

Living *adat* Law, Indigenous Peoples and the State Law: A Complex Map of Legal Pluralism in Indonesia

Mirza Satria Buana

Biodata: A lecturer at Lambung Mangkurat University, South Kalimantan, Indonesia and is currently pursuing a Ph.D in Law at T.C Beirne, School of Law, The University of Queensland, Australia. The author's profile can be viewed at: <http://www.law.uq.edu.au/rhd-student-profiles>. Email: mirza.buana@uq.net.au

Abstract

This paper examines legal pluralism's discourse in Indonesia which experiences challenges from within. The strong influence of civil law tradition may hinder the reconciliation processes between the Indonesian living law, namely *adat* law, and the State legal system which is characterised by the strong legal positivist (formalist). The State law fiercely embraces the spirit of unification, discretion-limiting in legal reasoning and strictly moral-rule dichotomies. The first part of this paper aims to reveal the appropriate terminologies in legal pluralism discourse in the context of Indonesian legal system. The second part of this paper will trace the historical and dialectical development of Indonesian legal pluralism, by discussing the position taken by several scholars from diverse legal paradigms. This paper will demonstrate that philosophical reform by shifting from legalism and developmentalism to legal pluralism is pivotal to widen the space for justice for the people, particularly those considered to be indigenous peoples. This paper, however, only contains theoretical discourse which was part of pre-liminary research data. Further research should expand the study by incorporating an empirical aspect.

Keywords: legal pluralism; living *adat* law; legal formalist; legal centralism; Indonesian legal system

Introduction

Today, Indonesia still normatively recognises the existence of living *adat* law and Indonesian indigenous peoples as evidenced by the wording of the Indonesian 1945 Constitution Article 18B (2) that states:

The state recognises and respects integrated legal indigenous communities (*kesatuan masyarakat hukum adat*) along with their traditional customary 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 law.

Article 28i (3) on Human Rights Chapter also states a similar idea. However, Hooker (1975) said that this written recognition is insufficient to protect and sustain the existence of living *adat* law because the position of living *adat* law is ambiguously inferior to the State law.

Law No 5 of 1960 concerning *Basic Agrarian Law* recognises the land rights of indigenous communities with the following conditions:

- 1) As long as such communities still exist;
- 2) It may not conflict with the national interest and the State's interest;

3) It shall not conflict the laws and regulations of higher level.

According to Bedner and Huis (2010), the recognition is unspecific and conditional: it is vague about what rights it refers to, whether a community that is no longer 'traditional' loses its specific rights, and whether these rights remain protected if they are out of tune with 'altered times and culture' and 'national interest' and 'the State's interest'. These norms can be concluded to be rubber norms which have diverse meanings and, consequently, the State can simply interpret them as it pleases to suit.

With regard to the judicial system, the common view is that the majority of judges and justices fiercely embrace a strong legal formalism paradigm (Putro, 2011, 27). As the former Chief Justice of the Supreme Court, Bagir Manan, said:

It is illogical thought to consider justice and other external values into legal reasoning processes. The judge must always consider the existing positive laws. (Manan, 2003, 34)

This paper will investigate the practices of legal pluralism in Indonesia particularly in philosophical, social and legal spheres. First, it is important to discuss and examine diverse legal terminologies utilised by the prominent scholars in regard to legal pluralism discourse in Indonesia. The choice of terminologies is crucial to the discussion because without determining a correct terminology the study may generate misunderstanding, lose its socio-legal characteristic and not focus on Indonesia's context.

The development of legal thoughts in Indonesia will be elaborated on by discussing the position taken by several prominent legal scholars. It starts from the idea of inseparability between morality and law proposed by naturalists, to legalism, to sociological and to the apex of contemporary legal discourse propounded by postmodernists. This paper only consists of theoretical discourse which aims as a theoretical framework. Further research should look into empirical studies on this area.

