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## CONSTITUTIONAL AND LEGAL RECOGNITION OVER TRADITIONAL ADAT COMMUNITY WITHIN THE MULTICULTURAL COUNTRY OF INDONESIA: IS IT A GENUINE OR PSEUDO RECOGNITION?

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### ABSTRAK

Indonesia dikenal sebagai negara multikultural di Asia Tenggara dalam faktor etnis, agama, ras dan stratifikasi sosial. Hal ini Bhinneka Tunggal Ika, yang tercermin dalam semboyan resmi negara untuk menggambarkan keragaman sosial dan budaya Indonesia. Keragaman mengacu pada konfigurasi budaya yang mencerminkan identitas Nasional Indonesia, mengandung modal budaya dan kekuatan budaya. Namun, keragaman budaya menghasilkan konflik yang berpotensi menghasilkan disintegrasi sosial akibat perselisihan antar-etnis dan antar agama yang dapat mengakibatkan disintegrasi Indonesia sebagai Bangsa. Pandangan dari antropolog hukum, sumber konflik didasarkan pada kebijakan diskriminatif yang menyatakan bahwa hukum negara dan peraturan perundang-undangan sesuai dengan pengakuan dan perlindungan eksistensi masyarakat lokal, yaitu masyarakat adat tradisional tersebar di wilayah tersebut. Dengan demikian, undang-undang negara disahkan dan diberlakukan oleh pemerintah cenderung mendominasi dan meminggirkan serta mengabaikan hak-hak masyarakat lokal, khususnya atas akses dan kontrol sumber daya alam mereka bergantung berdasarkan hukum adat di wilayah tersebut. Penulisan ini mencoba untuk menawarkan jawaban atas pertanyaan mendasar apakah UUD 1945 mengakui dan melindungi masyarakat tradisional dan hukum adat mereka dengan menggunakan pendekatan antropologi hukum dengan tujuan mendapatkan pemahaman yang lebih baik mengenai perkembangan hukum negara dalam negara multikultural menuju hukum yang lebih adil dan merata di Negara Indonesia.

**Kata Kunci:** budaya, hukum adat, negara.

### ABSTRACT

*Indonesia is well known as a multicultural country in Southeast Asia in term of its ethnic, religion, racial and social stratification. It is Unity in Diversity, which is reflected in the official motto of the State to describe the social and cultural diversity of Indonesia. The diversity refers to a cultural configuration which reflects the National identity of Indonesia, containing cultural capital and cultural power. However, cultural diversity yields conflict that could potentially generate social disintegration due to inter-ethnic and inter-religious disputes that may result in the disintegration of Indonesia as a Nation State. In the eyes of legal anthropologists, sources of conflicts are based on discriminatory policies expressed within State's law and legislations in line to the recognition and protection the existence of local communities, namely traditional adat communities spread out in the region. Thus, State laws enacted and enforced by the Government tend to dominate and marginalize as well as ignore the rights of the local communities particularly over access and control natural resources they depend on based on customary adat law in the region. The paper attempts to offer an answer to the fundamental question whether the 1945 Constitution recognises and protects the traditional communities and their customary adat law by employing a legal anthropological approach with the purpose of obtaining a better understanding regarding the development of State law in a multicultural Nation toward a more just and equitable State law of Indonesia.*

**Keywords:** cultural, adat law, state.

## INTRODUCTION

Indonesia has been well known as a multicultural country in terms of its ethnic, religion, culture, and social stratification. It is, therefore, an official motto of the State namely Unity in Diversity (*Bhinneka Tunggal Ika*) reflected the empirical social and cultural diversity of Indonesia. Territory of Indonesia which lied down from Sabang (North Sumatera) to Merauke (West Papua) contains richly natural resources, as well as cultural resources spread out in the region.<sup>1</sup>

On the one hand, the diversity refers to a cultural configuration which reflects the Nation identity of Indonesia, in which on the empirical circumstance forming elements that establish Indonesia as a Nation State. The mentioned cultural diversity has been a cultural capital and cultural power as well that generate dynamically the life of Nation State of Indonesia. But, on the other hand, these of cultural diversity contain yields of conflict that could potentially generate a situation of social disintegration. It is because the inter-ethnic and inter-religious community disputes bring sensitively about the consequence of disintegration of Indonesia as a Nation State. It is said that conflicts could not be avoided within human interaction; conflicts and tensions inherent within the life of community, wherever, whenever and within every kind of society.<sup>2</sup> Hence, for the case of Indonesia, it will become a fact if the conflicts could not be managed and handled wisely by the Government and all components of society in the country.

In the last more four decades Indonesia has increasingly been facing by conflict that based on cultural pluralism such as emerged in Aceh Province, Abepura and Timika of West Papua, Sampit and Palangkaraya of Central Kalimantan, Pasuruan and Situbondo of East Java, Mataram of West Lombok, Lampung of South Sumatera, Poso of Central Sulawesi, and Pontianak and Sambas of West Kalimantan. Those conflicts look like inter-ethnic conflicts that caused by the conflict of values,

conflict of norms, and conflict of interest between ethnic communities in the multicultural country of Indonesia.

