade base, trade routes and inland areas, together with merchants from Spanish, Portuguese, English, and French.[8]

Little was done in the way of jurisdiction for the indigenous population. In Ambon alone a tribunal (Landraad) on which native headmen also sat, was created. In Samarang a similar Landraad was established, as late as 1747, under the presidency of

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[3] Soepomo dan Djokosutono, History of Customary Law Politic (bahasa), Jakarta, Penerbit Djambatan, 1955, p. 3
[4] A.D.A De Kat Angelino, op. cit. p. 2
[5] Soepomo and Djokosutono, op. Cit. p. 1
[6] Ibid.
[7] Soetandyo Wignjosoebroto, From Colonial Law to National Law (bahasa), Dissertation Airlangga University, 1992 p. 47
[8] GJ Wolhoff, Introduction to Indonesian Constitutional Law, Jakarta, Timun Mas, 1955.

the governor. In Western Java, in the neighbourhood of Batavia a "Commissioner for and about native affairs" was entrusted with the administration of justice. Jurisdiction over Indonesians was guided mainly by native customs, conceptions, and prescriptions.[9]

In 1747, there was an initiative to start gathering legal materials by VOC. VOC this year issued an order to make a codification of Java criminal law for a new court in Semarang. The result of the command is Mogharrar Book (1750), which was an overview of Islamic law.[10] At about the same time, Boschennar Jan Dirk van Clootwijk (1752-1755) took the initiative to record customary law contained in the royal palace of Bone and Gowa. In 1760, DW Freijer made a short essay or a compendium of the laws of marriage and inheritance law of Islam. In 1768, on the initiative of resident Tjirebon, a book named "Tjerebons rechtboek" has been compiled.[11] At the end of the 18th century around the year 1783, there was book titled History of Sumatera that shows the reviewa and inspection on customary law was published by Marsden. In this book Marsden tried to investigate the structure of society, marriage law, inheritance law, and criminal acts. Marsden investigation center is Redjang, Pasemah, Lampung, Korintji, Minangkabau, Siak, Batak, and Aceh.[12]

CUSTOMARY RIGHTS UNDER RAFFLESS ERA 1811-1816

Western powers must be directly connected with the people. Rafless want to link government body to people, stepped heads native.[13]

When the British came in 1811, the government's first concern was directed at the issue of governance. After seeing varieties of natural resource and its unproper processing, the British government was determined to improve the conditions and removed barriers that exist, as had been done in the area of the West Indies. British Governor General, Lord Minto, had been ordered to perform all corrective measures as quickly and effectively as possible, starting with gathering information about the farmers, the land, and all related information, before they can make something new legal improvement.[14]

Following up the governor-general's command, then a special commission was formed under the command of Colonel Mackenzie, to collect statistical data. Land rental system and crop profit sharing was applied in the form of taxes and rent, while the practice of repression carried out by employees of the Dutch, the native ruler, the regents and the Chinese people had been eliminated. All rights owned by each resident of each communities rank had been re-examined, population number, quantity, and value of material and various natural resources which are managed by the colonial government had been investigated and published.[15]

System changes which must be made were as follow: First, elimination of all Feudal services, and provided freedom for the farmer planting. Second, the government must oversee all existing farms, including the process for collecting the

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[9] A.D.A De Kat Angelino, op. cit., p. 10

[10] Soekanto, Thinking Indonesia Customary Law (bahasa), Soerungan Petjenongan Jakarta, 1958, p. 5

[11] Ibid. p. 6

[12] Ibid. p. 6-7.

[13] Soepomo dan Djokosutono, op. Cit. P. 67

[14] Thomas Stamford Raffles, 2014, *The History Of Java*, Yogyakarta, Narasi, hlm. 97

[15] Ibid.

crops and land rent. Third, land rent should be calculated based on the actual conditions and how big was the land, with a fair calculated time. In the coming years (1814-15), this regulation would be set for the entire district under the authority of the government, based on the principle of ryotwar or in Java called as tiang alit. [16]

Principles of land rent and its application in detail consists of some simple rules. The management of the crop and the farmers shares shall be regulated under government control. The powers in the hands of a small ruler or other authorities should be removed to anticipate the various possibilities. Land, after surveyed and measured, will be distributed to farmers in fair proportion. The contract shall be made between the farmers in person and the government over the size and location of the land, conditions and period of validity of the lease contract, also other considerations regarding public revenues and welfare of tenants. If the case was not like that, then the land will be leased by another person with the lower rents, or based on a variety of system changes in accordance with the wishes of farmers without ignoring the interests of the government. [17]

The farmers will be benefited by reducing the tax burden and oppression upon them (reduction of rent, taxes and personal service). The rulers have nothing to lose because they are still receiving a salary from the government, they just have to reduce the attitude of oppression on their subordinates. The rulers should not be any longer collect fees from farmers, in addition to the salary provided in official income and official supervision over police duties. When farmers get fully their rights to cultivate the land without interference of businessmen, farmers will be easier to determine the times of planting and harvesting as well as what plants will be processed on land. [18]

The rules of each village should not be contested and the head of each village will be selected by its people to carry out the task of collecting the crop, supervising village police and reconciling small commotion among the population. The government will try not to interfere habits, customs and regulations of their village. [19]

The law during british occupation stated that, "the government find it necessary to give certainty of land rent and that it will not change in the future, and the government will not ask for more land than prescribed, so the farmers can find peace and quiet in nurturing their land, and thus expected farmer productivity will increase. They are convinced that the land would not be taken in from them, and they can enjoy generated profits. [20]