Debateable legal terminologies

Living adat law

The literature has introduced a large number of definitions referring to the law that sociologically are being used within local communities. The definitions are diverse, and scholars who embrace common law traditions such as Jain (1995), Allot (1995) and Forsyth (2009) often use the concept of customary law to depict the phenomena. On the other hand, civil law scholars prefer to use living law or *adat* law, because, according to Vollenhoven whose work was mainly influenced by Savigny and Ehrlich, *adat's* definition has a broader meaning than customary law (Benda-Beckmann F and K, 2009, 177). Vollenhoven considers *adat* as 'folk law', 'people's law' or 'living law', which has dynamic and flexible characteristics (Bourchier, 2008, 54; Thorburn, 2008, 78; and Hertogh, 2009, 64).

The concept of living law is more appropriate than *adat* law, because the living *adat* law is a living, actual and contextual law that is being practiced and obeyed by the community (Benda-Beckmann F and K, 2009, 177). The living law, because of its general characteristic, can be classified as a principal taxonomy (*genus*), and the customary law as a part of living law can be classified as a its *species*.

Living *adat* law is a real manifestation of the people's legal culture. It is an unwritten and genuine law of Indonesia which has been influenced by religious laws. Even though it is considered to be indigenous or primitive law, *adat* as a living law has several general concepts, elements, and divisions that are consistently ordered. Thus, living *adat* law can legitimately be termed a legal system (Soepomo, 1980, 12).

Philosophically, living *adat* law is divided into two laws. First, *adat yang berbuhul mati*, which literally means *adat* that is tied to death, is a strict *adat* law. It is neither negotiable nor adaptable to changes or context, and is dogmatic and transcendental in nature. Second, *adat yang bertali hidup* or *adat pusaka*, which means a flexible and fluid *adat*, is a law that passes from one generation to the next and is subject to social change (Koesno, 1998, 45). This *adat* is sociological in nature; *adat* as a living law grows and thrives within the community.

Even though, both terminologies share many similarities and differences, this paper will use living law or *adat* law interchangeably as the primary terminology, because nothing can accurately reflect and explain original Indonesian values better than our 'own' language and words (Messier, 2008, 10).

Indigenous peoples of Indonesia

There are contested definitions of indigenous peoples, which both international and national organisations have provided. Internationally, the *ILO Convention No 107* defined indigenous peoples through patronising language and talked about integration policies. This resulted in policies to integrate indigenous peoples into the majority class, rather than to appreciate their distinctiveness. In the 1980s, the ILO refined their previous convention into *ILO Convention No 169*, which is more culturally responsive in that it distinguishes between 'tribal people' and 'indigenous peoples,' but appreciates that there is some overlap as they are not mutually exclusive categories.

The UN issued *the United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). However, this document is not legally binding. Both the ILO Conventions and UNDRIP are considered insufficient in comprehensively defining indigenous peoples. The definition of indigenous peoples itself warrants less focus than, first, how that definition is used to hinder or limit the sovereignty of indigenous peoples, and second, the issue of how the power of 'defining' is used to achieve a 'hidden agenda' from interest groups (Bahar, 2008, 25).

At the national level, according to Ter Haar (1948) and Soekamto (1998), the indigenous community is divided into two groups: a culturally based indigenous community, which is independent from the State structure, and a legally-based indigenous community (*adatrechtgemeenschappen*), which is politically-based and functions within the State structure. Only the second group can be recognised by the State as a legal subject and these are further divided into the subgroups of genealogic, territorial and a mixture of the two.

Abdurrahman said that there are no legally-based indigenous peoples in South Kalimantan.¹ His argument was influenced primarily by Ter Haar, who stresses that in order to be recognised as a 'legal entity', indigenous peoples must be politically rather than

¹ Interview with Abdurrahman, a Justice of the Supreme Court, Banjarmasin, 3 January 2014.

culturally constructed. Ter Haar (1948) determines four requirements for legally-based indigenous peoples:

- (1) The community has well organised groups;
- (2) The community has its own territory;
- (3) The community has its own tribal institution (in particular a tribal court); and
- (4) The community has both material and non-material (spiritual) goods.

