ABSTRACT

This article aims to analyze recognition and respect towards adat law community and adat law in Indonesia legal pluralism context; the strength and weakness of adat law as conflict resolution mechanism; model on state recognition and respect towards adat law community and its adat law in order to reduce the weakness of adat law as a tool to resolve conflict. This is a legal normative article which written based on secondary data, such as books, articles, news, research report, and laws. Collected secondary data are selected based on the issues and analyzed qualitatively. Analysis results on descriptive report which explains the issues comprehensively. This article found that (1) In Indonesia legal pluralism context, the state has not recognized and respect adat law community and its adat law wholeheartedly. It is proven by cumulative limitations which hard to be fulfilled by the adat law community in order to be recognized and respected by the state; (2) The strength of non-litigation conflict resolution based of adat law principles is not about win or lose solution, but about win-win solution. Win-win solution has purpose to achieve justice which acceptable to all parties. Win-win solution is obtained based on consensus from conflicting parties until justice is achieved. The weakness of adat law in Indonesia Law context is the fact that Indonesia adopts European Continental system of law, therefore adat law is not the state law. Adat law is understood by understanding the life of the community where adat law is applied. Adat law is implemented voluntarily, without any force from the state. The weakness of adat law as tool of conflict resolution is the dependency towards good faith between parties. The decision cannot be implemented, unless there is good faith from the conflicting parties; (3)
model of adat law community and its adat law recognition and respect is synergic combination model between self declaratory by the adat law community and decisive state recognition with strict limitation which hard to be implemented by the adat law community.

Keywords: adat law; legal pluralism; win-win solution

PREFACE

BACKGROUND

Laws that exist and apply in Indonesia are legal systems. The existing legal system is the whole of the laws which consists of inseparable legal subsystems, mutually influential and interact with each other. Customary law exists, lives, grows, and develops according to the development of society so that customary law is considered as the living law in Indonesia. In addition to religious law and written law, customary law is the law that applies in Indonesia only that the form of customary law is not written in the legislation, so that customary law is said not as state law.

The existence of customary law in Indonesia is as a complex of norms that originates in the feelings, behavior, and legal awareness of the people in Indonesia. Customary law has a dynamic and elastic nature so that it can adjust to the development and the needs of the community. Customary law in its unwritten form is always made, carried out by the people voluntarily by the people without any orders / coercion from the state. Customary law can only be understood well
by studying it with feeling, deepening the people's lives feelings and people's traditions.

In accordance with the dynamic nature of customary law, so the customary law continues to change and develop. Every rule of customary law arises, exists, lives, grows and develops and then disappears with the emergence of the new customary law. The new rules of customary law will also develop, but also disappear with changes in people's sense of justice.

Customary law as a legal institution can be used to resolve conflicts/disputes. At present, some members of the community sometimes forget the background of philosophical values and the type of conflicts/disputes resolving provided by customary law. The philosophical values of the life of the Indonesian people from ancient times in an effort to resolve conflicts/disputes are always the spirit of togetherness and deliberation to realize justice.

The fact from ancient times that people's life in Indonesia is pluralistic both from the social aspects, cultural aspects, and religious aspects. This plurality results shows in every community by having its own rules/laws. Rules/laws made by customary law communities called customary law are often faced with laws made by government with unified and centralistic paradigms.

Customary law is the law of the people and not the law of the state, because customary law is made by the people, carried out by the people voluntarily without any coercion from the state, and
enforced by the people. In addition to state law in its written and formal form, the existence of customary law in Indonesia is a legal choice that can be used by the people to regulate people's lives to be orderly and regulatedly. Customary law institutions and regulations can also be used by the people to resolve conflicts/disputes in the perspective of legal pluralism in the Bhinneka Tunggal Ika community.

The recognition and respect of the state for the existence of customary law community and their customary law in Indonesia is a necessity because the life of the people in Indonesia is plural/diverse but the plurality remains single in one within the framework/place in the Republic of Indonesia. The recognition and respect of the state for the customary law community and its customary law support the need of customary law community/tribal group’s rights to be protected against the threat of state law politics which have unification and legal centralism paradigm.

PROBLEM FORMULATION

Based on the background of the abovementioned problem, the writer in this article conducts a study on the recognition and respect of the state against customary law community/tribal groups in the context of legal pluralism in Indonesia; The strengths and weaknesses of customary law as a legal choice to resolve conflicts/disputes; The thought of the type of the recognition and respect of the
state for customary law community/tribal groups and their customary law in order to minimize the weaknesses of customary law as a means to resolve conflicts/disputes.