In the years of 1814-1815, the new system was implemented in Batam, Chirebon, and the eastern region of the district, with a population of over one million, of which half were farmers. It was not without difficulty, but all can be overcome and income from land rent had been increases. The farmers no longer feel afraid of authorities and agencies that oppress and rob their work, they begin to feel passionate in working on their land, and their hatred of the government and the ruling began to fade. The British government and its employees, initially unsure upon the changes that would be occurred, but in the end we took part in the excitement felt by all parties for its success in implementing this new system. For two years, since the British occupied the island, after most of the changes take effect, there was the improvement of the condition of the population of Java and existing agricultural production. Agriculture expanded, the authority's pressure began to weak, and the crime rate

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[16] *Ibid*, hlm 98
[17] Ibid.
[18] Raffles, *ibid*, hlm 98-100
[19] *Ibid*.
[20] *Ibid*.

began to fall, as a result of the fulfillment of all the needs of each person together with the improvement of police work.[21]

Muntinghe, the right hand raffles had opinion on political character of raffles, "all actions intended to strengthen and expand the power of the west and push all the dangerous and detrimental influence of Muslim rulers; Western powers must be directly connected with the people. Rafless in this case want to link government body to people, stepped heads native.[22]

NETHERLAND INDIES GOVERNMENT PERIOD

The era before 1840 was dominated by policies of colonial attitude based on–with some notable exception–on European self interest and indifference to indigenous legal order.[23] *In general, the development of the legal system in 1840-1890 was highly influenced by the development policies of liberalism, which were trying to open wide on the opportunities and forms of private capital from Europe to the large plantations in the colony. There was also a view that the colonial government also provides protection against the interests of villages and traditional agriculture since both was the source of life of indigenous.*[24]

After the French power in the Netherlands ended, Kemper commission had been formed to make codification of law in accordance with the spirit of the Dutch nation. In 1830, the Kemper committee successfully complete the task except for the penal code. However, application of this codification can not be done immediately because of the political climate in the Netherlands is still hot since there was an intention of South Holland to secede. During 1830-1835, Hageman had been appointed to complete the task, but he could not complete the codification of the law. It was only after Scholten van Oud Harlem was given special duties as commission codification, codification task later completed in 1845. In 1847, Civil Code was formally enacted.[25]

When the codification of law was completed in Holland, many asked whether the Dutch legal doctrine, saying that custom gives rise to law only so far as referred to by the written law should not also apply to Indonesian adat law. But the question was not affirmatively answered, and the General Provisions of 1847 maintained the principle that, for reasons of fairness and good government, the (non-Christian) natives of the archipelago would as a rule was permitted to live according to their own laws and traditional institutions.[26]

In 1848, there was substantial changes occured with the formulation of Grondwet in Netherlands followed by the formation of Regering Reglement (RR) in

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[21] *ibid*.
[22] Sepomo dan Djokosutono, op. Cit. P. 67
[23] John Ball, Indonesian Legal History: 1602-1848 Sydney: Oughtershaw Press, 1982, p. 226, 336
[24] Soetandyo, op. cit. P. 5
[25] The Dutch colonialism on the Archipelago has transferred the Netherlands law derived from Napoleon Code, when Napoleon Bonaparte occupied Europe. Napoleon Code was mostly sourced the Roman Law. The Civil Law is characterized by its codification. Under the Concordance Principles, the law of the Netherlands has also applied to the citizens of the Netherlands' East Indies since 1848. During that time, the citizens of the Netherlands' East Indies were divided into three groups: Europeans, Orients and Natives. Non-European citizens might be subject to the European law both voluntarily and silently. The codification of the European law is consisted of Civil Code, Commercial Code and, Penal Code; see also Soetandyo Wignjosoebroto, op. cit, p. 6
[26] Van Vollenhoven, on Indonesia Adat Law, op. cit

1854.[27] In this phase, the policy to develop the legal instrument had been started, which is often referred to as *de bewuste rechtpolitiek*. *De bewuste politiek* has two main purposes: the first was to control the power and authority of the king and the executive officers within colonial territory, second was to guarantee the legal protection for all people.[28]

Post-establishment of Grondwet and RR, there were two step of colonial legal arrangement. The first was done in the field of civil law codification, and the second set the structure and judicial procedures. However, the codification of the law at that time also colored by dualism even Legal pluralism. This was occurred because the period before Grondwet had been marked by neglecting the unification of the law.[29]

This situation was continued until the period of Grondwet and RR. Since 1846 until 1854, eventhough there had been a legal codification and structure of the judicial bodies, but the legal substance and the applicable law is the law of natives.[30] In addition, the establishment of the court for indigenous people was only modification of the previous procedure, for example *Pradoto* Court to adjudicate based on the law of the king, *Surambi* Court to adjudicate based on religion, and *Padu* Court to adjudicate the case based on the customary law.[31]

Regulations until 1846 consisted of the regulations promulgated in the past by colonial rulers since the days of the VOC-Raffles-Cultuurstelsel. These rules was in the form of placard affixed in public places. Just after May 16, 1846, Staatsblaad 1847 No. 23 set a number of statutory provisions to the European in the form of Algemeine Bepalingen van Wetgeving (AB), Burgerlijk Wetboek (BW), Wetboek van Koophandel, and Règlement op de Rechterlijke Organisatie (RO), and Règlement op de Burgerlijke Rechhtsvordering (RV) or Civil Proceeding.

In 1854, when RR was introduced. Minister for Colonies Jean C Baud strongly suggested clauses guaranteing the indigenous people rights. The principle of protection called Baud Formula then become part of the RR. According to the Baud Formula, Governor General may allow long-term land lease set by ordinance, but this provision does not include cultivated land for their own needs such as agricultural land, sepherd land, and adat land.[32]

At the time of AB, the political law of Dutch Government could be seen in the distribution and occurrence of the law of each respective groups. Dutch East Indies, under Article 5 AB, splited the people into groups in Europe (along with those who equated) and Indigenous Peoples (which they equated with him). While the law applicable to the respective classes arranged in Article 9[33] and Article 11[34] AB.