Besides, it also could be observed that cases of law over natural resources tenure and management have been increasing in accordance with the implementation of national development in various sectors namely industry, agro-industry, transportation, transmigration, settlement and real-estate, as well as commerce and tourism industry.<sup>3</sup>

Conflicts over natural resources ownership and use were primarily caused by differentiation both interest of natural resources control and tenure, as well as differential perception to deal with environment and natural resources law between Government and the local people.<sup>4</sup> In this sense, the Government tends to enforce State law and regulations to control and manage natural resources in the name of national development, and on the other side the local traditional people namely the adat communities (*masyarakat hukum adat*) employs their own customary law which is called adat law (*hukum adat*) to control and manage their environment and natural resources in the territories they depend on.

In the perspective of legal anthropologist, source of the conflicts is naturally based on the discriminated policy and treatment of the Government that expressed within State law and regulation enactment in line with the recognition and protection of rights of the local adat communities over natural resources access and tenure and management. In this respect, those of State laws that particularly enacted and enforced by the Government tend to dominate and marginalize the local values, traditions, religion, as well as the customary law of traditional communities ignorance in the region.

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<sup>1</sup> Joan Hardjono (ed), 1991. *Indonesia, Resources, Ecology, and Environment*, New York: Oxford University Press.

<sup>2</sup> Paul Bohannon (ed.). 1987, *Law and Warfare, Studies in the Anthropology of Conflict*, Austin and London: University of Texas Press; Laura Nader and Harry F. Tood Jr. (eds.). 1978. *The Disputing Process-Law in Ten Societies*, New York: Columbia University Press; James Spradley P. and David W. McCurdy. 1987, *Conformity and Conflict, Reading in Cultural Anthropology*, Boston and Toronto: Little, Brown and Company.

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<sup>3</sup> Sukri Abdurrachman. 2004, *Konflik Pertanahan di Era Reformasi: Hukum Negara, Hukum Adat dan Tuntutan Rakyat (Conflict of Land Tenure in Reformation Era: State Law, Adat Law and Claiming of the People)*, Jakarta: Pusat Penelitian Kemasyarakatan dan Kebudayaan LIPI; Al Araf and Awan Puryadi. 2002, *Perebutan Kuasa Tanah (The Contest of Land Tenure and Control)*, Yogyakarta: Lappera Pustaka Utama; Dianto Bachriadi et. al. (eds). 1997. *Reformasi Agraria, Perubahan Politik, Sengketa, dan Agenda Pembaruan Agraria di Indonesia (Agrarian Reformation, Political Change, Conflicts and Agrarian Reform Agendas in Indonesia)*, Jakarta: Repetto.

<sup>4</sup> Anthony Allot and R. Woodman Gordon (eds). 1975, *People's Law and State Law*, Dordrecht-Holland: Foris Publication.

It is conventionally stated that basic function of the law is to keep social order and protect legal order in maintaining function of law as a tool for social control and ordering of society.<sup>5</sup> In doing so, another function of the law is remains improved to be an instrument of orderly change namely social engineering.<sup>6</sup> In the development of complexity society within Nation State such functions of law then questioned whether the role of State Law could also be improved as an instrument for maintaining and strengthening social integration within multicultural Nation State.

It is interesting to analyse such kind of legal phenomenon for the purpose of obtaining a better understanding whether cause of the conflicts originally based on the inter-ethnic disputes or the question of State's ideology and policy of the Government which defined within the 1945 Constitution and State's law and regulations. The paper attempts to offer the answer of the said fundamental question by employing legal anthropology approach in order to find another atmosphere in building a better understanding holistically regarding whether the 1945 Constitutional defines a genuine or pseudo recognition and protection to the traditional adat communities especially over natural resources rights and tenure.

## DISCUSSION

### **Ideology of the State in Recognising and Protecting Traditional Adat Community: Legal Anthropology Point of View**

Anthropological studies with regard to the function of law as system of social control within society have primary been conducted by anthropologist.<sup>7</sup> It is, therefore, recognized that anthropologists offered more significant contribution in relation to the development of concept of law as instrument of securing social control and legal order within the dynamic life of society. Anthropologist have focused their study upon micro-processes of legal action and interaction. They have made the universal fact of legal pluralism a central element in understanding

<sup>5</sup> Edwin W. Patterson, 1950. "Introduction", in *The Legal Philosophies of Lask, Radbruch, and Dablin*, translated by Kurt Wilk, Cambridge University Press.

<sup>6</sup> Lawrence M. Friedman, 1975. *The Legal System, A Social Science Perspective*, New York: Russell Sage Foundation.

<sup>7</sup> Donald Black. 1984. *Toward a General Theory of Social Control*, New York: Academic Press.

of the working of law in society, and they have self-consciously adopted comparative and historical approach and drawn the necessary conceptual and theoretical conclusion from this choice.<sup>8</sup>

In this respect, law has not been studied by anthropologist the only as a product of logic abstract of a group of people that mandated particular authority, but largely as a social behavior of society.<sup>9</sup> Hence, law has been studied as product of social interaction which strongly influenced by other aspects of culture namely politic, economy, ideology, religion etc. In other words, law has been observed as part of culture as a whole integrally with other elements of culture,<sup>10</sup> and studied as social process within society.<sup>11</sup>

It is difficult articulate a precise definition of law that capture the multiple aspects and actions of the State. In this regards, Hart argued to use the concepts of rule and authority to bring law into focus in analyzing the role of law in the State.<sup>12</sup> Law must be understood as generic, and the term used in a way that is general enough to embrace all legal experience.<sup>13</sup> That is the reason why Moore then formulated law as a short term for a very complex aggregation of principles, norms, ideas, rules, practices, and the agencies of legislation, administration, adjudication and enforcement, and backed by political power and legitimacy.<sup>14</sup>

Law is a definitional characteristic of the State and an object of efforts of the State to order and control its territory and natural resources contained therein. It is therefore importance to pay attention the role of law as ideology, and to analyze how the

<sup>8</sup> John Griffiths. 1986, What is Legal Pluralism?, in *Journal of Legal Pluralism and Unofficial Law* No. 24/1986, The Foundation for Journal of Legal Pluralism.