GOALS AND USAGE

This article aims to find out and analyze the country's recognition and respect for customary law community/tribal group’s and their customary law in the context of legal pluralism in Indonesia; The strengths and weaknesses of customary law as a legal choice to resolve conflicts/disputes; and a thought of state recognition and respect type for customary law community/tribal groups and their customary law in order to minimize the weaknesses of customary law as a means of resolving conflicts/disputes.

This article is expected to provide theoretical and practical benefits. The theoretical benefit of the results of this study is to expand the horizon of the customary law science and law in general. The practical benefit of the result of this study is expected to be a reading material for researchers and observers of customary law. In addition, the results of this study are expected to be used as an input material for government in regulating customary law. As for the customary law community, it is expected that the results of this study can be used as guidelines in the life of the community.
RESEARCH METHODS

Types of Research

Research is divided into four things, namely: (a) based on its nature: explorative, descriptive, explanatory; (b) based on the approach: longitudinal, cross sectional; (c) based on the place of occurrence: library research, field research; (d) based on the fields of science: law, economics, politics and many more (Maria SW Sumardjono, 2014: 6). This type of research on law as a legal choice in the perspective of legal pluralism in Indonesia is a type of library research that produces secondary data.

Based on its nature, researches are divided into exploratory, explanatory and descriptive research (Bambang Waluyo, 1991: 7). The nature of the research that was carried out in this research was descriptive research. Descriptive research is used to: (1) precisely describe the nature of individuals, groups, certain circumstances/symptoms; (2) determine the frequency/spread of a medium; (3) determine the frequency of certain relationships between one symptom with other symptoms (Maria SW Sumardjono, 2014: 6-7). By its nature, legal research on customary law as a legal choice in the perspective of legal pluralism in Indonesia is descriptive research. This is because this study provides a full picture of being used for the recognition and respect of the state for customary law community/tribal groups and their customary law in the context of legal pluralism in Indonesia; The strengths and weaknesses of customary law as a means to resolve conflicts/disputes; thinking type of recognition and
respect for the state of customary law community/tribal groups and their customary law in order to minimize the weaknesses of customary law as a means to resolve conflicts/disputes.

**Type of the Data**

The type of data used in this study is secondary data. Secondary data is data that is obtained indirectly from the source because the data is already available or already exist materials in the library both legislation, books, research results, journals, newspapers, magazines and the internet. Secondary data in this study include: primary legal materials, secondary legal materials, which is legal materials that explain primary legal materials and do not have binding strengths such as library books, journals, research results, articles published on the internet.

**Data Collection Techniques**

Data collection is an activity that must be carried out by the author in order to help in discussing the results of the research and draw conclusions appropriately. Research activities in the form of literature study include the activities of researchers to browse various library materials. The secondary data collection techniques are carried out by document study by reading and criticizing the laws and regulations, books, journals, research results, magazines, newspapers.
and the internet which are closely related to research problems. The data from the results of this literature study are used as raw material in analyzing and discussing research problems. The data collection tool in the literature research that the writer carried out was in the form of library material in the form of books, research results, articles in journals or even on the internet.

**Data Analysis**

Data analysis is the process of arranging data sequences, organizing them in a pattern, category, and one basic description. Data analysts are also a process of simplifying data in a form that is easier to read and interpret. Various researchers' activities in an effort to find and organize notes systematically to improve researchers' understanding of the case studied and present it as findings. In short, it can be summarized that data analysis is a process in compiling and integrating data research so that it can be interpreted. As a process, researchers carry out data analysis from the beginning of the research until the end of the research period. Researchers' efforts in compiling and integrating data in a particular theme or pattern mean that researchers carry out activities in the form of data classification. Researchers' efforts in interpreting the data mean that researchers give meaning and explain patterns/themes and look for connection between various concepts. In this study the data analysis process was
carried out since the beginning of the research by collecting library materials related to research problems.

Data analysis in the study is divided into 2, quantitative data analysis and qualitative data analysis. Researchers in this study used qualitative data analysis. Qualitative data analysis is a very personal process (Chatrine Dawson, Practical Research Methods translation M.Widiono, 2010: 137). Data obtained from the results of the study were analyzed qualitatively so the obtained data were grouped and selected based on the quality and truth related to the under study problems.