In 1854, article 75 of the new Constitution (**Regeringsreglement**) of the Indies laid it down that, except for European statutes declared applicable to Indonesians or to which Indonesians had voluntarily submitted themselves, native

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[27] Soetandyo Wignjosoebroto, Ibid.
[28] Ibid. p. 29
[29] Ibid. p 45-47
[30] Ibid. p. 48
[31] Ibid.
[32] Marjanne Termorhuizen-Art, Indonesia and its people dalam Hukum Agraria dan masyarakat di Indonesia, p. 43.
[33] *The Civil Code and Commercial Code (which applied in the Dutch East Indies) will only be valid for Europeans and for those who equated with europeans.*
[34] *The judge will apply the law of the religion, the institutions and habits of the indigenous people themselves, as far as the laws, institutions and customs are not contrary to the principles of decency and fairness of common commonly recognized and if the person people-natives themselves set the legal validity of European or indigenous people concerned have lowered themselves to the law of Europe.*

courts would apply the religious laws, institutions and customs of the natives, insofar as they are not in conflict with generally recognized principles of fairness and justice. This article also subjected Europeans in civil, commercial and criminal matters to general decrees which were to conform as far as possible to Dutch statute law, and thus established the legal system of the East Indies on as basis of differential group law: a legal pluralism of regionally differing adat law for natives and 'foreign orientals' equated with them, and a Dutch statute law for Europeans.

Under the provisions of **Regeringsreglement** (RR), the Dutch colonial government implemented legal policy in the form of written and unwritten law. There was a written form of civil in Burgerlijk Wetboek (BW) and Wetboek van Koophandel (WvK); uncodified law was regulated in the form of laws and regulations. While the unwritten adat law applied to any group of people outside of European class. Dualistic legal system thus implemented, namely a system of civil code that applies to the European group and the other adat law system applicable to the Indonesian group.

The classification had been continue in the formulation of Indische Staatsregelling. The classification of people under Article 163 IS had purpose on determining the legal systems of the behavior for each group as specified in Article 131 IS.

In 1870, Agrarische Wet had been enacted following the massive investment on farming and plantation, Based on the principles of Agrarisch Wet, Agrarische Besluit 1870 Statute No. 118 had been enacted. What was important in this Agrarische Besluit was the creation of Domein Verklaring stating that all land without the evidence of civil law ownership of property rights (based on Western colonial law) shall belong to the state (in private law term). Together with the provision of Domein Verklaring, article 1 of Agrarische Besluit also provided the guarantee of indonesia people right. The Domein principle, was also contained in the forestry laws of 1874, 1875 and 1897. Domein verklaring declared that free lands (woeste gronden) and land which was not held in ownership or under ownership-like rights, were deemed to be state property. Thus, Land under communal property or other forms that did not recognize individual owners were claimed under this law as state property and thereby making legally available any lands in which the colonial government wished to invest. [35]

Based on this law, various concessionary rights for plantation/estates were given to foreign corporations for operation on lands claimed as state-owned property. Domein verklaring in this case function as legal basis for colonial government to regulate the land with western property rights under civil code.[36] For more than seventy-years (1870 –1942) the "state domain" was the hegemonic legal political concept that served the colonial government in facilitating European private corporations with seventy-five year concessionary rights (erpacht recht), as a legal basis for their operation in Netherlands Indies.

Van Vollenhoven's wrote the book "The Indonesian People and Its Land" directed at the Netherland East Indies government's agrarian policy. Van Vollenhoven argues that adat law especially what he calls "beschicking recht" (right to control and allocate customary lands among community members) held by customary community must be taken into account by the government if it truly intends to design land related law based on Indonesia's legal system.

Van Vollenhoven repeatedly stated his opinion that the adat community rights certification is very important for the sake of legal certainty, and this has become a

[35] Soekanto, op. cit. p. 134
[36] Supriadi, op. cit. p. 49

political purpose of Agrarische Law 1870. Moreover, there is 1870 KB that allows the conversion of the land rights of the Bumiputera into land rights according to Western law. Most of the Bumiputera deny this. This phase is the phase at an important crossroads that ultimately lead to the effects of prolonged legal uncertainty for bumiputera community.[37] It can be argued that in this phase, the law development in the intersection which then determines the future of the adat law in the future.

Beside the critics on the application of Agrarische Wet, Van Vollenhoven launched reaction upon the western codification system neglecting the customary rights based on establishment that read "Geen Juristenrecht Voor De Inlander" (there will be no law that's just only comprehensible by legal experts could be applied to indigenous people that in everyday life has had its own legal system).[38] Arguing that Indonesians order 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[39]. Therefore, it was important to learn and record the people law or customary law before creating statue law.[40]

Van Vollenhoven successor such as Ter Haar and his students, who were studying at the School of Law in Jakarta (which at that time was named Rectshogeschool de Batavia) began working in the field to record the social norms (indigenous) communities with sanctions. The results were recorded and published in law books and law magazines and often (though not formalized as a codification) used as a reference by the district court judges who adjudicate cases between indigenous people. Van Vollenhoven and Ter Haar and his successors effort had made the application of colonial law by judicial bodies of the colonial government would not go beyond the law who live in the midst of society.[41]

In 1909, Van Vollenhoven had published his work on systematic collections of widely dispersed adat law data. His main legacies is the collection of a vast amount of ethnographic detail published in 45 volumes of the *Adatrechtbundels*. Adat law materials were also systematized in 10 volumes of the *Pandecten van h adatrecht*. In terms of quantity and quality, the information gathered and processed during the first three decades of the twentieth century was unique. The *Adatrechtbundels* contain a wealth of the most diverse information on adat, Islam, and history, written in Malay or Dutch, as well as reports on meetings and academic papers.[42] In his scholar work *Adatrecht van Nederlandsch-Indie*, van Vollenhoven concluded that within

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[37] Van Vollenhoven, Indonesia and Its land, p. 46

[38] Tulisan-tulisan Van Vollenhoven yang dengan kuatnya merekasi setiap rencana pemerintah untuk mengunifikassi hukum perdata Hindia Belanda berdasarkan hukum Eropa terdapat terutama karya-karyanya Geen Juristenrecht Voor De Inlander", *De Xxe Eeuw*, Maret 1905. Đe strijd om het Adatrech", *De Gids*, Mei 1914; "De Indonesier en zijn grond", Leiden: Brill, 1919; "Een accident in de Indische rechthervorming", De Gids, Maret 1921; "juridisch confectiewerk: Eenheidsprivaatrecht voor In ' *kolonial student*, Th. I, 1925, No. 9.