<sup>9</sup> Donald Black. 1984, *Toward a General Theory of Social Control*, New York: Academic Press; Donald Black and Maureen Mileski (eds). 1973, *The Social Organization of Law*, New York: Seminar Press.

<sup>10</sup> Leopold Pospisil, 1971, *Anthropology of Law, A Comparative Theory*, New York: Harper & Row Publisher.

<sup>11</sup> Sally F. Moore, 1978, *Law as Progress, An Anthropological Approach*, London: Routledge & Kegan Paul Ltd.

<sup>12</sup> H.L.A. Hart. 1960, *The Concept of Law*, Oxford: Oxford University Press.

<sup>13</sup> Phillip Selznick, 1969, *Law, Society, and Industrial Justice*, New York: Transaction Books.

<sup>14</sup> Sally F. Moore, 1978, *Law as Progress, An Anthropological Approach*, London: Routledge & Kegan Paul Ltd.

State establish and enforce the ideology.<sup>15</sup> In the case of Indonesia, it is clearly observed that law was developed and employed as ideology to order and control the territory of Indonesia and natural environment contained therein. This clearly defines within Preamble of the 1945 Constitution that states: “... to form a Government of the State of Indonesia which shall protect all the people of Indonesia and control the territory and natural resources contained therein mainly for the purpose of improving prosperity and public welfare, educate the life of the people, and to participate toward the establishment of a world order based on freedom, perpetual peace, and social justice”.

Such Preamble naturally reflected main goal of the establishment Unitary State of Indonesia, as well as kind of ideology that should be used for foundation in order to nation and character building of the country. Therefore, this ideology reaffirms particularly in Article 33 paragraph (3) of the 1945 Constitution that states: “The earth and water and natural resources contained therein should be controlled by the State and shall be utilized for greatest prosperity of the people”. Keywords of the ideology of the State in controlling and managing natural resources has been “... should be controlled by the State” and “shall be utilised for greatest prosperity of the people”.

In relation to recognition and protection of the indigenous people of Indonesia which is called the adat people and communities (*masyarakat hukum adat*) that spread out in the region, the Article 18B paragraph (2) of the 1945 Constitution defines that “the State recognises and respects the adat communities and their traditional rights *as long as* these remain in existence, and are in accordance with the societal development, and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by the law”. In this sense, key word of the Article that should seriously be paid attention is “... *as long as* ....”. It means that the 1945 Constitution defines an official restriction that the existence of adat people in the country will the only be recognised and respected by the State as long as they fulfill abstract and certain conditions namely still in the really life, living as and in the civilized society, and

not in contradiction with principle of the unitary State, and shall be regulated by the State’s law.

The said conditions have more been reconfirmed on the State’s legal instruments that regulate natural resources control and management in the territory of adat communities in the region such like the Basic Agrarian Act No. 5 Year 1960 that deal to lands tenure and use, Forestry Act No. 41 of 1999 pertaining to forest resources control and management, Biological Diversity Conservation Act No. 5 Year 1990, Spatial Use Act No. 24 of 1992, Water Resources Act No. 7 of 2004, Plantation Act No. 18 Year 2004, Fishery Act No. 31 of 2004, Coastal Zone and Small Islands Management Act No. 27 of 2007, Mineral Mining and Coal Act No. 4 Year 2009, and Human Environment Protection and Management Act No. 32 Year 2009.

Such conditions of *as long as* that defined in the mentioned Acts in line to recognition and respectation of the adat people come to consequence that clearly restrict and neglect rights of adat communities to control as well as manage and utilise natural resources they depend on for survive in the territory. Besides, customary law of the communities that reflect traditional environmental wisdom were automatically dominated and subordinated and ignored as well by the State’s Acts over natural resources tenure and management and use.<sup>16</sup>

In fact, the adat communities were in existence for years and generations, living in peace in the certain territory mostly in and around forest area or coastal zone and small islands, control and manage their natural environment they depend on under the supervision of their-owned customary adat law, a long period of time before independent day of Indonesia on August 17, 1945. It shows that such ideology and character of State’s law in which conditions of *as long as* attached as legal instrument to restrict rights of the communities in contradiction with the principle of *ad prima facie*. Which one is prior and posterior in existence in the territory of Indonesia, whether the traditional adat communities or Nation State of Indonesia? It is generally recognised that adat people and communities in the country were naturally basic

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<sup>15</sup> Charles V. Barber. 1989, “*The State, The Environment, and Development: The Genesis and Transformation of Social Forestry Policy in New Order Indonesia*”, Berkeley: Unpublished Doctoral Dissertation University of California.