The method used to describe the report using the explanatory method (descriptive) (M.B. Miles & Huberman, A.M. 1994: 16). The researcher explained all the data obtained through library research, called secondary data in the form of library materials associated with literature or theory and drawn conclusions.

LITERATURE REVIEW

Customary Law Community and Customary Law

The terms of customary law community and indigenous people are two terms often used by experts in various scientific forums. In 1981, the UN special rapporteur on the Commission for the Prevention of Discrimination and Protection of Minorities named Jose Martinez Cobo in his report entitled Discrimination Against
Indigenous People stated that *indigenous peoples* which are translated by customary community are groups of people or ethnic groups that have a continuation of historical relations between before invasion and the period after the invasion that developed in their region, consider themselves different from other community, groups or parts of a wider society (Rikardo Simartama, 2006: 25). The term indigenous people are then used officially in the ILO Convention 169 in 1989.

In Indonesia, the term indigenous peoples were introduced by the Indigenous Peoples' Rights Defenders Network (Japhama), in 1993. According to Japhama, indigenous peoples are groups of people who have ancestral origins (from generation to generation) in certain geographical areas, and have their own values, ideology, economy, politics, culture and territory. The definition was adopted by the Indigenous Peoples Alliance of the Archipelago (AMAN) in Congress I, 1999.

The concept of indigenous law as a translation of *rechtsgemeenschap* was first introduced by Cornelius van Vollenhoven. The term *rechtsgemeenschap* then by Ter Haar is focused on *adatrechtsgemeenschap* which is translated by customary law alliance/ customary law communities as groups of people as entities that experience their lives acting as a unity of the physical and non-physical world, having their own orderly order and eternal according to the nature and has its own management and wealth, both material and immaterial (Tholib Setiady, 2008: 76).
Hazairin (1970: 44), gives an understanding of indigenous law communities as: "Indigenous Law communities such as villages on Java, Marga in South Sumatra, Nagari in Minangkabau, Kuria in Tapanuli, Wanua in South Sulawesi, are community units that have the completeness of being able to stand on its own is to have a law, a unit of authority, and an environmental unit based on the unity of its members.

Bushar Muhammad in Tholib Setiady (2008: 77) states that,

"Indigenous law communities as regular people units, settle in certain areas, have powers, and, have tangible or intangible wealth where members of the unity each experience life in society as a natural right according to nature and not one of them has a mind or tendency to dissolve the bond that has grown or abandoned it in the sense of freeing itself from that bond forever."

A more simple opinion was states by Maria SW Sumardjono (2001: 56), some of the main characteristics of indigenous law communities are: a group of people, having their own wealth regardless of individual wealth, have certain territorial boundaries, and have certain authorities.

The term customary law communities are more often used in various laws and regulations than the term indigenous peoples. Constitutional juridically, the constitutional term of indigenous peoples is explicitly stated in Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. In addition, the term indigenous peoples is in various sectoral laws, such as Law No. 39,

The criteria of customary law communities that are regulated in various sectoral laws such as the Forestry Law, Plantation Law, and Environmental Protection and Management Law formulated cumulative criteria which mean that the existence of customary law communities is only recognized if they meet all predetermined criteria. Until now there was no agreement on the criteria of the customary law community and the government, so the government tends to use the above regulations and the opinion of Van Vollehoven as a reference.

The application of customary law in Indonesia has a philosophical, sociological and juridical basis. The basis of the application of customary law philosophically according to Soerojo Wignjodipoero (1983: 14), because customary law is rooted in folk culture so that it can manifest the real and living legal feelings among the people and reflect the personality of the Indonesian people and nation. Philosophical customary law is a law that applies according to
Pancasila as a life view or philosophy of life of the Indonesian people. The basis of the application of customary law sociologically means that empirical customary law as unwritten law applies and it’s carried out voluntarily and without coercion from the state so that customary law is considered as the living law. Customary law applies juridically means that customary law is in various laws and regulations. According to Djaren Saragih (1984: 15), to study the juridical aspects of the customary law application basis means learning the legal basis of the application of customary law in Indonesia since the colonial era to the present era.

