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The Recognition of Customary Rights by Indonesian Constitutional Court

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Abstract

Formal law and customary rights never-ending contest have been a challenge for Indonesia in its effort to construct a modern nation. In this kind of battle, there are two conflicting values, the certainty of law versus harmonious value within society. However, the idea of constitutionalism can incorporate customary law as part of its fabric. Within the array of positivism and legal pluralism, the Indonesian Constitutional Court is trying to take leadership in the role of customary rights recognition. One of the legal standings that can put a petition to the constitutional court is a representative of the adat community as long as it still lives according to the values Indonesian State as required by legislation. The provision requires the existence of customary communities stipulated in a specific law. However, the required legislation is not stipulated yet in Indonesia, creating the institutional difficulty for The Constitutional Court upon accepting the customary rights case from specific adat communities. Given the limitation, this paper turns attention to how the Indonesian Constitutional Court deals with the recognition of customary rights as outlined in the Constitution. This study will attempt at answering this question by integrating the reading of Indonesia Constitutional Court judgments, the institutional framework analysis with a sociological approach through Indonesian Constitutional Court judges' interviews. The study reveals one possible picture of how customary law and constitutionalism can co-exist in the same vision in Indonesia's pluralistic society. This co-existence is not without risk of tension, but with the possibility of success under the name of constitutionalism order to protect, rather than neglect, the national people living on the plural law.

Keywords: Recognition, Customary Rights, Constitutional Court, Indonesia

1. Introduction

Since independence time, the idea of legal system modernization influenced Indonesia, thus damaging the whole legal system of adat in Indonesia. Nonetheless, reality shows that Customary Rights or Adat Rights has existed and survived in Indonesia. This paper will use customary rights and adat rights interchangeably in this paper. The word adat may include everything of daily norms to the legal mechanism of the specified community. For every person in communities, adat is very important in their everyday life; therefore, one can not be separated from adat (Murray, 2001).

After independence, the government of Indonesia from Soekarno to Soeharto were trying to unify Indonesia in all dimension they can, including the pursuit of a unified legal system. Soeharto, under the label of New Order, pushes the unification encompassing the shape of the community and the form of institution (Liddle, 1992).

Government policies and institutions greatly influence the model of how state development goals achieved. Because after all the state's duty is to protect its people, including their rights (Perisic, 2013). Those policies and institutions shape the behavior of bureaucrat, jurist, and most people in Indonesia on how the development of law designed. In Indonesia's case, modernization and economic development mostly led the state policies. On the other side, most communities outside the capitol are walking on the adat guidance (Rahardjo, 1994).

Reformation, at the end of 1998, marked the beginning of constitutionalism and the big bang autonomy experiment in Indonesia. The decentralization policy provides the fertile soil for the revival of adat movement across Indonesia.

Amidst many scholars doubt the necessity of the adat law application on nation life (David, 1963). Aceh's experience in applying the adat law for the land problem post great disaster of Tsunami shows us the possibilities of adat law application in daily matters. Not only in Aceh, but several of adat law across Indonesia have also been recognized for its efficiency in protecting natural resources. The traditional fisheries management system "sasi" has been given much attention for its efficiency (Murray, 2001; UNDP, 1997). The evidence from many regions shows that adat law still survives and important guiding the communities in Indonesia.

At the same time, the early 1990s, the last two decades have witnessed remarkable developments in the constitutional law and the institution in the world, as often generally called a phenomenon of "constitutionalism," and Indonesia is among such events. The Indonesian Constitutional Court (Mahkamah Konstitusi, or MK) has been established since the amendment of the 1945 Constitution in 2001 and practically began its role in 2003. Since then, the Indonesian Constitutional Court has taken an active role in guarding constitutional supremacy. At this moment, an academic review on customary rights is highly anticipated. It is important to emphasize that, as one of the justices personally interviewed by the author recalled, the Indonesian Constitutional Court has genuinely been a struggle started from nothing. The battle was happening in the sense that Indonesia had lacked any experience of constitutional adjudication because of the four decades of the authoritarian regime in the preceding Soeharto era.