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<sup>16</sup> I Nyoman Nurjaya. 2014. “Progressive Environmental Law of Indonesia: Global Principles of Stockholm and Rio Declations As Defined Within The 2009 Act on Human Environment Protection and Management”, in *The US-China Law Review Volume 11, Number 1, January 2014 (Serial Number 97)*, Illinois-USA: David Publishing Company, Illinois.

elements of the establishment of Unitary State of the Republic of Indonesia.

From legal anthropology point of view such ideology brings to the consequence that the State law tends to dominate, marginalise, and even ignore folk law of the local communities namely customary law which remains naturally in existence as living adat law in the country. Eventhough, customary law declared as the only basic principle over the Basic Agrarian Act of 1960, but the capacity of adat law in such position and standing remain needs further clarification in the context of Indonesia's system of law. In this sense, as pointed out by Hart that the position of adat law within the State law could be mentioned as the rule of recognition.<sup>17</sup> The fundamental question as appeared whether it is a genuine recognition or pseudo recognition? In my opinion, the recognition of adat law within the State law is pseudol recognition as to be intended by Hart. It is because of the attached strictly condition of *as long as* within the 1945 Constitution and a number of Acts pertaining to natural resources resources control and tenure, condition of which bring about consequence that legal standing and capacity of customary adat law had been decreased in the level of both State's ideology and legislations. In other words, this is the so called pseudo-constitutional and legal recognition of the adat community rights over natural resources include their-owned customary adat law.<sup>18</sup>

What could be criticise from these mentioned legislations in relation to the State's ideology is legal position and capacity as well as legal recognition of traditional adat communities within the life of Nation State of Indonesia. In one hand, adat communities and their-owned customary law have been officially recognized by the 1945 Constitution and legislations. But, on the other hand, the existance of adat communities has been restricted with condition of *as long as* in the sense of recognition and protection within the Constitution and State's law. It means that

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<sup>17</sup> H.L.A. Hart. 1960, *The Concept of Law*, Oxford: Oxford University Press.

<sup>18</sup> I Nyoman Nurjaya. 2011. "Adat Community Lands Right As Defined Within the State Agrarian Law of Indonesia: Is It A Genuine or Pseudo Legal Recognition?", in *The US-China Law Review Volume 8, Number 4, April 2011*, Illinois-USA: David Publishing Company. I Nyoman Nurjaya. 2012. "State Law in Multicultural Country of Indonesia: Toward A Just and Equitable State in Legal Anthropology Point of View", in *the US-China Law Review Volume 9, Number 1, Febroary 2012*, Illinois-USA: David Publishing Company.

eventhough clearly stated that natural resources law regarding the earth, water and air space, including natural resources contained therein, is basically customary adat law, the word of *as long as* have decreased its legal position and capacity as the only foundation of State's ideology and legislations.

In other words, the attached conditions of *as long as* goes to prove that adat law was actually subordinated to the State's natural resources law in the level of ideology and legislations. What then could be concluded from this brief description of the fact legal plurality in multicultural country of Indonesia? The answer seems to be clear that fundamental principle that customary adat law should form the basis of State's law is so heavily qualified because of the word *as long as* attached in the 1945 Constitution and legislations. We must doubt seriously whether it can in fact continue to do so. There is certainly little room for the view that the legislature has supported or under written adat as mainly source of resources law, except to the extent that it does not conflict with the limits imposed upon it.<sup>19</sup> In line to the political of national law development that structured by the Government, this could be the so called the State's political of ignorance in term the existence of adat people and communities, as well as their rights over natural resources tenure and utilisation include ignoring the living customary law as legal entity in the total system of national law.

In the level of implementation and enforcement it could really be witnessed that in many cases customary adat law neglected and ignored by the State law in the time tensions and conflicts between Central and the Regional Governments and local adat communities over natural resources control and tenure appear in the regions of Indonesia. It could really be observed that the Government tends to disregard rights of the local adat communities in term of their access, control, and utilisation resources of the local people. In natural and empirical condition the traditional adat communities were powerless to meet the Government in the time their traditional rights over territory and natural resources contained therein

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<sup>19</sup> H.B Hooker. 1978, *Adat Law in Modern Indonesia*, Oxford: Oxford University Press.

were neglected and ignored and demised under the name of national development.<sup>20</sup>

In this respect, John Bodley said that the people in which their traditional adat rights on natural resources and cultures neglected and ignored in the name of development were naturally “victims of development”. In his words Bodley states: Government policies and attitudes are the basic causal factors determining the fate of tribal cultures, and that governments throughout the world are concerned primarily with the increasingly efficient exploitation of the human and natural resources of the areas under their control. It is becoming increasingly apparent that civilization’s “progress” destroys the environment as well as other people and cultures.<sup>21</sup>

Hence, it then could be understood why the national development implemented by the Government has been facing seriously difficulties and obstacles in the regions? It is because of its ideology of pseudo recognition of adat communities and State’s legislations that ignoring the existance and capacity of living customary law in the daily life of adat communities. State’s ideology and the legislation with regard to the recognition and protection of traditional adat communities and their customary law were both inconsistency in the level of the 1945 Constitution and uncertainty in the level of State’s law.