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

[40] Soetandyo Wignjosoebroto, *Untuk Apa Pluralisme Hukum?(Konsep, Regulasi, Negosiasi Dalam Konflik Agraria Di Indonesia)*, Jakarta, 2011, hlm. 24

[41] Soetandyo, *ibid*. hlm. 25; see also Wignjosoebroto, Soetandyo. 2011. *Untuk Apa Pluralisme Hukum?(Konsep, Regulasi, Negosiasi Dalam Konflik Agraria Di Indonesia)*, Jakarta: Epistema In te

[42] Franz Von Benda-Beckmann And Keebet Von Benda-Beckmann, *Myths and stereotypes about adat law A reassessment of Van Vollenhoven in the light of current struggles over adat law in Indonesia*, Bijdragen tot de Taal-, Land- en Volkenkunde (BKI) 167-2/3 (2011):167-195

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.[43]

Toward National Unified Law

Indonesia 1945 Constitution has been very positive toward the customary rights. During the Investigating Committee for Preparatory Work for Indonesian Independence (BPUPKI) meeting and Preparatory Committee for Indonesian Independence (PPKI) meeting, Soepomo[44] and Moh. Yamin gave their idea upon the importance of Adat Law within the constitution. Soepomo stated that inherent rights of regions with special characteristics shall be respected. Those regions with special characteristic were kingdoms both in Java and outside Java, and small regions that had distinguished structure such as villages in Java, nagari in Minangkabau, marga in Palembang, huta in Tapanuli, and gampong in Aceh shall be respected and held as its original. While Moh. Yamin conveyed that Indonesian ability in managing state affairs and land rights had been recognized since thousands year ago. These ability had been shown in the form of legal structure of desa, nagari, and many other special forms. These special structure had been strong even today.[45] Those arguments has been provided and survived until now.

Post Independence shows that Indonesian founding father and lawyers with nationalist spirit trying to build Indonesia's national law in a way move away from the colonial law, which was not easy. The difficulty arises not only because of the diversity of the legal system, but because of the legal system had been already created as a colonial legacy. The other problem was that the creation of national law could not be achieved in a quick and short way.

Thus, to fill out the vacuum of law in newly Independent Nation, 1945 Constitution had the safeguard in Article II of the Transitory Provisions, which stipulated that all laws and legislation existing under the Dutch colonial administration automatically became the laws and legislation of the Republic of Indonesia, until repealed, revoked or amended or found to be contradictory to the Constitution. As a consequence, Colonial law still applies due to transitional provisions in our constitution. Article II of the Transitional Provisions of the 1945 Constitution provides a legal guarantee for transitional colonial law into national law. Therefore, the regulations in Indonesia after independence remained the same as the legislation enacted in colonial times, such as Civil Code (Burgerlijk Wetboek), the Commercial Code (Wetboek van Koophandel) and the other colonial laws, until amended by new laws in accordance with constitution.

Colonial law was chosen as the law of the transition on the one hand serves to prevent a legal vacuum during the process of unification of law, but on the other hand prevent the struggle for influence by various interest and political power such as islam and communist. Advocate of Islamic law and customary law has long been known to explore the possibility of raising the legal system of their choice as the basis of

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[43] 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; see also Van Vollenhoven on Adatrecht, p. LVII

[44] Soepomo was Van Vollenhoven student in Leiden.

[45] The original 1945 Constitution of the RI had Article 18 on local administration, which provided that "the division of the territory of Indonesia into large regions and small regions with administrative organizations is stipulated under law that takes into account and determine to consider the principle of consultations at state administrative organizations as well as inherent rights of areas with distinct characteristics."

national legal systems.[46]

In addition, the process of acculturation Dutch legal tradition in the early decades of Indonesian independence had been on a massive scale, especially in the substantive aspects of criminal and civil law, including commercial law, so that the actual Netherland law has been mixed with Indonesian law. [47] At the time of the Dutch East Indies rule, colonial law which was secular and neutral can mediate and prevent any intention to impose Islamic law while it is able to co-opt the customary law as part of the colonial law. [48]

It is very important to note Daniel S Lev[49] that the choice to use Transition Article of 1945 Constitution was not merely a matter of convenience nor was it simply because no one had any ideas but because the colonial law provided an availableand apropriate framework and because colonial law was a secular neutrality between religious and social groups.

After the relatively calm condition after the long struggle defending the independence, National Legal Development Agency (LPHN) was created in 1958 as the first state instution focusing on legal development in Indonesia. Its first task was to implement 1960 MPRS guidelines that national law should be coordinated with state policy and based on an adat law which would not impede the development of a just and prosperous society vide article 33 0f 1945 Constitution. LPHN in 1960 thus established that the development of national law must be built by accumulating specific areas of law within the legal codification. While the unwritten law is recognized to the extent not inhibit the formation of Indonesian socialism and the judge has the function of guiding towards the uniformity of the law through jurisprudence.