Customary law is a juridical technical term used by legal experts in various scientific forums. The term customary law as a translation of *adatrecht* was introduced by Snouck Hurgronje as a traditional custom with sanction. Van Vollenhoven in Hilman Hadikusuma (1992: 13) gives an understanding of customary law as a law that applies to the natives and foreigners who have sanctions (hence said to be law) on the other hand are not codified (hence said to be customs). Ter Haar cited by Sri Harini Dwiyatmi (2006: 18), said that customary law is a whole rule which manifests in legal instrument decisions that have authority and influence in their implementation and are immediately obeyed wholeheartedly. Soepomo in Tholib Setiady (2008: 16) explained that the customary law is synonym with unstatury law, state conventions, judge made law, and customary law. Djojodigoena in Hilman Hadikusuma (1992: 21) said that customary law if it is opposed by legislation (codification law) then the
customary law is a law that does not originate in regulations. Soerjono Soekanto in Tholib Setiady (2008: 22) said that customary law is essentially is a habitual law, which is a habit that has legal consequences. The decision of the seminar on customary law in Yogyakarta in 1975 provides a summary that customary law is genuine Indonesian law which is not written in the form of legislation of the Republic of Indonesia which contains elements of religion.

Based on the opinions of the aforementioned experts, it can be concluded that customary law is a law that is not written in the legislation because it was made by the people, carried out voluntarily by the people without any coercion from the state and maintained by the people.

**Legal Pluralism**

Legal centralism denies the existence of another legal system outside the law of the state or recognizes it but merely as 'recognition' in the text, legal potivism denies the ability of the people to make their own laws. Griffith in Lidwina Inge Nurtjahyo (2011: 35) stated law in a positivistic perspective, in society. Both legal centralism and positivism in legal studies, both view law based on theoretical assumptions without looking at existing empirical facts. The concept of pluralism was put forward by Sally Falk Moore. According to Sally Falk Moore the concept of legal pluralism refers to a heterogeneous normative situation based on the fact that social action is always
carried out in the context of semi-autonomous social fields in society (semi autonomous social fields). According to Hooker (1978: 79), the term "legal pluralism" to the situation in two or more laws interacts. The most obvious fact is the co-existence of state law, customary law and religious law, especially Islam.

In the theory, legal pluralism can be divided into two types; there are strong legal pluralism and weak legal pluralism (Griffiths, 1986: 1). Strong legal pluralism occurs when each diverse legal system is autonomous and its existence does not depend on state law. If the existence of legal pluralism depends on recognition of state law, this condition is called weak legal pluralism.

In general, these activists view legal pluralism as effective for resolving conflicts, especially in situations of limited formal justice processes, providing justice for conflict communities. Fast principle, cheap fees in the court is not the case. The limitations of formal justice are precisely answered by traditional/ local conflict resolution patterns.

RESULTS AND DISCUSSION
Recognition and Respect of the State for Customary Law Community and Customary Law in the Context of Legal Pluralism in Indonesia
The implementation of customary law in Indonesia as a hereditary rule is carried out by the people so that it is natural and feasible if the state cannot ignore/override customary law. In theory, the essence of the law's purpose is to benefit, certainty and legal justice. These three aspects are ideal but cannot be realized at the same time. When the law emphasizes its main purpose is justice, then the study is absolutely not only carried out in a doctrinal-normative manner based on state law, but also must be extended by involving other aspects, such as social studies outside of legal science because the problem of social justice is a social problem of society.

The existence of customary law and customary law communities has become an international concern, both institutionally and legally. In the opinion of Eddie Riyadi in (Rafael Edy Bosco, 2006: 1), the problem of the existence of indigenous peoples and their rights to the international world cannot be separated from the long struggle at the local and national level in their respective countries. Eddie Riyadi also emphasized that each country's response to customary law communities was different and influenced by the new world view and philosophical perspective (Rafael Edy Bosco, 2006: 9-10).

Customary law and customary law communities in Indonesia develop in line with the development of social life. Historically customary law and customary law communities have existed, lived, grew, and developed in Indonesia since the Kingdom era, Dutch colonialism era and on Indonesia's independence era. The interference
by the royal government, invaders, and Indonesian government continues to change in accordance with the development of the state administration (Tholib Setiady, 2008: 146). Some of the government's interference is reinforcing and some are weakening the customary law community and its customary law.