In summary, when we observed the development of national law in the country, it could be mentioned that the State law has become the idiom for expression of power to control its territory and manage natural resources contained therein, and has systematically ignored and neglected the legal position and capacity of customary adat law as a naturally living law of the traditional adat people in the country.<sup>22</sup> It brings to the consequence that the natural resources control and management in the level of implementation

and enforcement are mostly dominated by conflicts between Government and the local adat communities particularly over natural resources access and tenure. In this sense, the conflicts of which reflected on larger tensions between the central and regional Government and the local people in most regions of Indonesia.

In order to obtain better understanding in relation to social and cultural context of law, our attention should be addressed to the relationship between law and culture. In this respect, that law is actually part of culture, and therefore law should be studied as an integral part of culture whole, and not regarded as an autonomous institution.<sup>23</sup> Consequently, when we are speaking about the establishment of State law, other aspects of culture such as economy, politic and ideology must be taken into account. In fact, these aspects of culture powerfully influence in the development of State law. That is why, in a number of obstacles that faced from ideological, economical and political reasons can be observed in the establishment of national law both in the level of law making and implementation and enforcement as well.

Law can not be understood without regard for the realities of social life. Thus, if we wish to clarify position and the capacity of adat law in the total structure of Indonesia, the social and cultural structure including law in particular, I encourage to employ the concept of semi-autonomous social field as introduced by Moore.<sup>24</sup> In this regard, society was described as a social arena in which a number social fields have rule-making capacities, generate rules, customs, symbols internally, and the means to induce or coerce compliance that so called self-regulation or legal order. But, they are simultaneously set in a large social matrix which can, and does, effect and invade by its autonomy and means of legislation. Therefore, these social fields may be called as semi-autonomous social fields within the total structure of society.

The above theoretical framework is clearly significant in order to obtain better understanding with regard to such law issue in the total system of Indonesia’s law, particularly in understanding ideology of the State and the position and capacity

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<sup>20</sup> Michael R. Dove. 1981, *Peranan Kebudayaan Tradisional Indonesia dalam Modernisasi (The Role of Traditional Culture in Modern Indonesia)*, Jakarta: Yayasan Obor Indonesia; Person, Gerard. 1991, “The Tension Between State Law and Local Culture”, Unpublished Paper; I Nyoman Nurjaya (ed) (1993), *Politik Hukum Pengusahaan Hutan di Indonesia (Politik of Law on Forestry Management of Indonesia)*, Jakarta: Wahana Lingkungan Hidup Indonesia (WALHI);

<sup>21</sup> John Bodley, 1982, *Victims of Progress*, California: Mayfield Publishing Company.

<sup>22</sup> Starr, June and Jane F. Collier. 1989, *History and Power in The Study of Law, New Direction in Legal Anthropology*, Ithaca and London: Cornel University Press.

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<sup>23</sup> Leopold Pospisil, 1971, *Anthropology of Law, A Comparative Theory*, New York: Harper & Row Publisher.

<sup>24</sup> Sally F. Moore, 1978, *Law as Progress, An Anthropological Approach*, London: Routledge & Kegan Paul Ltd.

of customary adat law as naturally living law of the traditional communities of Indonesia.

### Discussion and Recommendation

From the legal anthropology point of view the form of law has not been the only legislation that shaped and enforced by the Government namely State law. In the daily life of communities it could also be observed the existence of religious law, as well as folk law, indigenous law or customary law as legal fact within human interaction, include self-regulation or inner-order mechanism which play an urgent role mainly as tool for securing social order, legal order, and social control within society. Therefore, it is confirmed that law as a product of culture comprises those of folk law, religious law, State law, and self-regulation/inner-order mechanism as well. This is the so called legal plurality situation within the dynamic life of society.<sup>25</sup>

The anthropological study of law focuses its study to the interaction between the law and social and cultural phenomenon which take place in society, as well as the work and function of law as instrument of social order and control in society. In particular words, legal anthropology refers to the study of cultural aspects which relate to the legal phenomenon of social order and legal order within society. Hence, legal anthropology in the specific sense refers to the study of social and cultural processes in which regulation of rights and obligations of the people has been created, changed, manipulated, interpreted, and implemented by the people. In this respect, law as it is functioned for maintaining social control and order could be State law and other sort of social control mechanism which emerge and really exist as living law within communities namely folk law or customary law, and in the Indonesian term called adat law.

Legal anthropology has also given attention to the study of legal pluralism phenomenon within society. Accordingly, we should think of law as a social phenomenon pluralistically, as regulation of many kinds of existing in variety of relationships, some of

the quite tenuous, with the primary legal institutions of the centralized state. Legal anthropology has almost always worked with pluralist conceptions of law.<sup>26</sup> As such, a legal fact of pluralistic generally refers to a situation of two or more system of law interact each other and co-existence in a social field. In other words, legal pluralism is employed to explain the existence of two or more legal systems that interact each other within a social field and the situation of legal phenomenon pluralistically is also intended to describe an empirical situation of two or more legal systems operate simultaneously in a social field.<sup>27</sup>

