ADAT COMMUNITY LANDS RIGHT AS DEFINED WITHIN THE STATE AGRARIAN LAW OF INDONESIA: IS IT A GENUINE OR PSEUDO-LEGAL RECOGNITION? ¹

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INTRODUCTION

In the last more than three decades it could be observed that cases of law on agrarian 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 (Harman, 1995; Suhendar & Kasim, 1996; Bachriadi, 1998; Benedanto, 1999; Araf & Puryadi, 2002; Abdurachman, 2004; Bakri, 2007; Sumardjono, 2008).

Conflicts over agrarian resources ownership and use are primarily caused by differentiation both interest of agrarian resources tenure and management, as well as differential perception to deal with agrarian law between government and the local people (Moniaga, 1991; Peluso, 1992; Tjitradjaja, 1993; Bachriadi et.al., 1997: Wiradi, 2000; Sumardjono, 2008). In this sense, the government tends to enforce State law and regulations to order and control agrarian resources in the name of national development, and on the other side the local people namely adat communities employs their own customary law which is called adat law (hukum adat) to control and manage their agrarian resources in the territories they depend on.

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This paper attempts to examine legal position and the recognition of adat law of the local communities in the region of Indonesia within the State agrarian law and its capacity in the country. In order to meet other atmosphere in analyzing such law issue I shall approach the legal issue of interaction between State agrarian law and the customary law by using legal anthropology point of view.

ADAT LAW AND ITS CAPACITY WITHIN THE STATE AGRARIAN LAW OF INDONESIA

The establishment of agrarian law is actually part of the national law development in Indonesia. In this regard, the Basic Agrarian Law of 1960 (BAL 1960- Act No. 5/1960) which covers a wide range of issues on land ownership and use related to both private and government-controlled lands is recognized as the national agrarian law in the country. In principally, the BAL of 1960 reaffirms the 1945 Constitution of Indonesia. Hence, Article 2 (1) BAL of 1960 states that:

The earth, water and air space, including the natural resources contained therein, are in the highest instance controlled by the State as an Authoritative Organization of the whole people.

These rights of the State to control the earth, water and air space and the natural resources contained therein might be delegated to Provincial Government and the local adat communities, as long as was not in conflict with national interest and provisions of the State Agrarian Act (Article 2 [4]). Moreover, BAL of 1960 established the principle that agrarian law to deal with the earth, water and air space including natural resources contained therein, was adat law as long as was not in contrary to national interest and the State, socialism of Indonesia, provisions of the Act and every elements which based
on religious law (Article 5). This was also confirmed that the formation of land ownership according to adat law regulated by provision of the government (Article 22 [1]). Besides, BAL of 1960 also noted that all lands not yet under national land ownership legislation were to continue to be governed by local adat law, as long as adat remains exist and was not in conflict with the spirit of provisions of the Act (Article 56).

What could be observed from these regulations mentioned above in relation to the State is position and capacity as well as legal recognition of adat law within the State agrarian law. In one hand, adat communities and their law have been officially recognized by the State agrarian law. But, on the other hand, adat law has been restricted in the sense of its capacity within BAL of 1960. Nevertheless, it was clearly stated that agrarian law regarding the earth, water and air space, including natural resources contained therein, is basically adat law. But, the word of *as long as* have decreased its legal position and capacity as the only foundation of BAL of 1960.

In other words, the condition of *as long as* that attached on Articles of BAL 1960 goes to prove that adat law was actually subordinated to the State agrarian law in the level of ideology. What then could be concluded from this brief description of adat law and the State law, particularly the provisions of Article 5 BAL of 1960? The answer seems to be clear that the principle that adat should form the basis of land laws of Indonesia is so heavily qualified because of the word *as long as* attached in a number of Articles of BAL 1960. 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 underwritten adat as source of land law, except to the extent that it does not conflict with the limits imposed upon it (Hooker, 1978).
It could be witnessed that in many cases State law have neglected adat law when the tension between both sort of laws appear in the level of implementation. In most region of Indonesia the government tends to disregard rights of land, including forests, ownership and use of the local people. In fact, local people were powerless to meet the government when their adat rights on land and natural resources contained therein were ignored and even demised in the name of development (Dove, 1981; Bodley, 1982; Peluso, 1992; Nurjaya, 1993; Moniaga, 1993; Bachriadi, et.al., 1997, Bakri, 2007; Sumardjono, 2008).

The local people in which their adat rights on natural resources and cultures neglected and ignored in the name of national development were victims of development. In his words Bodley (1982) 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.