Customary rights, has been very related with the agrarian matters, since colonial time. Agrarian reform in the period of post independence had been move forward with the formation of agrarian ministry in 1955. [50] This Ministry initiated the establishment of legal unification in the field of agrarian. Responding to the intention of Agrarian Ministry, Agrarian Law committee had been formed to conduct preparation on the draft of the law. Finally, in 1960, Basic Agrarian Law (BAL) was formulated.

The 1960 BAL were replacing the state domain principle (Domein Verklaring), set forth from Agrarisch Besluit 1870, with a new called State's rights to control (Hak Menguasai dari Negara). The 1960 BAL was the first national agrarian law that originally intended to operationalize the philosophical basis of the Indonesian state (Pancasila) and the provision of article 33 section (3) of the 1945 Indonesian Constitution provide that, "The land, the waters and the natural riches contained therein shall be controlled by the State and exploited to the greatest benefit of the people." State's right of control over all resources provides authority to the government as state apparatus in constitutional law term to give all rights related to land.

BAL resulted in the unification of the law of agrarian and land reform. On the unification of the law, BAL had convert old right into new rights consist, among others: the western rights such as eigendom, Agrarische eigendom, and the sovereign grant into ownership rights. Individual adat rights such as yasan, gogolan, sanggan, and pekulen was also converted into ownership rights. While the others western rights

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[46] Soetandyo, op. cit p. 304
[47] Sunaryo Lukito, Legal Tradition in Indonesia
[48] Daniel S Lev, Judicial Unification in Indonesia,
[49] Daniel S Lev, Judicial Unifification in Indonesia
[50] Kepres Nomor 55/1955 tanggal 29 maret 1955

such as *vruchtgebruik* and *gebruik* and adat rights such as bengkok, lungguh, and angaduh into right of use. Erfpacht rights (right to rent for 75 years) and concession rights had been converted into the right to cultivation.[51]

Regarding to adat rights, Bal had been clear to be based on the adat law. BAL acknowledge adat rights and put it in the higher rank of rights above the individual rights. The problem remained that this system did not accomodated the communal rights under the positive rights. The drafter of the BAL admitted that there was possibility that adat rights may be disappear during the modernization and when that condition occur, the remnants of adat rights will be accomodated in the state control.

Adat law principle affected the national law in two important respects, namely: Social Function and the Principle of Horizontal Separation Principle. Western rights under BW Recognizes eigendom or ownership rights as absolute rights upon land, while BAL respect the social function of the land. The other difference lies in the using of horizontal separation principle in which the property rights above and under the land was not in one package.[52]

In sum, BAL has spirit on the protection and recognition of customary rights, however, BAL has not been clear on the manifestation of those recognition since the protection and recognition has been on the principle and meta norm.

DEVELOPMENTAL STATE AND THE FALLEN OF ADAT

The adat law system pionered by Van Vollenhoven and Ter Haar and guaranteed by newly drafted constitution, however did not survive. In part, this has been the result of unification of the judiciary and the shortage of trained Indonesian judges and adat law researchers. It has also been due to the ambivalence of the Indonesian elite towards the adat law and to their relentless demand for a modern and unified state.[53]

Most of the nationalist elite have, since before the war, conceived Indonesia's future as one of rapid economic and social progress. For many of them, adat law represented the opposite of progress. But it also represented something that was frankly and indisputably Indonesian. The resolution of this problem after the independence began was more or less complex, depending on the individuals who thought about it. For some the choice was either the adat law or European law exclusively. Others favored an equally difficult modernization of the law on a base that comprehended the distinctly Indonesian sense of justice, as it is manifested in adat law. Most lawyers and scholars after the independence saw the adat law in the light of their desire for a modern industrial state. The Indonesian people would have to be pushed towards new and modern law. Adat law, in the view of post-revolutionary leaders, is inadequate and must give way.

The experience of Indonesia is also existed in other post-colonial nation. In other post colonial nation, the new nations often tried to use their customary law as a means of strengthening national identity. But because national boundaries reflected compromises among the colonial powers more than actual cultural unity, the new nations were usually faced with the problem of dealing with a multiplicity of groups with differing customs[54].

With the advent of new order authoritarian regime since 1966, a basic understanding of the instrumentalism of the law had found its place. Customary law

[51] Arya Wirayudha, dari klaim sepihak hingga land reform, STPN Press. 2011. P. 96.
[52] Ibid. p. 193
[53] Daniel S. Lev, supra note 21.
[54] Peter Ørebecher etal, p. 7.

ideological victory primarily in 1960 BAL enactment finally stopped since customary law was rarely mentioned along with the economic development policy that opens the entry of foreign capital. In 1965-1970, other laws relating to land were enacted without considering the BAL, consequently some laws and regulations dealing with land are contradictory. Legal conflict and confusion produces problems and impacts on disparity of land holding, land ownership, land use and utilization, slow implementation of agrarian reform, land disputes and conflicts, abandoned land, etc.

The law and development strategy based on high economic growth gives implication in various areas of development that tends exploitative. The first of this period recorded the birth of Act No. 1/1967 on the Foreign Investment Law, Law No. 5/1967 on the Basic Forestry Law. Those set of laws designed by the Suharto government to facilitate the entry of foreign investment in Indonesia. Unlike the BAL, the BFL did not include provisions for the recognition of traditional rights. Instead, it created a system in which all forest areas would be under the management of the government. The government promptly entered into contracts with private companies whereby land concessions were granted for logging, agricultural, mining and other uses.