What has been elaborated above shows that basic of law is naturally lied down in society itself. Hence, if we do want to obtain better understanding about law within society comprehensively that law should be studied as part of culture integrally with other aspects of culture such like politic, economy, ideology, social structure, clan system, system of religion etc. In other words, Friedman stated that law as a system particularly in actual operation is basically a complex organism in which structure, substance, and legal culture interact each other. Legal culture refers to those parts of general culture namely customs, opinions, ways of doing and thinking that bend social forces toward or way from the law and in particular ways. It is, therefore, the law naturally expresses and defines the legal norms of the community.<sup>28</sup>

Legal pluralism has conventionally been addressed to be in contradiction with the ideology of legal centralism namely an ideology of the State which enforce State law become the only officially law put into effect to all people within the territory of the State and natural resources contained therein. Such ideology legal centralism tends to disregarding the existence of adat community and other kind of legal systems such like folk law or customary law as living law within the life of adat communities in the country. That is why the recognition of adat community rights over natural resources defined and regulated within the State law as the only pseudo-legal recognition and not as genuine-legal recognition.

<sup>25</sup> Brian Tamanaha, 1992, "The Folly of the Concept of Legal Pluralism", paper presented at the International Congress the Commission on Folk Law and Legal Pluralism in Victoria University of Wellington, New Zealand; John Griffiths. 1986, What is Legal Pluralism?, in *Journal of Legal Pluralism and Unofficial Law* No. 24/1986, The Foundation for Journal of Legal Pluralism.

<sup>26</sup> Roger Cotterel, 1995, *Law's Community, Legal Theory in Sociological Perspective*, Oxford: The Clarendon Press.

<sup>27</sup> M. B. Hooker. 1975, *Legal Pluralism: Introduction to Colonial and Neo-Colonial Law*, London: Oxford University Press.

<sup>28</sup> Lawrence M. Friedman, 1975, *The Legal System, A Social Science Perspective*, New York: Russell Sage Foundation.

It has been outlined above that law from the perspective of anthropology studied as a basic system of social order and social control within society. Anthropologists have similarly concentrated on what they regards as law, typically the most formal and dramatic aspects of social control in tribal and other simple societies, although this often includes non-governmental as well as governmental process. Besides, law has also played its role as facilitation of human interaction as well as functioned as social instrument for dispute settlement that takes place within community. In the development of politically organized society namely Nation State, basic function of law has been increased and established as an instrument for social engineering in order to build a certain social condition which is intended by State and the Government in particular.<sup>29</sup>

As the idea of law pointed out by Gustav Radbruch that all kinds of law is ideologically oriented firstly toward justice. A second element of the idea of law is expediency, suitability of purpose, and the third element of the idea of law is legal certainty that is the law, as an ordering of society, must be one order over all members of society and therefore it requires positive law.<sup>30</sup> In this regard, the basic question remains appeared whether function and role of the State law could also be oriented toward maintaining and strengthening social integration within a multicultural country such like Indonesia.

It is a fact that Indonesia is a multicultural country in terms of ethnic, religion, language, and social stratification, including the existence of multi-system of law namely State law on the one hand and customary adat law and religious law on the other hand. Those are working and putting into effect simultaneously toward all members of communities in the territory of Indonesia. Even so it could clearly be observed that since the last four decades the Government tended to enforce the ideology of legal centralism in the development of national law in the country. Consequently, large number of State legal products namely legislation and regulations indicated toward such like State's policy of legal unification

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<sup>29</sup> Darji Darmodiharjo and Arief Shidarta, *Pokok-pokok Filsafat Hukum, Apa dan Bagaimana Filsafat Hukum Indonesia (Basic Legal Philosophy, What and How Indonesian Legal Philosophy)*, Gramedia Pustaka Utama, Jakarta, 1996.

<sup>30</sup> Edwin W. Patterson, "Introduction", in *The Legal Philosophies of Lask, Radbruch, and Dablin*, translated by Kurt Wilk, Cambridge University Press, 1950, i-xxxix.

and codification, as well as legal uniformity enacted by the Government. This is the so-called rule-centred paradigm which brings the consequence of dominating, ignoring and marginalizing the other system of living adat law that in the empirical legal fact put into effect and work much more effectively in the life of traditional adat communities in the region.<sup>31</sup>

In this regard, such kind of political law development that employed by the Government has intentionally been directed and functioned as instrument of governmental social control,<sup>32</sup> the servant of repressive power,<sup>33</sup> as well as the command of a sovereign backed by sanction.<sup>34</sup> It is a repressive instrumentalism in which law is bent to the will of governing power. Therefore, from the legal anthropology point of view, it could be said that source of legal conflicts that increasingly occurred in the last five decades in the region could initially be based on the employment of legal centralism paradigm in the establishment of national law. On the contrary, the empirical legal fact refers to social and cultural pluralistically in which local adat communities have capacity to create and develop their customary law in ordering society.

What should be carried out to establish a legal pluralism ideology and atmosphere is to reformulate legal policy of national law development with which the multicultural fact should absolutely be taken into consideration as a source of legal action in recognizing and protecting the real existence of traditional community and the living law in the country. This brings into consequence that in the process of State law making, those values and principles of customary adat law must be accommodated and responded as well as integrated into the system of national law in the form of State legislation. Hence, characteristic of State law that reformed by the Government is national law that expresses cultural diversity of Indonesia. In line to the types of law as introduced by Nonet and

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<sup>31</sup> I Nyoman Nurjaya. 2012. "State Law in Multicultural Country of Indonesia: Toward A Just and Equitable State in Legal Anthropology Point of View", in *the US-China Law Review Volume 9, Number 1, Febroary 2012*, Illinois-USA: David Publishing Company.