This paper disagrees with the classification for the following reasons: First, it may lead to a false dichotomy. Indigenous peoples, like any other community, must be constructed culturally; culture is the starting point for every social norm and law in the community. In fact, the living *adat* laws are a reflection of the culture. Therefore, a dichotomy between culturally-based indigenous peoples and legally-based indigenous peoples is a fallacy. Second, the concept of the legally-based indigenous peoples currently used by the Constitution and legislation may lead to discrimination. This may occur, because there will be indigenous peoples whose cultures and traditions are appreciated, but not recognised as legal entities by the State, and there will be indigenous peoples whose cultures and traditions are both appreciated and recognised as legal entities by the State. The concept of indigenous peoples must be holistically understood as a cultural, political and legal entity.

Traditional dispute resolution (TDR)

Many Indonesian scholars such as Abdurrahman (2002), Medan (2012) and a leading Indonesian NGO concerned with indigenous peoples and human rights such as AMAN (2003) utilise the concept of *adat* court (*peradilan adat*) to depict indigenous dispute resolution within indigenous communities.

Ter Haar (1948) focuses on what he called tribal *adat* courts as a fundamental prerequisite for legally-based indigenous peoples. Based on his argument, the concepts of indigenous peoples and TDR are inseparable. As a result, Abdurrahman states that there are no legally-based indigenous peoples in South Kalimantan, because there are no *adat* courts in South Kalimantan. It is true that there is no *adat* court in South Kalimantan, and maybe in other parts of Indonesia, because the form of dispute settlement used is not even close to a 'court'. TDR is a communal forum aiming to settle disputes peacefully. The tribal chief is not a 'judge', rather, the tribal chief acts as a facilitator and communicator to stabilise the community.

Ter Haar's perspective on Indonesian indigenous peoples was influenced by his civil law background, similar to Vollenhoven whose theory places *adat* sanctions as the cardinal requirement in deciding and grouping indigenous peoples. In rebutting Vollenhoven's sanction theory, Malinowski refines substantially the notion of sanction on *adat* by converting sanction into the principle of reciprocity which is not derived from formal State hierarchy. Sanctions in indigenous communities are used not as a form of payback but to restore the cosmic order by remedying a disorder in the balance of nature. Instead, it is a result of dynamic social relations (Jong, 1995, 111-115).

The essence of TDR lies in the reconciliation agreement between the victim and the perpetrator mediated by the tribal chief. Through this agreement, the perpetrator admits

fault and promises not to repeat the crime, while the victim wholeheartedly forgives the crime (with some compensations). This form of agreement is the essence of living *adat* law, and corresponds with the indigenous proverb: '*agreement is older than adat law, law therefore is agreement.*' Through this agreement, living *adat* law updates its validity within the community. Vollenhoven's understanding of living *adat* law may stem from the fact that he could not free himself entirely from his western civil law background, leading him to think that sanctions are the only guarantee of order (Maddock, 2002, 87).

The typical western concept of a 'court' being imposed on indigenous communities and their TDR should be reviewed. TDR is under much pressure to become more formalised, a tendency that must be rejected, because the formalisation will abrogate the living *adat* law from TDR practice. It is true that some TDR performs a 'court' or adjudication function, but TDR has a broader purpose than just adjudicating. Instead, TDR is not only a process for the settlement of dispute but TDR can also be applied in many other non-conflict social relations including the conclusion of a marriage, childbirth, death and funeral events (Slaat & Portier, 1992, 34). The aims are to strengthen harmony and re-establish cosmic relations between disputing parties within its jurisdiction.

The living *adat* law and social morality become the main source of law (Pryles, 2002, 1-3). Hooker (1975, 294) states indigenous dispute resolution should be based on *adat* values such as: the value of togetherness, the value of totality, and the value of appropriateness. By contrast, the formal court is based on an objective pre-existing legal source which is a legal proposition stipulated by legislators and applied by judges.

Other researchers use concepts such as ADR (Black, 2001; Black, 2005), and informal, popular or non-state justice (Matthew, 1988; Abel, 1994; UNDP, 2006, World Bank, 2008). This paper rejects these terminologies by stating: indigenous dispute resolution is not necessarily an alternative to formal mechanisms, because it is often the first stage of dispute resolution (Astor and Chinkin, 2002, 5).

This paper proposes a concept of TDR because it is a more moderate and inclusive concept encompassing diverse social and legal dispute resolution mechanisms that are being practiced by indigenous peoples.