In the early days of Indonesian independence, recognition and respect for customary law and customary law were constitutionally implied in Article 18 of the Constitution (UUD) 45. Since the reformation period with amendments, recognition and respect for customary law communities and their customary law is regulated explicitly in Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. In Article 18 B paragraph (2) it is affirmed that "the state recognizes and respects the units of customary law communities and their traditional rights as long as in reality they still exist, in accordance with community development and the principle of the Unitary State of the Republic of Indonesia and regulated in law ".

Recognition and respect of the state for customary law and customary law in the 1945 Constitution of the Republic of Indonesia can be interpreted philosophically and juridically (Sulastriyono, 2014: 101). Philosophically, the recognition and respect are the state's appreciation of the philosophical values that exist in customary law and have been crystallized in the principles of Pancasila. The philosophical value is the value of humanity and the value of collectivism and the value of justice. In addition, philosophically it is
said that the connection between the state and the customary law community and its customary law means that in a mandate, the state of Indonesia must recognize in the sense of protecting, safeguarding, fulfilling, and respecting the existing legal community and its customary law.

Juridically, Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia has become a strong legal basis (constitutional basis) for the direction of the legal politics of recognition and respect for customary law in the legal system in Indonesia. The weakness of the formulation of norms in Article 18 B paragraph (2) is that there is no explanation of what is meant by "traditional rights". This certainly can lead to differences in understanding or mistakes in practice in the community both by the state, the private sector and by the customary law community itself. The philosophical value of customary law that has crystallized in the principles of Pancasila is always maintained and nurtured continuously when the state continues to carry out the mandate with political will in recognizing, safeguarding, and respecting indigenous peoples and customary law in Indonesia. In the framework of implementing the values of humanity, collectivism and justice, this is vital because the state of Indonesia as an independent and sovereign country must uphold the values of humanity, including recognizing and respecting indigenous peoples and their customary law in a state of life. This was also reinforced by ILO Convention No. 169 of 1989 that every signatory country to the convention is always obliged to
recognize and respect groups of customary communities (Indigenous people) and their customary law.

Philosophically, the recognition and respect of the state for the customary law community and its customary law covers 3 aspects, such as: the existence of customary law communities, the existence of institutions/organisation in the customary law community, and the existence of customary law rules/norms in the life of customary law communities (Rikardo Simarmata, 2006: 16). The state recognizes and respects customary law communities and their customary law means that the state accepts the existence of institutions that include institutions or organisation (customary law) that exist in customary law communities. The institution includes elements that are tasked with carrying out and enforcing customary law norms so that people's lives can run harmoniously, regularly and orderly. These institutions are customary consultation and customary justice institutions. Customary consultation or meeting is an institution authorized to form and maintain customary law led by customary leaders and assisted by customary law community leaders, religious leaders and intellectuals. In other words, customary meeting institutions are tasked with forming customary law, implementing, and enforcing customary law so as to create an orderly, peaceful, harmonious society.

The state recognizes and respects customary law communities and their customary law from the institutional aspects of customary law, meaning that the customary justice institution is also an important element that cannot be ignored by the state. Juridical
constitutionally, if the state recognizes and respects customary law communities and their customary laws, it will not be meaningful to customary law communities if the state does not recognize and respect traditional institutions and customary justice. Customary law that exists, lives, grows, and develops in Indonesia is smooth, flexible and in accordance with the values of Pancasila because these values are a crystallization form of values that are in customary law. In the main principles of the state life as stated in the preamble of the 1945 Constitution of the Republic of Indonesia is always as the soul and the heart or spirit of the legal system that applies in Indonesia. The current Indonesian legal system consists of elements of written law, unwritten law (customary law) and religious law. Customary law as a form of Indonesian folk culture embodies real and living legal feelings among the people and reflects the personality of the Indonesian people and nation (Soerojo Wignjodipoero, 1983: 14).

The state recognizes and respects the customary law community and its customary law philosophically also means that customary law as applicable law in Indonesia is exists, lives, grows, and develops based on the process of social interaction in people's lives. The state also guarantees the prevailing legal system in Indonesia which includes elements of written law, customary law, and religious law in accordance with the legal values contained in the Preamble of the 1945 Constitution of the Republic of Indonesia. These legal values are a reflection of the values of Pancasila as the crystallization of values that the value of customary law is in
accordance with the spirit of the Indonesian community (volkgeist). Pancasila’s values are a benchmark of truth and justice for customary law community and the Indonesian people in community life. This is what underlies the idea that Pancasila is used as a source of all legal sources in Indonesia.