<sup>32</sup> Donald Black, 1984. *Toward a General Theory of Social Control*, New York: Academic Press.

<sup>33</sup> Philippe Nonet and Philip Selznick, 1978. *Law and Society in Transition, Toward Responsive Law*, New York: Harper Colophon Books.

<sup>34</sup> Hilaire McCoubrey and Nigel D. White, 1996. *Textbook on Jurisprudence*, London: Blackstone Press Limited.

Selznick,<sup>35</sup> this is the so-called responsive law namely that the State law is more responsive to the cultural diversity and traditional adat community needs in particular. That is the reason why the paradigmatic function of State law as instrument of social order and control, as well as a tool of social engineering could also be directed in strengthening social integration of the Nation State toward a just and equitable State law for the whole people of Indonesia.

To end this discussion let me quote the statement of John Griffiths which relate to the fact of legal pluralism within universally societies as follows:

Ideology of the legal centralism that is the law is and should be the law of the State, uniform for all persons, exclusive of all other law, and administered by a single set of State institutions. Those of other legal system are in fact hierarchically subordinate to the law and institutions of the State. ... Legal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion. Legal pluralism is the name of a social state affairs and it is a characteristic which can be predicted of social group.<sup>36</sup>

## REFERENCES

- Allot, Anthony and R. Woodman Gordon (eds). 1975. *People's Law and State Law*. Dordrecht-Holland: Foris Publication.
- Abdurrachman, Sukri. 2004. *Konflik Pertanahan di Era Reformasi: Hukum Negara, Hukum Adat dan Tuntutan Rakyat (Conflict of Land Tenure in Reformation Era: State Law, Adat Law and Claiming of the People)*. Jakarta: Pusat Penelitian Kemasyarakatan dan Kebudayaan LIPI.
- Araf, Al and Awan Puryadi. 2002. *Perebutan Kuasa Tanah (The Contest of Land Tenure and Control)*. Yogyakarta: Lappera Pustaka Utama.
- Bachriadi, Dianto, Erpan Faryadi, dan Bonnie Setiawan (eds). 1997. *Reformasi Agraria, Perubahan Politik, Sengketa, dan Agenda Pembaruan Agraria di Indonesia (Agrarian Reformation, Political Change, Conflicts and Agrarian Reform Agendas in Indonesia)*. Jakarta KPA & Lembaga Penerbitan FE-UI.
- Bachriadi, Dianto. 1998. *Sengketa Agraria dan Perlunya Menegakkan Lembaga Peradilan yang Independen (Agrarian Disputes and the Needed for Enforcing the Independently Agrarian Court)*. Bandung: Kertas Posisi KPA 002/1998, Konsorsium Pembaruan Agraria (KPA).
- Barber, Charles Victor. 1989. *"The State, The Environment, and Development: The Genesis and Transformation of Social Forestry Policy in New Order Indonesia"*. Berkeley: Unpublished Doctoral Desertation University of California.
- Black, Donald. 1984. *Toward a General Theory of Social Control*. New York: Academic Press.
- Black, Donald and Maureen Mileski (eds). 1973. *The Social Organization of Law*. New York: Seminar Press.
- Benedanto, Pax. 1999. *Menggugat Ekspansi Industri Pertambangan di Indonesia (Reclaiming over Maining Industrial Expantion in Indonesia)*. Bogor: Pustaka Latin.
- Bodley, John H. 1982. *Victims of Progress*. California: Mayfield Publishing Company.
- Bohannan, Paul (ed.). 1967. *Law and Warfare, Studies in the Anthropology of Conflict*. Austin and London: University of Texas Press.
- Cotterel, Roger. 1995. *Law's Community, Legal Theory in Sociological Perspective*. Oxford: The Clarendon Press.
- Dove, Michael R. 1981. *Peranan Kebudayaan Tradisional Indonesia dalam Modernisasi (The Role of Traditional Culture in Modern Indonesia)*. Yayasan Obor Indonesia, Jakarta.
- Friedman, Lawrence M. 1975. *The Legal System, A Social Science Perspective*. New York: Russell Sage Foundation.
- Griffiths, John. 1986. *What is Legal Pluralism?, in Journal of Legal Pluralism and Unofficial Law No. 24/1986*. The Foundation for Journal of Legal Pluralism, pp. 1-56.
- Harman, Benny K. (1995). *Pluralisme Hukum Pertanahan dan Kumpulan Kasus Tanah (Pluralism in Indonesian Land Law and Compilation Land Tenure Cases)*. Jakarta: YLBHI.
- Hart, H.L.A. 1960. *The Concept of Law*. Oxford: Oxford University Press.
- Hatfindo. 2004. "Final Report of the Study on Capacity Building for Decentralized Natural Resources Management", ADB TA 3523-INO.

<sup>35</sup> Philippe Nonet and Philip Selznick, 1978. *Law and Society in Transition, Toward Responsive Law*, New York: Harper Colophon Books.

<sup>36</sup> John Griffiths, 1986, What is Legal Pluralism?, in *Journal of Legal Pluralism and Unofficial Law No. 24/1986*, The Foundation for Journal of Legal Pluralism.