Legal pluralism discourse

The development of living law can be traced from Savigny's famous maxim *Volksgeist* (a common consciousness of law), as opposed to *Juristenrecht* (lawyer's law). It was originally elaborated from a fundamental principle of *opinion necessitatis* which is the individual's perception of law (Watson, 1995, 154).

In response to the State law hegemony, Ehrlich opposes the formalist's claim that the only valid law is a legal proposition produced by the legislature or State political power or by recognition of 'juristic law' (Hertogh, 2009, 54). He proposes an alternative theory of 'living law' whose values mingle with everyday life even though these values have not been positioned as a legal proposition. Living law is not only directly associated with the State but to the internal orderings of various social groups, and it does not depend on formal recognition from the State. Rather, the people's usage in everyday life determines living law's validity (Cotterrell, 2009, 88). Ehrlich attempts to position living law into legal discourse,

although he has no intention to replace jurisprudence as set out by Kelsen who responded to Ehrlich stating he blurs fact and norm (Klink, 2009, 130-133).

Ehrlich and Kelsen were highly critical of each other in defending their own opinions. The author is inclined to stand in a neutral position as both theories can be merged and integrated in order to construct a normative 'humanistic' legal system. The law still doesn't lose its formal form but it is also filled by other external values such as justice and morality. The author rejects the idea of legal exclusivism that means law can only be understood through internal (judge and legislator) perspectives or a close logical system while disregarding other external values that may lessen legal certainty and objectivity. In the author's view, law should be inclusive in order to strengthen the idea of justice and fully open access to justice. Judges and legislators have a significant role to balance those values by reflecting on the social context that the law applied.

The living law theory contributes to the emergence of the concept of legal pluralism. Griffith (1986) identifies the true nemesis of legal pluralism: legal centralism. He was the first to provide a distinction between the so called weak and strong legal pluralism. Weak pluralism, or state legal pluralism, can be seen as the paradox of legal pluralism when the living laws have been embraced and contaminated by the formality of state law; there is no a pureness of law, but a diversity of legal sources is still exist. On the other hand, strong legal pluralism is a situation in which not all of the law is state law, nor is all of it administrated by a single set of state legal institutions.

Santos (1987) utilises legal pluralism as a yardstick to enter post-modernism discourse. Formalism's claim that law only operates on a single scale is opposed by legal pluralism that claims there is no single legality, but diverse legalities. Post-modernism rebuts the State metanarrative through its cardinal principles including hierarchical power, legal texts and objectivity (Stacy, 2001, 45).

In regard to postmodernist's on the Indonesian legal system, there is a sceptical tone, saying that Indonesia is not in a right stage to embrace postmodernism thoughts, because as a developing country Indonesia is still struggling to be a modern country. In other words, any postmodernism discourse is irrelevant to Indonesia. However, the author opposes that statement by arguing both modernism and postmodernism are the product of the European Renaissance which is based on rationality and humanism.

The existence of postmodernism is necessary to fill the gap in the organic life of modernism that preserves the status quo, dichotomises the public and private sphere, and may discriminate against the 'have nots', which in turn nurtures 'the social time bomb' that may suddenly escalate into severe conflicts between groups. Therefore, disregarding postmodernism can be seen as closing the book of knowledge, the fading away of dialectical inquiry and lead to the ignorance of unjust social relations.

Indonesia's experience

This paper contextualised legal pluralism debate and discussion to Indonesia, beginning in the post-colonial or unification era, new order developmental era and continuing to the current reformation era.

Post-colonial (unification) era

Soepomo was an important person whose insights and knowledge framed the Indonesian legal paradigm. His *integralistic* theory was romantic in that it favoured the Indonesian *adat* values as the legal foundation for the Indonesian legal system, while lessening Western and individualistic values. Soepomo's speech at the Preparation Meeting of Indonesia's Independence highlighted his paradigm:

The foundation of the nation must be based on its own legal experiences (*rechtsgeschiede*) and its social structure and institutions (*sociale structuur*). Other nation's contexts are not guaranteed to be fitted to Indonesia's context. (Kusuma, 2004, 125)

Soepomo (1980) considered *adat* law a living law, one that was continually and actually living within the community and that, reflected the legal conscience of the community.