The consequence of state recognition and respect for customary law means that the state must assess the existence and function of customary law for the Indonesian people. Benchmarks or criteria used to assess the existence and function of customary law are good if they are in accordance with the values contained in the principles of Pancasila. If customary law is not appropriate or violates the values of Pancasila then customary law needs to be revitalized so it will not to deviate from the values of Pancasila. Customary law as an element of the prevailing legal system in Indonesia serves as a means of social control aimed at realizing the legal objectives of order and regulation and the realization of justice for the Indonesian people.

Juridically, the constitutional recognition and respect of the state for the customary law community and its customary law as stated in Article 18 paragraph (2) of the 1945 Constitution of the Republic of Indonesia is declarative and anticipatory. In the concept of a unitary state and the life of a state, there are no countries in the country. The Indonesian state was established as an Indonesian "eenheidstaat" (unity) country which did not have a state (staat) in the "Staat" environment. Customary law communities cannot stand alone outside the territory of the Republic of Indonesia because customary law
communities are an integral part of the territory of the Republic of Indonesia (NKRI). This cannot be ignored by the state. Recognition and respect of the country for customary law communities in Indonesia does not occur automatically, but always have to be fought for continuously, planned and sustainable (Safroedin Bahar and Ruwiati Suryasaputra, 2013: 1).

In constitutional juridical terms, the recognition and respect of the state for the customary law communities and its customary law must be implemented concretely by the state in order to provide optimal legal protection. Legal protection for customary law communities and their customary law is meaningless if the state does not guarantee the existence of customary law communities and their customary law. With the fulfillment of these guarantees, it means that customary law communities have the freedom to regulate and manage their own interests, certainly within the framework of the Unitary Republic of Indonesia.

According to Zen Zanibar, the traditional rights of customary communities which are at the same time a cultural identity of customary law and a requirement for the existence of customary law community units are the rights of autonomy (Zen Zanibar, 2008: 7). The customary communities’ right to autonomy is the right of customary communities to take care of their own households. The nature of autonomy includes the activity to form its own legislation (zelfwetgeving), carry out itself (zelfuitvoering), conduct its own judiciary (zelfrechtspraak), and carry out the task of its own police
What it means by "Recognition" is the formal validation of customary courts that have special status (Ad Hoc Committee DPD RI, 2009: 50). Formal validation means that the customary courts are regulated explicitly as part of the justice system in Indonesia which has special status and special authority.

The Unitary State of the Republic of Indonesia (NKRI) will remain intact as an independent and sovereign state if the Indonesian state continues to maintain and develop the value of collectivism and the value of justice. The value of collectivism is implemented by maintaining the spirit of "diversity and deliberation in resolving conflicts/disputes that occur in the community". Customary law communities in the territory of the Republic of Indonesia are pluralistic because there are those who based on genealogical aspects, territorial aspect and mixed between genealogical and territorial aspects. Customary law communities based on genealogical aspects include patrilineal society, patrilineal and parental societies. Customary law community based on territorial aspects such as desa in Java, Gampong in Aceh, Nagari in Minangkabau, Marga in Palembang, Negeri in Maluku is a concrete form of customary law community in the territory of the Republic of Indonesia that must be recognized and respected both by the de facto and de jure state.

In the opinion of Sudjito, which was referred by Arif Rahman, stated that the truth of Pancasila values was objective-universal. Such characteristics that make Pancasila is accepted by this nation. Crystallized customary law values that contained in the values
of Pancasila in international law are also mandates that must be carried out by the state. Therefore, customary law and open international law meet and unite in national law so that its existence does not interfere with Indonesian nationalism (Arif Rahman, 2012: 20-21).

The Strengths and the Weaknesses of Conflict/ Dispute Resolution Based on Principles and Values of Customary Law

Conflict/ dispute are an example of a negative social relationship that needs a strategy to resolve and prevent the conflict/ dispute. Strategies that can be used to prevent and resolve conflicts/ disputes are by implementing conflict management based on local cultural roots, which called the values of customary law. Implementation of conflict/ dispute resolution strategies and prevention based on customary law values, which is called recognizing rules in the form of customs, habits, religion, and beliefs; recognize the social conditions of the community including local leaders and community leaders; and recognize the geographical conditions of local customary communities. Another strategy that can be implemented is to implement a reciprocal model of cultural transformation by exchanging knowledge, expertise and technology, which can be in the form of training activities such as: legal education, mapping of customary law communities. In addition, strategies and approaches can also be carried out by raising external support for
recognition and respect for the rights of customary law communities (Syamsudin, 2008: 351).