- West Vancouver Canada: Hatfield Consultants Ltd.
- Hoebel, E. Adamson. 1954. *The Law of Primitive Man*. Cambridge, Massachusetts.
- Hooker, M.B. 1978. *Adat Law in Modern Indonesia*. Oxford University Press, USA.
- Korten, D.C. "Community Based Resource Management", in Korten D.C. (Ed). *Community Management: Asian Experience and Perspectives*. Kumarian Press.
- Llewellyn, Karl and E. Adamson Hoebel. 1941. *The Law of Primitive Man*. New York: Atheneum.
- Moniaga, Sandra. 1999. "Toward Community-based Forestry and Recognition of Adat Property Rights in the Outer Islands of Indonesia". Unpublished paper.
- Moore, Sally F. 1978. *Law as Progress, An Anthropological Approach*. London: Routledge & Kegan Paul Ltd.
- Nader, Laura and Harry F. Tood Jr. (eds.). 1978. *The Disputing Process-Law in Ten Societies*. New York: Columbia University Press.
- Nonet, Philippe and Philip Selznick. 1978. *Law and Society in Transition, Toward Responsive Law*. New York: Harper Colophon Books.
- Nurjaya, I Nyoman (ed). 1993. *Politik Hukum Pengusahaan Hutan di Indonesia (Politik of Law on Forestry Management of Indonesia)*. Jakarta: Wahana Lingkungan Hidup Indonesia (WALHI).
- Nurjaya, I Nyoman. 2005. *Magersari: Dinamika Komunitas Petani-Pekerja Hutan dalam Perspektif Antropologi Hukum (Magersari: The Community Dynamic of Forest Labor and Peasant in the Perspective of Legal Anthropology)*. Malang: UM Press.
- Nurjaya, I Nyoman. 2007. *Pengelolaan Sumber Daya Alam dalam Perspektif Antropologi Hukum (Natural Resources Management in Legal Anthropology Perspective)*. Jakarta: Prestasi Pustaka Publisher.
- Nurjaya, I Nyoman. 2011. "Adat Community Lands Right As Defined Within the State Agrarian Law of Indonesia: Is It A Genuine or Pseudo Legal Recognition?", in *The US-China Law Review Volume 8, Number 4, April 2011*. Illinois-USA: David Publishing Company.
- Nurjaya, I Nyoman. 2012. "State Law in Multicultural Country of Indonesia: Toward A Just and Equitable State in Legal Anthropology Point of View", in *the US-China Law Review Volume 9, Number 1, Febroary 2012*. Illinois-USA: David Publishing Company.
- Nurjaya, I Nyoman. 2014. "Progressive Environmental Law of Indonesia: Global Principles of Stockholm and Rio Declations As Defined Within The 2009 Act on Human Environment Protection and Management", in *The US-China Law Review Volume 11, Number 1, January 2014 (Serial Number 97)*. Illinois-USA: David Publishing Company, Illinois.
- Peluso, Nancy L. 1992. *Rich Forest, Poor People: Resource Control and Resistance in Java*. University of California Press, USA.
- Person, Gerard. 1991. "The Tension Between State Law and Local Culture". Unpublished Paper.
- Pospasil, Leopold. 1971. *Anthropology of Law, A Comparative Theory*. New York: Harper & Row Publisher.
- Repetto, Robert and Malcolm Gillis. 1988. *Public Policies and the Misuse of Forest Resources*. New York: Cambridge University Press.
- Suhendar, Endang dan Ifdal Kasim. 1996. *Tanah sebagai Komoditi, Kajian Kritis atas Kebijakan Pertanahan Orde Baru (Land as Economic Commodity, Critical Study of Land Tenure Policy in the New Order Era)*. Jakarta: ELSAM.
- Selznick, P. 1969. *Law, Society, and Industrial Justice*. New York: Transaction Books,.
- Snyder, F.G. 1981. "Anthropology, Dispute Process and Law: A Critical Introduction", dalam *British Journal of Law and Society* Vol. 8 No. 2 Winter, pp. 141 – 179.
- Spradley, James P. and David W. McCurdy. *Conformity and Conflict, Reading in Cultural Anthropology*. Boston and Toronto: Little, Brown and Company.
- Starr, June and Jane F. Collier. 1989. *History and Power in The Study of Law, New Direction in Legal Anthropology*. Ithaca and London: Cornel University Press.
- Sumardjono, Maria S.W. 2008. *Tanah dalam Perspektif Hak Ekonomi, sosial, dan Budaya (Land in the Perspective of Ecnomic, Social and Cultural Rights)*. Jakarta: Kompas Press.
- Tamanaha, Brian. 1992. "The Folly of the Concept of Legal Pluralism", paper presented at *the International Congress the Commission on Folk*

- Law and Legal Pluralism*. New Zealand: Victoria University of Wellington.
- Tjitradjaja, Iwan. 1993. "Differential Access to Resources and Conflict Resolution in A Forest Concession in Irian Jaya", in *Ekonesia, A Journal of Indonesian Human Ecology* Vol. 1 Mei 1993, pp. 58-69.
- Wiradi, Gunawan. 2000. *Reforma Agraria, Perjalanan Yang Belum Berakhir (The Unfinished Journey of Agrarian Reformation)*. Yogyakarta: Insist Press.