Soekarno (1964) added to Soepomo's argument by proposing a concept of Indonesian democracy, which was not Western democracy, but a synthesis of political and economic democracy aimed social welfare. Hatta then added to this further by rejecting the Western liberal political concepts, stating that Indonesia's democracy must be rooted in the spirit of collectivism not liberalisation. Hatta referred to his democracy concept as, a social democracy influenced by three sources: Western socialism, Islamic teaching and indigenous collectivism (Manan, 2011, 8), which was rather an ambitious wish.

In the post-colonial era to the earliest years of developmental era, Koesno was the key defender of natural law and the *adat* law school. He actively advocated the notion of law as a value, which went against the mainstream perspective of legal formalism. Koesno was convinced that Indonesian law should be spirited by *adat* law, with its two cardinal principles: democracy and national fraternity (Koesno, 1995, 120).

Koesno's stand point was meta-physic and categorical in nature. He rejected the principles of the separation of law into: objective law and subjective law. He considered that classification to be misleading, saying that subjective law is the true meaning or spirit of the law which becomes the essence of positive law. In other words, legal values are higher than positive law. In Indonesian law, the objective law is equivalent to state law, and subjective law is equivalent to 'rights'. He also rebutted dogmatic inquiry and legal language, which primarily influenced by Dutch's terminology, including the superiority of the rule of regulation.

In its earlier years, Indonesia was not prepared for a sophisticated legal structure. Thus to avoid a legal vacuum, the newly born republic simply transplanted the Dutch colonial laws to the Indonesian legal system. The initial transplantation project was done by literally translating both the Dutch Civil Code (BW/KUHP) and the Criminal Code (WvS/KUHPid) into the Indonesian legal system (Koesno, 1994, 110). These Dutch legacies are still maintained today, and are dogmatic in nature.² Because the positive laws were a literal translation from Dutch, the Dutch legal language was mandatory at the time. The judges had to know the

² The legislation of the Dutch legacies was manifested in Transition Article II of Constitution (Before Amendments) and Government Regulation No 28 of 1945. These Laws were legally accepted, as long as did not contradict to the spirit of the Independence Declaration and Constitution. The spirit of the colonization must be replaced by the spirit of the law; this policy is called judicial tolerance.

meaning of the legal wording in both Dutch and Indonesian. Meanwhile, they were obligated to apply positive laws to concrete conditions and were trained to be technical jurists, which was typically for a civil law jurist.

However, the codification policy had its drawbacks. With respect to the legal language, even though the judges had a good understanding of Dutch, they lacked contextual insights into the legal text. For example, the law of adultery in the Criminal Code was from a European context whose propositions were totally different from living *adat* law and Islamic values. In the Criminal Code, the definition of adultery was narrow because an act could only be considered adultery if one of the perpetrators was married. On the other hand, living *adat* law and Islamic values shared the same position with regards to adultery, in that either perpetrator, married or single, was subject to punishment. In the Civil Code, the notion of private goods was divided into both static goods (*onroerend*) and moving goods (*roerend*). In contrast, this dichotomy was not accepted in living *adat* law. With regards to agrarian law, living *adat* law was radically different to modern law. The ownership of land and properties on the land are separated. For instance, the indigenous peoples own the land, but it can still be borrowed or used by others. However, there are no rights for the disposal of communal land, so the land can be transferred or used as debt collateral. In modern law, the ownership of land is holistic, and owning the land also means owning the properties and resources extracted from the land. The land also has both the right to use and the right to disposal (Koesno, 1991, 123).³

To overcome the problem of legal language, the government stipulated Urgent Law No 1 of 1951 concerning Judiciary. Even though this Law abolished indigenous TDR within Indonesian archipelago, it had the positive effect, that although the government formally abolished the living law institutions, their essences were transmitted into the judge's legal reasoning.⁴ Koesno (1995) encouraged judges to trace the internal morality of the law into legal reasoning processes.

The essence of judicial independence does not just rely on a constitutional provision for a formally separate and independent judicial branch of government, but also stresses the freedom of the judge to elaborate law and use judicial discretion. This is necessarily saying that a judge is more important than a legislator, thus the judge should be intellectually independent and free from dogmatic legislative pressure.