Implementation in preventing and resolving conflicts/disputes carried out by the community is to strengthen the role of customary law in the community. Within the customary justice system there are known sanctions for violations called "customary fines" or "subject to customary law". Customary institutions that have the right to adjudicate conflicts/disputes are a customary deliberation forum consisting of traditional elders, religious leaders, community leaders and led by customary chief/ the head of customary village.

The type for resolving conflicts/disputes according to the principles and values of customary law is known as the term through non-litigation channels (without going through state courts). The advantage of the conflict resolution/dispute by the type of through non-litigation channels is that the decision is reached based on consensus from the parties to achieve justice for the conflict/dispute parties. The contents of the decision to resolve conflicts/disputes through non-litigation channels are not win or lose, but win-win solutions. The win-win solution aims to achieve justice that can be accepted by the conflict/dispute parties.

The model for resolving conflicts/disputes through non-litigation channels using the principles and values of customary law has been carried out by the community for generations in the lives of customary law communities in Indonesia. The type of conflict
resolution based on customary law in accordance with Indonesian culture that prioritizes justice is not legal certainty. In everyday life, words of wisdom arise in resolving the conflict/seketa, namely "just solve it in custom way". This means that customs institutions can be used as a basis for resolving conflicts/disputes. In addition, this is also in line with the recommendations of Alvon Kurnia Palma (2005: 206) that conflict resolution needs to be done based on the principles and values of customary law.

It is undeniable that the model for resolving conflicts/disputes using a non-litigation customary law has weaknesses/shortcomings. The weakness of the conflict resolution type through non-litigation channels is that it depends on the good will of the parties in conflict to carry out the decision. The implementation of the decision cannot be forced if there is no good will from the conflict parties because no party is coercing, except by the conflict/dispute parties themselves.

Customary law society and customary law itself already exist, live, grow and develop before Indonesia becomes independent. After Indonesia's independence, indigenous and tribal peoples are an integral part of the Unitary State of the Republic of Indonesia (NKRI). Customary law communities have implemented their customary laws for generations based on customary institutions, but in practice often clash with outsiders including the private sector and the government so that conflicts/disputes arise. Customary institutions can be used as a basis for resolving conflicts/disputes and have been emphasized by
Arkauddin that: "customary institutions relating to the resolution of conflicts/ disputes need to be preserved so that they can be used as material or basis for solving problems that occur both within the ethnic community and other ethnic groups with the same case ". (Arkauddin et al: 2007: 4).

The spaces for resolving conflicts/ disputes that prioritize the values of customary law are choices in resolving conflicts/ disputes. The number of legal products that do not take side with the community makes legal pluralism as a way to open opportunities like people's law/ customary law to appear to defend the interests of society. Nevertheless, it is based on the weakness of legal pluralism, which is the absence of a clear control mechanism for the process of conflict resolution/ dispute that uses people's law to ensure accountability and responsibility for its function against victims of conflict/ dispute. In the case of resolving conflicts/ disputes the use of customary law is actually effective compared to state law. Customary law originating from the habits of the community and accommodating the interests of customary law communities becomes a tool for the community to protect their rights which have not yet been fully recognized by the State (Andriani, 2011: 162).

The Model of the Recognition and Respect of the Republic of Indonesia against the Customary Law Community and its Customary Law in Indonesia

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In conventional legal theory, existing and applicable law in society has a function as a tool for social control (law as social control) and a tool for engineering social change (law as a tool of social engineering). These two legal functions as if the legal function can be clearly distinguished, such as the function of law as a means of social control applies to underdeveloped society, while the function of law as a tool of social change applies to advanced society. In fact, the two legal functions go hand in hand in a community's life both in the advanced society and in the community that is still developing towards an advanced society. In its development the law also functions as interaction facilitation between humans (law as facilitation of human interaction) (I Nyoman Nurjaya, 2013: 66).

Customary law exists to protect the interests of humans and society, including customary law communities. The state in providing legal protection to various human and community interests which is influenced by the legal thinking model as a paradigm adopted and enforced in people's lives. The legal paradigm that has been established and firmly rooted in Indonesia so far is the paradigm of unification and legal centralism. The weakness in implementing this paradigm is that the law that is recognized is only state law while the law outside the state law is not recognized. In this context, legal pluralism is ignored because the priority is legal unification and codification.