Hence, it then could be understood when the development of State agrarian law has been facing various obstacles because of its ideology and implementation in the country. Ideology and implementation of the State agrarian law that deal to adat law were both inconsistency and uncertainty. But then, the question is why could it happened? In this respect, I do attempt to answer this kind of question by using legal anthropology approach in order to find other academic point of view in analyzing such law issue.
FOLK LAW AND THE STATE LAW : A LEGAL ANTHROPOLOGY POINT OF VIEW

Anthropological studies with regard to the function of law as system of social control within society have primarily been conducted by anthropologist (Black, 1984). 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. It is because anthropologist have focused upon micro-processes of legal action and interaction. They have made the universal fact of legal pluralism a central element in understanding 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 (Griffiths, 1986).

In this sense, 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 (Llewellyn & Hoebel, 1941; Hoebel, 1954; Black & Mileski, 1973; Moore, 1978; Cotterrel, 1995). 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 (Pospisil, 1971), and studied as social process within society (Moore, 1978).

It is difficult articulate a precise definition of law that capture the multiple aspects and actions of the State. In this regards, Hart (1960) has argued to use the concepts of rule and authority to bring law into focus in analyzing the role of law in the State. Law must be understood as generic, and the term used in a way that is general enough to embrace all legal experience (Selznick, 1969).
That is the reason why Moore (1978) 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, backed by political power and legitimacy.

Law is a definitional characteristic of the State and an object of efforts of the State to order and control its universe. It is therefore important to pay attention the role of law as ideology, and to analyze how the State shapes and uses the ideology (Barber, 1989). In the case of Indonesia, it is clearly observed that law was established and enforced as ideology to order and control the Territory of Indonesia. The 1945 Constitution particularly Article 33 (3) reaffirms that: “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”. It was then reconfirmed on Basic Agrarian Law (BAL) of 1960 that deal to lands ownership and use, as well on Basic Forest Law of 1999 (BFL - Act No. 41/1999) pertaining to forests, including their natural resources contained therein, as to control Indonesian Territory. Consequently, the State law which were shaped and enforced by the Government dominates other short laws or legal orders, it could be the customary law of the local communities namely adat law for example, which remains really exist as the living folk law in most regions of Indonesia.

Nevertheless, adat law declared as the only basic principle over the State agrarian law, but the capacity of adat law in such position remain needs further clarification in the context of Indonesia’s system of law. In this sense, as pointed out by Hart (1960) the position of adat law within the State agrarian law could be mentioned as the rule of recognition. The question then is whether it is a real recognition or not? In my opinion, the recognition of adat law within the State agrarian law is unreal recognition as to be intended by
Hart. It is because of the official condition of *as long as* that have been attached on a number of Articles pertaining to adat lands and other agrarian resources ownership and use within BAL of 1960, condition of which bring about consequence that legal position and capacity of adat law had been decreased in the level of both ideology and the implementation and enforcement. Is it a genuine or pseudo-legal recognition in term of rule of recognition as intended by Hart? In my opinion, this is the so called pseudo-legal recognition of the adat community rights on agrarian resources particularly lands control, access and utilization as officially defined within the State Agrarian Law of Indonesia (Nurjaya, 2005, 2007).

In sum, when we observed the development of State law in the country, it could be mentioned that the State agrarian law has become the idiom for expression of power to order and control lands and agrarian resources tenure, and has systematically ignored and neglected the legal position and capacity of adat law as a living folk law of the local people in most regions of Indonesia. Ultimately, legal aspects of sustainable development policy in many rural areas, particularly in the field of lands and agrarian resource tenure and utilizes, are mostly dominated by conflict of norms between State law and the adat law, the conflicts of which reflected on larger tensions between the central Government and local people particularly adat communities in the country.

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 sense, Pospisil (1971) explained 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. 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 law enforcement.

In the meantime, Vago (1988) in his words confirmed: “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 (1978). 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.

This 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 the position and capacity of customary law, folk law, or indigenous law and in the Indonesian term mentioned adat law (hukum adat) as a living law in the country.
CLOSING NOTE

In the perspective of anthropology 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 pluralism situation within the dynamic life of society (Griffiths, 1986).

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 within communities. 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 (Pospisil, 1973). 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 (hukum adat).

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 (Cotterrell, 1995). 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 (Griffiths, 1986). The situation of legal phenomenon pluralistically is also intended to describe en empirical situation of two or more legal systems operate simultaneously in a social field (Hooker, 1975).

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, social structure, clan system, system of religion etc. In other words, Friedman (1975) 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.

In relation to the State law, especially the State Agrarian Law in the case of Indonesia, 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. Such kind of law tends to disregarding the existence of other kind of legal systems such like folk law or customary law as living law within the life of adat communities in the country.
of Indonesia. That is why the recognition of adat community rights over land and other agrarian resources defined and regulated within the State Agrarian Law as the only pseudo-legal recognition and not as genuine-legal recognition.

To end this discussion let me quote the statement of Griffiths (1986) 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.
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