During this period, the law was not regarded as the norm as living in the community, but as a means to achieve development goals. In this period, the law as a means of development into become the mainstream school of law development in Indonesia In this period, the school of law development appeared very famous in that era. During 1970-1990, the idea of law as a tool social engineering was used to serve development programs all over the country.[55] The school of law development was the result of the changing paradigm from supremacy of politic to supremacy of economy. The economic downturn in the old order became the basis for the justification of the school of law development. The choice of economic supremacy requires the specific law to accelerate the development of economic growth. Customary law got less attention, if any, it was more related to the practices of the court in the case of traditional inheritance.[56]

Throughout the New Order, 1960 BAL Principle State's right to control had been used to achieve the developmental goals. Using the BAL principle, authoritarian government took control of the country's resources and directs them towards his goal of "development." The authoritarian regyme using resources and development benefits in a manner that would bring stability to a country as an appeasement for the people. I would argue that domein verklaring or state domain from colonial rule had been survived in this period.

State Control Doctrine, taken from the provisions of Article 2 Paragraph (1) and (2) BAL, is essentially a reflection of the implementation of the values, norms and configuration of state law governing the acquisition and utilization of environment and natural resources, or an expression of ideology which gives the authority and legitimacy of the state to control and utilize the environment and natural resources including land tenure within its sovereign territory.

Relating with the State Control Doctrine, The New Order Government under former President Suharto considered land as an economic asset that is indispensable to efforts to integrate the Indonesian economy into a capitalist economic system. A concrete manifestation of this policy has been the deregulation of the countrys land market in favor of private, particularly foreign, investors. Thus, Laws, ministerial decrees, and local regulations related to land affairs and exploitation of other natural

[55] Lihat GBHN 1970-1979
[56] Lihat Achmad Sodiki, Politik Hukum Agraria, p. 103.

resources have been formulated to create a more conducive environment for free investment and market creation activities. This legal system was used to facilitate the entry of capital. This legal instrument that systematically express the government's power and displacing then ignore the existence of other systems that live in the community such as indigenous people have the right to land, which is called the land titles of indigenous peoples.

The shift of legal political development had been moved to the period of institutionalization of Islamic Law. Legal pluralism in Indonesia had been reduced by the incorporation of Islamic Law into National Law. To enforce Islamic law as formal law, the Indonesian government had made many legislation in the foundation of islam, such Law No. 1 of 1974 on the Marriage and Law No. 7 of 1989 on Religious Court. In 1991, government gathered groups of moslem scholar to create a Compilation of Islamic Law. The Compilation of Islamic Law contains law or regulations related to Islamic law, particularly private matters, as legal source to settle islamic dispute.

With the incorporation of Islamic Law into national law, national legal unification moved one step further leaving the problem of adat law within the legal pluralism. New Order government move to unfication agenda with the enactment of Law No. 5/1979 on Village. Village Law had big impact on the fallen of adat community and law. 1979 Village Law set out to establish uniform local administrative structures across Indonesia with the model of Java Regions. Thus. The Law systematically abolished the adat government system by making all the village government uniform in Indonesia. This Law normatively destroyed one of the established criteria of customary community definition within academic circle[57]. By this law, the adat community lost the governmental system as had been replaced by the new administration system. The lack of governmental system within adat community has been used by court to deny the existence of adat community[58].

The fallen of adat structure was one structured movement by authoritarian government to achieve unification and homogenization in Indonesia. By the dissappearance of adat system and structure, the legal ground for claiming adat rights will be lost in front of the formal law. This condition is true in case of Indonesia where the adat community had been decreasing all over the time.

In the specific area of land law, the nation versus customary law is evident of which nation based on the positive law always wins. The defeat of hak ulayat right usually happened when adat community made agreement with private companies under the right of use agreement. After the right of use was ended, the land automatically becomes state land under the provision of BAL 1960. The adat community lost their hak ulayat and cannot prove the existence since the evidence of adat community existence has been weakened by the enactment of Law No. 5/1979 on Village government. This condition has been worsened by the court stance to hold of positive law rather than take more account on adat claim.

It can be argued that, during the era of develomental state, unification and modernization of legal system grew stronger and made Adat law had been pushed away from law development policies. Normative values would be recognized as Law if it were coming from state authorities. Adat law was defined as Law after given recognition by state legislation. In Suharto's New Order period, however, adat law was never considered as part of national laws. Several laws on natural resources either ignored or limited the recognition of adat laws.

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[57] Academic cirlcle in Indonesia use Ter Haar definition of adat community in most of the legal argumentation, see the definition in detail in Ter Haar supra note 21.

[58] See the minutes of constitutional case No. 31/PUU.V/2007.

FROM STATE SOVEREIGNTY TO PEOPLE SOVEREIGNTY

The end of 20th century marked the huge changing of legal political system especially in Asia. Indonesia's authoritarian government finally broke down after the series of economic and political turn in the region. The condition reflected the changing of legal political situation from state sovereignty to people sovereignty in indonesia.[59]

The New Order's hot pursuit of economic development and stability had led the government to consider that human rights and the rule of law are dispensable in pursuit of economic development, thus putting aside the constitutionalism after the economic development and stability. Therefore during the New Order period, the existence of written constitution did not make the Indonesian people feel either a procedural or substantive sense of Constitutionalism. All those experiences and the weaknesses of the 1945 Constitution were the considerations that led to the 4th times amendment of 1945 Constitution during 1999-2002, regarded as one of the largest constitutional reforms in Indonesia after the fall of former President Soeharto in 1998[60]. Former President Habibie, the successor of Soeharto, apparently already thought of the need for constitution amendment and direct election for presidency. Habibie said that the future of Indonesian democracy lies in the constitution amendment so that Indonesia can stand firm together with other democratic nations without losing its own identity[61].

Constitutional amendement after the fall of New Order have changed the face of legal political system of Indonesia. The constitutional amendment had been followed by the enactment of local government law, giving the federal-like institutional design to regions and the establishment of constitutional court. This new institutional setting had given rise to adat community and adat institution.