Koesno was not only against legal formalism, he also rebutted the movement of legal pragmatic or sociological jurisprudence. Law as a tool changes the position of law from meta-physic, *a priori* (law as a value) to an *a posteriori* sociological-empirical stand point. It is not society that follows the values of the law, but the law itself that must adapt to its social surrounding. Koesno rejected this proposition; however, he strayed in understanding from Ehrlich's theory, which he claimed as a free law tenet. In fact, Ehrlich's theory was a living law theory, which was a sociology of law theory, thus making Koesno incorrect in positioning Ehrlich's theory as sociological jurisprudence. With regards to Pound's theory, he wrongly interpreted the word 'law' in 'law as social engineering' as 'legislation'. As a matter of fact, 'law' in Pound's context was a common law, meaning a court decision. In fact, idealistic

³ The separation land ownership principle is recognized by the Agrarian Law No. 5 of 1960.

⁴ Urgent Law No 1 of 1951 concerning Unification of Judiciary, Article 5 (3) b.

jurisprudence supported by Koesno and sociological jurisprudence are not strongly contradictory, because both theories are meta-physic and structuralistic in nature, and the law is transmitted from above. The only difference is that sociological jurisprudence adds external interests to the law.

Koesno's disagreement with sociological jurisprudence was caused by Indonesian legal experiences rather than the concept itself. In the Old Order regime, Soekarno used law as a tool of revolution, his political jargon, and in the New Order regime, Soeharto used law as a tool of 'development', favouring his cronies and evil businessmen. Koesno argued that in order to find the true spirit of Indonesian law, the legislators and judges must look closely at the Preamble of the Constitution, as well as its Articles and explanation. Meanwhile, imported Western legal perspectives should be lessened. Koesno (1994) was critical of codification, and of a hybrid legal system. He believed that a legal system that is the result of legal transplant from imported legal values will jeopardise the true and pure Indonesian legal system. Koesno's *a priori* reasoning seems too naive and emotional, because, today, the Preamble of the Constitution has been erased and its essence transferred to the Constitution's Articles.

New Order developmental era

The legal system in general, and legal education in particular, in Soeharto's developmental era was misleading, because the law was considered a mere 'legitimation' of economic development. 'Development' soon became a much-used (and much misused) word at the time, with almost all governmental aspects being inserted with development jargon.⁵

Mochtar Kusumaatmadja⁶ had a significant role in establishing the 'development' notion. Kusumaatmadja was a strong protester against Soekarno's guided democracy and the socialist economics paradigm. Kusumaatmadja was influenced by structuralist and functionalist theories, particularly from Pound, Northrop, Lasswell and McDougal, whose theories he modified to implement in the Indonesian context. He called his theory 'normative sociologic' jurisprudence (Wignjosoebroto, 2012, vii; Kusumaatmadja, 1997, 11).

Kusumaatmadja was inclined to place the law as the core of social and political affairs. His theory of 'law as a tool of developmental engineering' was similar in many ways to Pound's theory, but also had several differences. Kusumaatmadja clearly copied Pound's sociological and pragmatism jurisprudence by favouring the state law as the main 'tool' to 'domesticate' people and ensure social order. He considered it is a patron-client relationship (Sidharta, 2012, 11).

There were several differences between Kusumaatmadja and Pound. Kusumaatmadja's theory reduced the law to mere legislation and favour to public (state) interests by giving authority to the legislature and executive body (President) to legislate the law. Legislations were considered the most rational and effective way of making the law,

⁵ These 'development' jargons included: cabinet of development, economic of development, national development, sustainable development, education of development. Notably, legal guidance of the government, the National Guidance (GBHN) 1973 and the National Development Five Years Plan (Repelita) II, stated that legal development had an important role in all governmental aspects.

⁶ He was a former Minister of Justice (1974-1978) and Minister of Foreign Affairs (1978-1988). Kusumaatmadja's academic pinnacle was between the 1970s and 1995, coincidentally the summit of Soeharto's developmental era.

compared to precedents and living *adat* law. He believed the legislative body, with the backing of a strong executive power, was sufficient to absorb the people's aspirations and grass-root perspectives, which was a rather naive contention.