The implementation of the positivistic paradigm of unification and legal centralism in Indonesia is evident in the legal
politics contained in article 18 B paragraphs (2) of the NRI Constitution. The type of state recognition and respect for customary law communities according to Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia and several sectoral legislation shows a type of state recognition and respect for customary law communities and customary law with statements from the state through strict and layered restrictions. The weakness of the recognition and respect type is that customary law communities are burdened with heavy evidence because they have to prove according to unilaterally required criteria by the state that is difficult to fulfill by indigenous peoples.

Therefore, there needs to be a breakthrough in the type of recognition and respect from the government for customary law communities and its customary law that can be accepted by customary law communities but does not disturb political stability and still support the integrity of the Republic of Indonesia. The state should recognize and respect customary law communities and their customary law with a synergistic type of merger. This type is a synergistic combination between the type of self-statement by customary law communities with a type of recognition and respect from the state explicitly with strict restrictions that are difficult and difficult to be implemented by customary law communities. In a combined type/ synergistic combination, the state gives delegates to the district government to recognize and respect it by issuing a District’s Decree as a form of confirmation of the existence of existing
customary law communities in accordance with their own statements by customary law communities. This type can be applied to customary law communities that have existed to this era are customary law communities based on territorial and genealogical aspects such as desa in Java, Nagari in Minangkabau, Marga in Palembang, Negeri in Maluku, Wanan in Sulawesi and so on.

The second type, the recognition and respect of the state for the customary law community and its customary law is by limiting but loosely, it is not as strict as the current limitation. The state carries out restrictions through a process of research carried out jointly between customary law communities, government and academics. The criteria for existence are not determined unilaterally as is currently the case but the result of a consensus between the government and customary law communities. This is intended to make it easier for customary law communities, not to the contrary, to burden indigenous and tribal peoples.

CLOSING

CONCLUSION

State recognition and respect for customary law communities and customary law in a constitutional juridical manner in Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia and existing sectoral laws contain philosophical and juridical
meaning. Recognition and respect by the state for the customary law community and its customary law have not been carried out sincerely because the state still gives various strict and layered restrictions so that it is difficult and tough to fulfill by customary law communities.

Customary law as an unwritten law in the legislation is called the living law in Indonesia because customary law is carried out voluntarily by the people without any coercion and orders from the state. The advantage of the non-litigation conflict/ dispute resolution type based on the principles and values of customary law is that the decision is not win or lose, but equally win (win-win solution). A win-win solution aims to achieve justice that can be accepted by the parties to the conflict. A win-win solution decision is reached based on consensus from the conflicting parties so that justice can be achieved for the parties.

Weaknesses in customary law in the context of state life in Indonesia which applies the continental European legal system can be seen from its form and status as people's law not state law. The form of customary law as a law that is not written in the legislation can be understood by understanding the life of the community where the customary law is not what has been regulated in the articles of legislation. The status of customary law is a law that is not made by the state but is made by the people so that the implementation of customary law is voluntary by the people so that there is no order or even coercion from the state. Therefore, when customary law carries out its function as a means to resolve conflicts/ disputes, it depends on
the agreement of the conflict/dispute parties. The decision cannot be enforced if there is no goodwill from the conflict/dispute parties.

Recognition and respect of the state for the customary law community and its customary law at this time is potential for the emergence of conflicts/disputes. Therefore, it requires a breakthrough in thinking about the type of state recognition and respect for customary law communities to minimize the weaknesses of the type for resolving conflicts/disputes based on principles and values of customary law so that customary law can function more optimally. The breakthrough type that can be implemented is a composite type/synergistic combination between the self-statement types by customs law communities with a type of recognition and respect from the state explicitly with strict and layered restrictions so that customary law communities are difficult and hard to fulfill.

**Suggestion**

It is advisable for customary law communities to be open, not close themselves and antipathy towards the government but more accommodating so that if there is a program of state recognition of the customary law community and its customary law having a deadlocked because each party insists on its establishment. It is suggested to the government that willingness to open up with the good will is willing to delegate its authority to the Provincial and District governments in providing declarative inauguration with decrees to the existing
customary law communities and its customary law communities. To activists and observers of customary law communities and its customary law to continuously fight for customary law in various ways and media.

REFERENCE LIST


**Biodata Penulis**

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