In Indonesia, one of the legal standings that can put a petition to the constitutional court is a representative of the adat community as long as it still lives according to the values of the Unitary State of the Republic of Indonesia as required by legislation. The provision requires the existence of customary communities stipulated in a specific law. However, the required legislation is not stipulated yet in Indonesia, creating the institutional difficulty for The Constitutional Court upon accepting the customary rights case from specified customary communities. Given the limitation, this paper turns attention to now the Indonesian Constitutional Court deals with the recognition of customary rights as outlined in the Constitution.

2. Methodology

This research uses normative legal research guidelines with the main approach to statutory regulations and the decisions of the Indonesian constitutional court. This study will attempt to answer this

question by integrating the reading of Indonesia Constitutional Court judgments, the institutional framework analysis with a sociological approach through the analysis of the dynamic development of legislation. The rise of constitutionalism, evidenced by an active role of the constitutional court and the revival of adat rights, is calling for academic review of such phenomenon.

3. Results & Discussion

3.1 Constitutional Court in The Boom

Constitutionalism is the buzzword at the end of the millennium. It has become a magic word for many countries, which have taken steps from authoritarian to democracy, using legal reform instruments has spread around the world assisted by various international donors (Carothers, 1998). The collapse of communism in the 1990s in most Eastern European countries, a massive number of post-communist countries, was taking a huge jump to reform their legal system, including amending constitutions. Latin American countries have taken reform on the rule of law. In Asia, the revision of the constitution is a vital part of the reformation in related to economic development and investment (Carothers, 1998).

More than half of United Nations members took amendments to their constitutions during the end of the 20th century. These member states provide the instrument of human rights and a new model of constitutional review (Davis and Trebilcock, 2008). In the end, constitutional reconstruction in the 1990s was very intense as the result of the rule of law propaganda under the name of development (Carothers, 1998).

The profound change in the world system of constitutionalism brought a package with the creation of a constitutional (Neal, 1995). This expansion seems a natural phenomenon given the fact that the role of the constitutional court has long been attributed to both of the two dimensions, as mentioned earlier of Constitutionalism, namely, procedural and substantive goals (Cappelletti, 1970). Cappelletti (1970) considers the constitutional court as a constitutional structure to create positivization towards higher values which are further expressed by the constitution, in addition to its role as an institutional pillar in the separation of powers. A reference is also made to the stream of scholars descending from Montesquieu (1997) asserting that the existence of an independent constitutional court characterizes constitutionalism.

Also, the world has observed three waves of the spread of constitutional review. The first wave was the adoption of a Judicial Review into the US constitutional system and the constitutions of its constituent states. The second wave was soon after Hans Kelsen's Reconceptualization of constitutional review under special court, particularly after World War II, assuming that the legislature might make mistakes, which constitutional review could rectify (Kelsen, 2005). During the third wave of democratization, a large number of countries, particularly in the post-Communist world, as well as new democracies, were adopting the German type of constitutional court (Ginsburg, 2003).

Apart from one view that the reconsideration would be subject to western influences was seen as strong (Huntington, 1997). In addition, it would be very difficult to adjust to the Asian historical image of authoritarian regimes (Bodde and Morris, 1967), the existence of constitutional and judicial examinations will be recognized and will be documented by law scholars, especially constitutional law in each region (Ginsburg, 2002). South Korea and Taiwan are the examples of east Asia nations successfully rising as new kids on the block on a constitutional court success story. Indonesia appears headed in this direction too, although Indonesian constitutionalism still awaits consolidation. Mongolia has, likewise, had an active civil law constitutional court, though some might fear too active. While Japan and Hong Kong took another direction. The Hong Kong Constitution choose the centralized system of constitutional review. On the other side, Japan is using the decentralization system as same as with the United States. The Philippines is having a hybrid law system, although its constitutional judicial review is f on the America common law system.