Kusumaatmadja's structuralist paradigm was more radical than Pound's and far more so than Northrop's, because Pound, in particular, still considered social interests as significant ingredients in the law-making process. Kusumaatmadja, on the other hand, suggested that it was not the state that follows society's aspirations, but the state law that must be positioned as a sole regulator and initiator, and society, like it or not, must obey the law of the state.

Furthermore, in the name of 'development', the judicial system must uphold the government policy. Kusumaatmadja situated the ideology of development above the supremacy of the law.⁷ In contrast, Pound's context was a common law tradition in which judges have a significant role in elaborating the law and have the ability to simply re-new the law. The supreme source of law was not positive law (legislation), but rather, a legal principle that may be a custom or community value. This principle must be flexible and fluid depending on the social interests, and social interests must override state interests (Cotterall, 1996, 23).

With regards to living *adat* law, Kusumaatmadja dichotomised *adat* law and living law by saying that *adat* law was an obsolete and colonial legacy law which is irrelevant for Indonesia's development, thus the cult of *adat* law must cease (Rasjidi, 2012, 121). On the other hand, the living law, which was customary law, should be positioned as a guidance for state law. The living law, located outside the epicentre of government, must be modified and used for the sake of state development. Unification must be supported because it will guarantee legal certainty and support law and order, and pluralism from the Dutch legal dualism era must be forgotten because it was merely an anti-acculturation policy aimed at alienating Indonesians from modernisation (Kusumaatmadja, 1997, 185).

Indonesian legal development under developmentalism, must support national stability, and therefore, legislation must be regulated by insensitive issues only, while avoiding sensitive issues, such as human rights, the protection of labour and marginalised people. The character of the law soon changed to conservative. The first priorities of the state were to stimulate rapid economic development and promote state stability. The law became static as it was reduced into positive law, and legislation was considered self-sufficient. This led the judiciary to a singular reliance on legislature, an excessively formalist attitude. The jurists could not even imagine how to interpret the law creatively.

This was worsened by the idea that precedent was not binding, because Indonesia was a civil law country. Precedents only had a binding-power in the common law tradition, and thus, in Indonesia, judge should be less concerned with precedent. In fact, Kusumaatmadja's argument was obsolete because there was no doubt that in all developed civil law systems, precedent was considered binding (Bedner, 2013, 263). This faulty allegation caused Indonesia's legal development to suffer from a formalist paradigm.

⁷ In the New Order era, the Supreme Court and its subordinate courts were under surveillance and structure from the Ministry of Justice. In that time, the court was totally under control of President Soeharto.

Reformation Era

Despite law reforms since the fall of Soeharto, formalists and developmentalists still actively promote their ideas with the aim of putting Indonesia back on the 'developmental track'. One follower of the late Kusumaatmadja is Erman Rajagukguk⁸, who fiercely upholds the notion of state developmental evolution. Rajagukguk's ideas were influenced by Organski's view that the modern nation has gone through three development stages: unification, industrialisation and social welfare state (Mendelson, 1969, 223).

He believes that Indonesia, like many other countries that have undergone these stages, such as Japan, England, and the United States of America, must have consecutive consistencies with these developmental stages. This view was derived from Rostow (1960) who strictly dichotomised the traditional and modern communities, and believed that the traditional community should be weakened and, if possible, eliminated in order to achieve modernisation.

Rajagukguk (2007) implicitly advised the current government to continue the developmental and industrialization policy, because, in fact, Indonesia is still in its industrialisation stage. Law and its practitioners must fully endorse economic development by creating legal certainty and stability in all aspects of business and foreign investment, and lastly educate lawyers as corporate lawyers who strongly uphold 'the law of economic'. These strategies are the meeting point between formalists and developmentalists. Development and human rights are positioned as contradictive elements, and the state cannot address them both. Instead, the state must choose whether it wants to prioritise development while disregarding human rights, or vice versa.