A revival of adat laws took place in the beginning of reformasi a period after the resignation of Suharto. Several Scholar has called this phenomena as adat revivalism. [62] Some district regulations were enacted to recognize certain adat communities and their land. A law on special autonomy was also enacted in 2001 for Papua, recognising the role of adat institutions and the implementation of adat law in that province.[63] The legislation seem to proctect the customary rights but in reality had difficulty on the application. The new Basic Forest Law, passed in 1999, appears to recognize traditional communities that live within State forest lands, and acknowledges that adat forests are the home of traditional communities. At the same time, however, it decrees that all lands that are not covered by proprietary rights are

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[59] In 2008, AusAID described three periods in the reform trajectory of the Indonesian law and justice sector: **Pre-1998** when little commitment was made to the rule of law and human rights; **1998-2004** when entirely new legal and institutional frameworks were established; and **2004-present** during which the focus of reform has begun to shift toward implementing the new frameworks. This present period can be seen as 'road testing' and consolidation of the new frameworks

[60] The situation during the fall of Soeharto was nearly the same with Philippine experiences when thousand of people were standing along the toll road of EDSA requesting Marcos to step down, See Valina Singka Subekti, 2008, Menyusun Konstitusi Transisi "Drafting Transition Constitution, Jakarta: Rajawali Press.

[61] Ibid.

[62] See Sayaka Tak, The Concept of Adat and Adat Revivalism in Post-Suharto Indonesia,

[63] Myrna Safitri, Legal pluralism in Indonesia's land and natural resource tenure: a summary of presentations in Marcus Colchester & Sophie C "Divers Paths To Justice: Legal pluralism and the rights of indigenous peoples in Southeast Asia", Forest Peoples Programme (FPP) and Asia Indigenous Peoples Pact (AIPP), 2011, p. 127

considered as State forests. Thus, it denies ownership to communities even as it allows them to use, access, and manage the land.

In another form, there are efforts to accommodate and to respect the existence of adat peoples through the efforts initiated by AMAN. One of the effort is to encourage the assurance of the existence of adat rights through a Memorandum of Understanding between National Land Agency and AMAN in 2011 on The Registration of Adat Land. The MoU needs to be appreciated, but in the perspective of the law will lead to legal uncertainty especially with aspects of legal formality that should be taken into consideration. Memorandum of Understanding is not legal product, and the current legal regime tends not give space to form agreements-agreements in the form of MoU to collectively binding.

The establishment of Indonesian constitutional court was also the result of the rapid spread of constitutionalism and judicial review. Over one hundred countries and several supra-national entities across the globe establish constitutional supremacy in one form or another[64]. The rise of constitutionalism is followed by the gradual emergence of new constitutional court, that in many of these countries have been responsible for translating these constitutional provisions into practical guidelines to be used in daily public life. Many of these courts have become significant, even powerful-actors[65]. Despite the growing number of academic works on the relationship among constitution, minority rights, and judicial review[66], it might be argued that a little attention paid to the relation between constitutional court and the protection of customary law especially in culturally divided societies[67].

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[64] A partial list of country that have undergone fundamental constitutional reform since 1970s includes new democracies in Eastern Europe (Hungary 1990, Romania 1991, Bulgaria 1991, Poland 1992, Czech Republic 1993, Russia 1993, Slovakia 1993); new democracies in Southern Europe (Greece 1975, Portugal 1976, Spain 1978, Turkey 1982); new democracies in Africa (Mozambique 1990, Zambia 1991, Uganda 1992, Ghana 1993, Ethiopia 1995, South Africa 1993 and 1996, Egypt 1980); Asian Countries (Sri Lanka 1978, Philippines 1987, Hongkong 1991, Vietnam 1992, Cambodia 1993, Indonesia 1998, Thailand 1997); Latin American Countries (Chille 1980, Nicaragua 1987, Brazil 1988, Colombia 1991, Peru 1993, Bolivia 1994). For details see Robert Maddox. I. *Constitutions of the World*. Washington D.C, Congressional Quarterly; Albert Blaustein & G.H Flanz, eds. 1998. Constitutions of the Countries of the World. New York, Oceana Publications; For discussion on the emergence of constitutionalism see Ran Hirschl. *The Rise of Constitutional Theocracy*, Harvard ILJ Online Volume 49, October 16, 2008; Neil Walker, *The Idea of Constitutional Pluralism*. The Modern Law Review, Vol. 65, No. 3 (May, 2002), pp. 317-359; Tate, C. Neal, & Torbjorn Vallinder, eds. 1995. *The Global Expansion of Judicial Power*. New York: New York Univ. Press; Mark Ensalaco, *In with the New, Out with the Old? The Democratising Impact of Constitution Reform in Chile*, Journal of Latin American Studies, Vol. 26, No. 2 (May, 1994), pp. 409-429; Istvan Pogany, *Constitutional Reform in Central and Eastern Europe: Hungary's Transition to Democracy*. The International and Comparative Law Quarterly, Vol. 42, No. 2 (Apr., 1993), pp. 332- 355;

[65] Lee Epstein, Jack Knight, Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, Law & Society Review, Vol. 35, No. 1 (2001), pp. 117-164; Schwartz, Herman, *New Eastern European Constitutional Courts*, 13 Michigan J. of International Law 763, 1992; Jean-Marie Henckaerts & Stefaan Van derJeught, *Human Rights Protection Under the New Constitutions of Eastern Europe*, 20 Loyola L. A. International & Comparative Law Journal 475, 1998; Tom Ginsburg. *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, Law & Social Inquiry, Vol. 27, No. 4 (Autumn, 2002), pp. 763-799

[66] Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*. Law & Social Inquiry, Vol. 25, No. 1 (Winter, 2000), pp. 91-149; M. L. Marasinghe, *Ethnic Politics and Constitutional Reform: The Indo-Sri Lankan Accord*. The International and Comparative Law Quarterly, Vol. 37, No. 3 (Jul., 1988), pp. 551- 587; See Vello Pettai, "Estonia: Positive and Negative Constitutional Engineering," in Zielonka, ed., Democratic Consolidation, 111-38. 29.