Indonesian constitutional court is one of such typical products amid the third wave of democratization. Until the introduction of Indonesian constitutional court (starting now referred to as

MK) in 2003, the application of the rule of law, both the procedural dimension of *rechtstaat* or the substantive aspect of democracy, was within reach of the Indonesian people. Indonesia's constitutional doctrine that "Indonesia is *rechtstaat* but not *machstaat*" was only written in the constitution elucidation and constitutional books but had never been realized. It is understood that since independence time to the new order period, constitutionalism was not regarded as necessary in our country. The main caused of the constitutionalism failures were the weaknesses of the 1945 Constitution and the absence of an institution for safeguarding the Constitution.

With the formation of the Constitutional Court, the two parts of the judiciary power that were covered by the Supreme Court and the Constitutional Court. Constitutional adjudication has followed the scheme in civil law with reference to the Kelsenian model for a centralized constitutional court outside of ordinary courts. With this model, the Constitutional Court will stand independently, but still as part of the judicial power, apart from the Supreme Court with a different jurisdiction in accordance with the 1945 Constitution.

3.2 *Adat Rights: Long Way for Recognition*

Adat rights and especially adat court has been existing for an extended period, maybe the same period with the current communities in the archipelago. Hadikusuma was stating that long before Islam entered Indonesia, this country has its court (Saleh, 2003). Adat Law term was introduced the first time by Dutch scholar Hurgronje and later developed and studied by Van Vollenhoven and Ter Haar. Van Vollenhoven argued that Indonesian communities had their own legal rule different from the western norm. Therefore the colonial government shall consider this condition and give (Lev, 1962).

Van Vollenhoven wrote adat law compilation consisting of vast information on the adat law and adat communities (Benda-Beckmann and Benda-Beckmann, 2011). Based on the work, In his scholar work *Adatrecht van Nederlandsch-Indie*, van Vollenhoven concluded that within the archipelago, there were 19 boundaries of Adat Law and more than 250 autonomy states with customary communities (Muhammad, 1961).

Dutch legal scholars in their study of Adat Law had been influenced heavily by positivism mainstream in the mid 19th century. Van Vollenhoven, in the effort distinguishing Adat Law with mere Adat, was using the sanction as the requirement to accept adat as law (Lukito, 2008). While Ter Haar was more accepting of the decision by Adat leader as Adat Law, therefore in Ter Haar's opinion, Adat Law is part of Adat's leader decisions (Lukito, 2008). While Dutch scholar was using positivism spectacle and tended to ignore the etic and moral value in analyzing Adat Law, Indonesia's scholar such as Soepomo was using the spectacle of etic and moral in studying the Adat Law. It is disappointing, however, that Adat Law scholar in Indonesia nowadays has not renewed Van Vollenhoven's work and Soepomo legacies. This kind of work is deemed to be essential to support the recognition of Adat Law within the Indonesia legal system.

During the Investigating Committee for Preparatory Work for Indonesian Independence (BPUPKI) meeting and Preparatory Committee for Indonesian Independence (PPKI) meeting, Soepomo and Moh. Yamin gave their idea upon the importance of Adat Law within the constitution. Soepomo stated that the inherent rights of regions with unique characteristics should be respected. Those regions with distinctive features were kingdoms both in Java and outside Java, and small areas that had an unusual structure across the archipelago 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 for thousands of years ago. These abilities had been shown in the form of the legal structure of *desa*, *Nagari*, and many other particular types. These specific structures had been active even today (The original 1945 Constitution of the Republic of Indonesia article 18).

The introduction of the adat legal system designed by the Van Vollenhoven and his students and guaranteed by the newly drafted constitution, however, did not survive. This was caused by the Indonesian leader's vision toward the modern legal system based on the western system. Also, the design of the judicial development of legal unification based on the civil law pattern.