This approach has its drawbacks, in that the capitalist laws must override human rights principles and disregard access to justice for marginalised groups because development is considered to be nothing more than economic growth. O'Manique (1992) suggested an alternative approach which contradicts to the Rostow's view. He stated that development must be derived from human rights values, and the government must make laws or policies that respond to social needs (Donnelly, 1985, 29). In other words, the human rights position is higher than the law and state interests, and to achieve civilised development both human rights and development theory must be seen as fundamentally complementary and mutually reinforcing at all times.

A second person whose ideas and insight changed the performance of the Supreme Court in general, and judges and justices in particular, is Bagir Manan.⁹ Manan was being stamped as a conservative-legalistic jurist. However, he rejected the accusation by saying that the law is not merely wording, but also an understanding. This does not necessarily mean that he only considers formal written evidence in court proceedings; the judge's tool in court is his reason, used through law-finding processes either to construct, sublimate, interpret or make the law. These processes are inherent in judicial discretion (Manan, 2011, 23). However, he still opposed the over-exposure of sociology to legal reasoning processes. Sociological facts are just one of the instruments used by judges to understand the subject matter of a

⁸ He is a legal professor in the Faculty of Law at the University of Indonesia.

⁹ He is a former Chief Justice of Supreme Court. He was rather conservative compared to his colleague, Mahfud, who was a former Chief Justice of Constitutional Court, and ex-politician.

case; they are needed to compile a satisfied judge's decision. However, sociological facts must not negate legal consideration.¹⁰

With regards to pluralism, Manan considered it a universal phenomenon because it was a logical consequence of living and sharing a world where everyone is different. Pluralism not only manifests in a cultural setting, but also occurs in social and economic settings. The state in general, and the judiciary in particular, respond to pluralism by exercising affirmative action policy, which is a responsive policy aimed at balancing the bargaining power between a marginalised and a superior group. Judges also have an obligation to exercise this policy, because normatively affirmative action is a manifestation of the social justice principle, explicitly stated in the Constitution. However, there is a difficulty in implementing this policy in the judiciary, because Indonesian judges are doctrinally educated by a strict dichotomy between public laws, including constitutional law, criminal law and private laws. Judges who specialise in either criminal or private laws can rarely connect legal issues with constitutional issue, which is why the court's decisions are mostly poor in constitutional reasoning.¹¹

Manan did not wish to preserve the pristine living adat laws, but rather supported a gradual modernisation of indigenous peoples and their laws. With a significant modernisation, living *adat* law can gradually change, either horizontally by blending and mingling with other religions or perspectives, or vertically, through both legislations and court decisions. The judicial institution has a role to modify and contextualise the living adat law.¹²

Despite his kind responses to living *adat* law, Manan still puts the state judicial institution and its judges at the centre of legal development and enforcement, a typical structuralist's paradigm.

Conclusion

In today's world, jurisprudence has become more inclusive than exclusive. The dichotomies among legal paradigms tend to merge with each other, most notably in the case of natural law and legal formalism. However, there are still fundamental differences among them, due to a difference in point of view: external vis-à-vis internal. The wise policy would be to synthesise these legal paradigms, in order to correspond to a country's legal, social and political context.

The state legalistic system must also be balanced by appreciating other non-legalist theories, including sociological jurisprudence, sociology of law in general and legal pluralism and living law theories in particular. An appreciation and reception of these theories is important to ease the rigidity of the state legal system and to create a legal equilibrium. Shifting the legal paradigm is necessary, but is not necessary in a radical way by ignoring state sovereignty. Thus, the idea of implementing strong legal pluralism is rather naive. Instead, state legal pluralism should be enforced.

From a modern law perspective, living *adat* law is a pre-modern communal lifestyle whose its existence depends on communality. There is less freedom of will and intellectual independency, as intellectuality is limited by communal decisions. This communality may lead

¹⁰ Interview with Bagir Manan, Jakarta, 20 March 2014.

¹¹ Ibid.

¹² Ibid.

to a purification, which would eventually create exclusivism and a patron-client relationship. However, the negative effects of communality can be controlled by implementing state legal pluralism and affirmative action policy, which protect the community's rights, limit the tendency toward segregation, while empowering the individuals within the community.

With regards to 'development' practice, the state in general, and judicial institutions in particular, must embrace the idea of human rights, thus development practice must be based on human rights principles, not the interests of corporations and elites.

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