[67] It is worth to note article written by Rachel Sieder on Guatemala and Colombia experience on the protecting the customary law. In this article, Sieder shows that Many Mayan rights activists now prefer

Upon issues of legal pluralism, constitutionalism and the old debate of unification versus pluralism, constitutional court in Indonesia, as institution with authority to interpret the constitution, might mediate and find way of adjustment to resolve the conflict and put fundamental legal basis for future conflict. The paper argue that the absence of constitutional review since independence was one cause of the old debated issue of informal law position within Indonesian legal system. Since its establishment, Indonesia Constitutional Court has been reviewing more than thousand cases until present. Few cases as follow has been regarded as the protection and recognition of customary law.

Noken model had been appeared in Indonesia Constitutional Court trial No. 47-81/PHPU.A/VII/2009[68] as the result of constitutional petition raised by Rev. Elion Numberi and Hasbi Suaib, S.T. Both of petitioner in fact questioning the final result of general election but not the recognition of noken model of vote. However, the noken model somehow can't be separated from the initial case since it had direct linkage to the general election result. By accepting the number of ballots using the adat law method, Yahukimo Adat Law has bee recognized by constitutional court. In its judgment, Indonesia Constitutional Court understands and respects adat law within adat communities in Papua and therefore recognizes the general election method used by the communities in Yahukimo. The court accepted the collective votes conducted by Yahukimo people by considering that giving recognition upon its distinguished way of election will bring harmony among the society living in Yahukimo; the court consider that forcing the positive law may not bring the harmony, thus neglecting the purpose of law and justice.

In 2010, a year after the shocking noken judgment, Constitutional Court accepeted the petition raised by NGO Coalition to involve adat communities in planning the Island and Shore management.[69] In the same year, Constitutional Court accepted the petition on Plantation Law. Article 21 of Plantation Law had been regarded as threating the constitutional rights of customary communities.[70]

In 2011, Petition on Law on Forestry had been accepted. Constitutional Court gave judgment that forest control by the state shall protect, respect and fulfill the rights of indigenous people as long as it exists and recognized.[71] Later, AMAN, in 2013, representing adat people put petition on Constitutional Court to remove the legal position of adat forest from state forest. Indonesian Constitutional Court in May

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to approach the issue of coordination between indigenous law and state law by a judicial rather than legislative route. This implies that when conflicts of competencies and jurisdiction between state law and indigenous law occur that they should be approached on a case-by-case basis, with the goal of forcing the government to uphold its international commitments by respecting the collective rights of indigenous peoples to legal autonomy. Such an approach has been successfully applied in Colombia for over a decade. There, the Constitutional Court has played a central role in advancing indigenous peoples' rights to jurisdictional autonomy via its decisions. For details see Rachel Sieder, Supra 9.

[68] In 2009 General election, citizen in Yahukimo regency participated in nationwide general election. Eventhough there was a positive law on general election, Yahukimo people were using their own method of choosing leader according their adat law. Before deciding the which person should be elected, leader of clan was holding a meeting attended by all member of the clan to discuss on who the one should be elected, after that people of each clan were represented by their leader to vote all the ballots in front off all the clan member, after that adat leader put the ballots into noken[68]. Finally adat societies was holding party after the vote. This is very typical of Adat law that put more weight on communities rather than individual. Thus, the communities harmony will be put more priorities above

See the detail in Indonesia Constitutional Court official Website, accessed on 25th December 2010: http://www.mahkamahkonstitusi.go.id/index.php?page=website.Persidangan.PutusanPerkara&id=26&aw=21&ak=31&kat=1

[69] See detail on MK Judgment No. 003/PUU-VIII/2010.

[70] See detal on MK Judgment No. 055/PUU-VIII/2010.

[71] See detail on MK Judgment No. 034/PUU-IX/2011.

2013 granted the petition to remove customary forests from state control, although implementation remains a long way off.[72]

Several case shows that many petition brought by adat communities has been denied by the Constitutional Court because there is not enough prove that the petitioner is the representative of adat communities. The situation is different with the judgment involving Papua adat communities because Papua has special autonomy law that define the characteristic of adat communities. The weakness admitted by the MK judges is mainly within the constitutional court proceeding that includes unclear limitation upon the legal standing for Adat community.[73]

FUTURE CHALLENGES

In countries with a civil law tradition, such as Indonesia, a more positivist legal philosophy has often prevailed. Civil law countries have typically endeavored to codify all legal rules. Such countries might be expected to be less receptive to laws based on custom than common law countries, where the gradual evolution of case law was a dominant element. Under the dominant paradigm of legal positivism, the status of legal authority granted to customary law was assigned little weight as a low priority source. Indonesia has clearly operated within this paradigm.

History of customary rights protection on recognition shows us that positive law has been discriminating on the application of customary rights in Indonesia. Thus, Another challenge is how to push the more clear application of customary rights into the normative positive law. The past had showed us that the failure of customary rights application was because there was not clear application of the norm in the positive law.

In addition, Since the application of customary rights recognition has been based on the evidence on whether customary community is existed or not, customary communities shall be supported with the academic evidence. In this case, the method of proving customary communities in Indonesia is a question of evidence. Therefore, research upon the adat law and adat communities 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.

Finally, the progressive judgment from constitutional court reveals one possible picture of how customary 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 in order to protect, rather than neglect, the national people living on the plural norms. Accordingly, the constitutional role of the Constitutional Court itself has to be identified through the continued endeavors by itself. The challenge for "constitutionalism" in Indonesian context is yet continuing.

[72] See the annex of constitutional court judgment no. 45.
[73] Interview with constitutional court judges.

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