The tradition of positivist law doctrine had influenced the view. The positivistic theory evolved out of the 1648 Westphalia Constitution axiom of sovereignty drafted by the "first truly European settlement in history (Pages, 1970)." In the aftermath of the Constitution Westphalia, legal and political philosophies launched the idea of the "omnipotent state" that left little room for customary law (Gough, 1956). As follows from the famous John Austin statement, "laws properly so-called" require not only a basic normative structure but also a sovereign command and a rule of recognition (Austin, 1954). It is argued that "customary law has no known person for its author, no known body of words for its substance." By customary definition, law, like the invention of quasi-organs, is not really "law." Jeremy Bentham belongs to this critical, anti-popular tradition initiated by Immanuel Kant, saying that Every system of Government that is not representative is non-accurate. Customary law is nothing but a bottom-up despotism, executed by the Populus – the idea that "der Volksgeist" produced "customary law is fiction from beginning to end." Replacing these metaphysical normative structures with written laws, Bentham argued, would bring the modern era of the rule and due process of law to the forefront (Ørebecher et al, 2005).

The experience of Indonesia has also existed in other post-colonial nations. In other newly independent states, the new countries generally are using their customary law to preserve their unique system and keeping up their national character. However, because state territory is usually drawn as the top-down decision by the state power, the new (Ørebecher et al, 2005).

After independence, and especially during Soeharto New Order, the condition of adat was not guaranteed. During the era, unification and modernization of the legal system grew stronger, and the government had pushed adat law away from law development policies. Normative values would be recognized as Law if it were coming from state authorities. Adat law will be known as Law after given recognition by state legislation. For that reason, the aim after independence was to unify the legal system within the archipelago. The first logical step for New Order appeared to be to make the customary law into state law by codifying it and writing it down and then to incorporate it as state law into a national system. This ambition changed the body of the customary law by drawing it into the centralized realm of sovereignty.

One of the new order efforts was the enactment of Law No. 5/1979 on the Village Government. The Law systematically abolished the adat government system by making all the village government uniform in Indonesia. This Law destroyed one of the established criteria of customary community definition within the a (see Ter Haar supra note 21). By this law, the adat community lost the governmental system as had been replaced by the new administration system. The lack of administrative operations of the adat community has been used by the court to deny the existence of the adat community (Minutes of constitutional case No. 31 / PUU.V / 2007).

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

Besides, as a country with a civil law tradition, Indonesia is operating the positivist approach of the legal system. In this condition, we can not expect such favor on adat law winning over the legal status given by the law. This condition is different from the common law system that is building the caselaw gradually (Ørebecher et al, 2005).

The sinking of adat law was evident during the New Order. In this regard, Adat law was not regarded as the rule to govern the state and apparatus. Especially during the time of economic development rush. There are several bills relating to natural resources that ignore or even limit the recognition of customary law. The revival of adat law occurred at the beginning of the reformation, the period following Suharto's resignation (Colchester et al., 2011). Several regulations at the district level

are enacted to recognize the existence of a particular adat community and the land on which they live. The law on individual autonomy was also passed in 2001 for the Papua region, so as to understand the role of customary institutions and the application of customary law in the province (Safitri, 2011; Tim Riset Epistema Institute, 2019; Colchester *et al.*, 2011). Apart from the Papua region, the Aceh provincial government has also attempted to limit the conflict by integrating adat and sharia into state law. The regional legislation is called the term qanun, which is an arena for such integration (Tim Riset Epistema Institute, 2019; Colchester *et al.*, 2011). Government policy states that sharia and customary law have been the source of qanun making (Colchester *et al.*, 2011). Several Scholar has called this phenomenon as adat revivalism (Takano, 2009).

3.3 Adat Rights Recognition by Indonesia Constitutional Court

Constitutionalism in Indonesia took ground after series of 1945 Constitution amendments from 1999-2002. These constitutional moments marked the transition period from an authoritarian regime to a more democratic government. Those Constitutional amendment processes amend the provision on local government and local autonomy, including the provision on adat relating rights.

In a specific area of adat rights provision, the constitution guarantee upon the Adat law in article 18B paragraph 2 of the 1945 Constitution. With this arrangement, the State will recognize and respect the people who have customary laws and traditional rights as long as they exist, are in accordance with social developments, and are in line with the principles of the Unitary State of the Republic of Indonesia.

These provisions strengthen the positivism school against Adat law. It makes several requirements for the legalization of Adat rights, such as recognized in the shape of the definite norm. Thus, the problem remains that in Indonesia, adat rights do not exist until recognized by legislation or courts. Law must either be initiated by the legislators or interpreted by the courts. This notion is fitted Ter Haar's argument that courts have an essential role in the process of adat legalization.

While before the amendment, there was no institution given the authority upon the constitutional provision interpretation, the amended constitution formed the constitutional court as the interpreter of the 1945 Constitution. Today adat rights are demanding the constitutional court to define the line of its recognition based on an amended Constitution.

Within the problem of adat law recognition, the Indonesian Constitutional Court may fill the gap by its interpretation of the adat law rights. The author argues that the durable nature of positivism may be reduced by the establishment of the constitutional court and in some way, gives mediation between the formal positive law and adat law in specific regions.

The Indonesian Constitutional Court has four authorities and one obligation as regulated in the 1945 Constitution. Referring to the 1945 Constitution regarding requests for judicial review, the Constitutional Court has the authority to judge at the first and last levels whose decisions are final to:

1. conduct a constitutional review to ensure that laws comply with the Constitution;
2. make decisions in disputes related to the authority of state agencies the jurisdiction of which bestowed by the Constitution;
3. make decisions on the dissolution of political parties; and
4. resolve disputes related to the results of general elections.

The Law on the Constitutional Court provides special provisions for the adat community to submit the constitutional review. That provision has not found in common court in Indonesia. During 2003-2018, the Indonesian Constitutional Court has taken an active role while dealing with a total of 3.470 cases and passing judgments for 2.173 cases already. Compared to the total cases, review relating to adat rights recognition is still far from the expectation. Below is the summary of constitutional court judgment relating to adat rights recognition.

Table 1. Constitutional Court Judgment 2003-2018 Relating to Adat Rights Recognition

No Register	Legal Standing	Object	Judgment	Explanation
1 010/PUU-I/2003	H. Jefry Noer as Head of Regions (Person)	Regions Creation in Kepulauan Riau	Denied	The formal legal mistake is not the same as the constitutional breach.
2 018/PUU-I/2003	Drs. JOHN IBO, MM. as Head of Regions (person)	Regions Creation in Papua	Accepted	Regions creation shall be based on the existing Law. Especially in Papua, Regions creation shall be based on Law on Special Autonomy No. 21/2001.
3 031/PUU-V/2007	Adat Communities	Regions Creation in Maluku	Cannot be Accepted (N.O)	Adat Communities can not prove the characteristic of Adat Communities
4 006/PUU-VI/2008	Moch. Chair Amir as Head of Adat Institution in Banggai	Regions Creation	Cannot be Accepted (N.O)	Adat Communities can not prove the characteristic of Adat Communities
5 004/PUU-VI/2008	Persekutuan Masyarakat Adat Batak Timur Wilayah Serdang Hulu	Regions Creation	Cannot be Accepted (N.O)	There is no Constitutional Lost
6 018/PUU-VIII/2009	Sadrak Moso dkk (person)	Regions Creation	Cannot be Accepted (N.O)	The petitioner does not have legal standing
7 No. 47-81/PHPU.A/VII/2009	Rev. Elion Numberi and Hasbi Suaib, S.T.	The dispute over Local Election Result in Yahukimo	Accepted	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 unique way of election will bring harmony among the society living in Yahukimo. The court believes that forcing the positive law may not bring the balance, thus neglecting the purpose of law and justice.
8 127/PUU-VIII/2009	Chiefs of the Clans (Adat Communities)	Regions Creation	Accepted	The petitioner has legal standing and constitutional lost
9 003/PUU-VIII/2010	NGO Coalition	Law Number 27 of 2007 concerning Management of Coastal Areas and Small Islands	Accepted	a. Petitioner has legal standing b. Adat Communities shall be involved in planning and HP-3
10 055/PUU-VIII/2010	Japin Vitalis Andi dkk (Person)	Law on Plantation	Accepted	Article 21 threat the constitutional rights of Adat Communities
11 179/PHPU.D-VIII/2010	Local Election Candidate	The dispute over Local Election Result in Waropen	Denied	The application is not legally proven
12 029/PUU-IX/2011	Chief of Clan (Adat Communities) and Member of Adat Communities (Adat Communities)	Law on Special Autonomy for Papua	Accepted	The definition of Papua people shall be based on the rule of each adat community and shall not be limited by the definition of government.
13 034/PUU-IX/2011	Maskur Anang (Person)	Law on Forestry	Accepted	Forest control by the state shall protect, respect, and fulfill the rights of indigenous people as long as it exists and recognized.

No Register	Legal Standing	Object	Judgment	Explanation
14 019/PHPU D-IX/2011	Local Election Candidate	A dispute over Local Election Result in Yahukimo	Denied	Court consistent with the judgment no. No. 47-81/PHPU.A/VII/2009 recognizing the collective votes as the adat legal procedures on choosing leader conducted by Yahukimo people by considering that giving recognition upon its unique way of election is upholding the constitution.
15 29/PUU-IX/2011	Head of Indigenous Community and Local Election Parties	Law on Special Autonomy for Papua	Accepted	The authority of the Papuan People's Assembly (MRP) to consider and approve the indigenous Papuans of the Papua gubernatorial candidates is thought to have a negative impact like abuse of power, the practices of money politics and the autonomous authority of indigenous communities and shallow definitions on the term "indigenous people of Papua."
16 003/PHPU.D-X/2012	Local Election Candidate	The dispute over Local Election Result in Dogiyai	Accepted	Court consistent with the judgment no. No. 47-81/PHPU.A/VII/2009 recognizing the collective votes as the adat legal procedures on choosing a leader
17 35/PUU-X/2012	AMAN (Indonesian Indigenous Community Alliance), Indigenous Community of Kenegerian Kuntu Indigenous Community of Kasepuhan Csitu	Law on Forestry	Accepted for Partially	Restore the status of adat forest to the property of indigenous peoples, which previously claimed as state forest
18 039/PHPU.D-X/2012	Local Election Candidate	The dispute over Local Election Result in Puncak Jaya	Accepted	Court consistent with the judgment no. No. 47-81/PHPU.A/VII/2009 recognizing the collective votes as the adat legal procedures on choosing a leader
19 097/PHPU.D-X/2012	Local Election Candidate	The dispute over Local Election Result in Deiyai	Accepted	Court consistent with the judgment no. No. 47-81/PHPU.A/VII/2009 recognizing the collective votes as the adat legal procedures on choosing a leader
20 19/PUU-XI/2013	Head of Region, Head of Regional Council, Head of Indigenous Community and his secretary	Law on Region Creation	Accepted	The customary territories included in the new autonomy region have divided the indigenous community and brought constitutional losses to the applicants due to disharmony of population data
21 105/PUU-XI/2013	Keliopas Meidogda, dkk (National Aparattus) and Head of Region	Law on Region Creation	Denied	An application is the authority of the legislator

The series of judgments on the protection of customary rights may be classified into three conclusions. First, the judgment shows that many petitions brought by adat communities have been denied by the Constitutional Court because there is not enough to prove that the petitioner is the representative of adat communities. The situation is different from the judgment involving Papua adat communities because Papua has special autonomy laws that define the character of adat communities. Constitutional Court judges in the interview session explained that the weaknesses recognized by the Constitutional Court judges, especially in the trial process at the Constitutional Court, included unclear boundaries of legal standing for Indigenous people. In addition, he also explained that to help Indigenous communities, courts find other ways to answer the constitutional problems of Indigenous

communities without involving them as parties with legal standing.

Second, the judgment shows that collective votes as the unique way of adat in Papua has been accepted and consistently recognized by the Court. The noken method has become a tradition since the first election held in Papua Province in 1971. In this system, a popular way is for the residents to support the choice of their tribal chief, who then determines the attitude through the ballots entered on the noken. The second way, voters can insert their own votes into noken, coordinated by the chief. A total of 12 districts in Papua still use the "noken" system in the last election.

Third, the court recognizes the status of adat forest to the property of indigenous peoples, which previously claimed as state forest. After the judgment, The Ministry of Environment and Forestry has assigned customary forests to dozens of communities, but the extent is still minimal. At present, there are at least 17,092 hectares of indigenous territories returned in the form of customary forests (www.mongabay.co.id). The development of customary forest recognition by the government following the judgment shown positive trends.

3.4 *Waiting for The Law: from Ius Constituendum to Ius Constitutum*

One of the legal foundations that can submit an application to the constitutional court is the existence of a customary law community union, as long as it continues to exist and is in accordance with the conditions of community development and the principles of the Unitary State of the Republic of Indonesia which have actually been regulated in legislation. The provision requires the existence of adat communities stipulated in specific laws. In an interview session, Mahfud MD and Maria Farida Indrati (constitutional judge) explained that the required law has not been drafted in Indonesia, and this makes the Court have limitations in accepting cases of recognition of customary law from certain customary communities.. Indonesian Constitutional Court, in this regard, needs legislation as a foundation to accept more petition on adat law recognition. It should be noted that the Yahukimo case and case on local election dispute initially was not adat law case and was not brought by adat communities. Still, by local election participants, thus The Court can accept the fact and give judgment.

The condition of recognition in Indonesia is very different from other nations, for example, Norway has not recognized unique 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 fishers in Finnmark indicate that should they be called as witnesses, they would support the position that the customary law prerequisites have been satisfied (Ørebecher et al, 2005). In the case of Indonesia, legislation on adat communities' legal standing is needed for the court to accept the petition of adat law recognition.

The method of proving adat in Indonesia is a question of evidence. Therefore more research upon the adat law and adat communities are urgently needed in Indonesia. Indonesia's adat scholarship has been lacked integrated analysis to support the documentation of adat law and adat communities' evidence. Van Vollenhoven and Ter Haar's work on adat law have 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 community recognition because it can give academic input in the drafting process of the legislation on adat communities and adat law.

Meanwhile, the adat community recognition movement has been initiated by AMAN (National Adat Community Alliance) through the academic discussion on the legislation draft on Protection and Recognition on Adat Communities Rights (PPHMA) 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 campaign, however, still needs to be carefully observed and evaluated.

Right now, the PPHMA draft has entered the priority list in Legislation Committee and has been consulted to many regions in archipelago. Hopefully, PPHMA Law will be the critical key for the recognition hand in hand with the constitutional court role since the court need legal measures to

define the characteristic of adat communities.

4. Conclusion

Within the array of positivism and legal pluralism, the Indonesian Constitutional Court is trying to take leadership in the role of Adat Law recognition. The problem of legislation that is not enacted yet still needs to be solved for the recognition. However, 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's pluralistic society. They can co-exist without risk of tension, but with the possibility of success under the name of constitutionalism to protect, rather than neglect, the national people living on the plural forms. Accordingly, the constitutional role of the Constitutional Court itself has to be identified through the continued endeavors by itself. The challenge for "constitutionalism" in the Indonesian context is yet keeping.

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