

# Adat Law and Legal Pluralism in Indonesia: Toward A New Perspective?

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**ABSTRACT:** Adat law is part of Indonesia's legal system with unwritten characteristics. To some extent, it embeds with religious values. As a country with pluralist societies, adat law plays an important role in Indonesia that increasingly adds the critical discourse of legal pluralism since it originates from indigenous values based on habits to execute from the older generation. This study aimed to analyze the contextual development of adat law in Indonesia through a historical perspective and its applicability to its emerging positivization in the form of state law. It emphasized the recent development of transforming adat law into state regulation through by-laws with the following prospects and challenges. This study used socio-legal method research, a cross-disciplinary approach in nature through the form of analysis to the normative and contextual issues of adat law. This paper concluded that constituting the state regulation contains the boundaries to implement adat law as the right of adat community, adat court, and the adoption of the adat values. The positivization has developed by adopting adat law to by-laws at the regional level of governments. By-law is assumed to have law enforcement that binds the community because it comes from the habits of the community. Therefore, it indicates a new paradigm in recognizing and protecting adat law, not through by-laws, in which both adat and state laws are different and could not be a unity law.

**KEYWORDS:** Adat Law, State Law, Legal Pluralism, Indonesian Law.



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## I. INTRODUCTION

Legal pluralism has a long historical pedigree and varied from community dispute resolution to the international system. While it is regarded as the traditional system, it remains embedded with the creation of the modern state. Hitherto, legal pluralism has shaped interactions between different societies in parts of Africa, Asia, Latin America, and the Pacific which have similar issues of pluralistic societies.<sup>1</sup> Indonesia is a country with various legal forms and values in developing its legal system due to its pluralist and divided societies. In doing so, adat law plays an important role in Indonesia. It increasingly adds the critical discourse of legal pluralism since it originates from indigenous values based on habits to execute from the older generation.<sup>2</sup> Consequently, adat law applies in a various customary law community.<sup>3</sup> For instance, in some regions of Indonesia, adat law remains to govern customary marriage, its procedures or ceremonies, with the following the termination of customary marriage.<sup>4</sup> The traditional values that develop in the community are honored as an entirely usable law. Indeed, while people society violates the law, they get sanctions in the form of moral sanctions.<sup>5</sup> Adat law is an inheritance to be guarded and preserved and provides binding obligations to obey the law. Even though adat law is an unwritten law, it binds powers as part of the Indonesian legal system

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<sup>1</sup> Geoffrey Swenson, "Legal Pluralism in Theory and Practice" (2018) 20:3 *International Studies Review* 438–462 at 441.

<sup>2</sup> Gary F Bell, "Multiculturalism in Law is Legal Pluralism—Lessons From Indonesia, Singapore, and Canada" (2006) *Singapore Journal of Legal Studies* at 316.

<sup>3</sup> Muhamad Jefri Ananta, Dominikus Rato & I Wayan Yasa, "Perceraian dan Akibat Hukumnya terhadap Anak dan Harta Bersama Menurut Hukum Adat Osing di Desa Aliyan, Kecamatan Rogojampi, Kabupaten Banyuwangi" (2017) 4:3 *Lentera Hukum* 221–236 at 230.

<sup>4</sup> Dhelima Putri Laksana, Dominikus Rato & Emi Zulaikha, "The Cost of Panai' as the Marriage Requirement for the Migrant Bugis Tribe under Adat Law" (2020) 1:1 *Indonesian Journal of Law and Society* 57–74 at 61.

<sup>5</sup> Franz von Benda-Beckmann & Keebet von Benda-Beckmann, "Myths and stereotypes about adat law: A reassessment of Van Vollenhoven in the light of current struggles over adat law in Indonesia" (2011) 167:2–3 *Bijdragen tot de taal-, land- en volkenkunde / Journal of the Humanities and Social Sciences of Southeast Asia* 167–195 at 171.

and influences the development of positive law.<sup>6</sup> Sanctions for violations of adat law can provide moral effects with its relationship to societies. Thus, it becomes a strong reason to argue that adat law is more obeyed and socially binds than positive law.

Historically, adat law had emerged before Indonesia gained independence. It has gradually developed with the influence of the indigenous people's interactions and traditions. Besides, the primary excuse is that adat law remains in Indonesia because of the integralists' values in the community. The indigenous values implement the law to represent the soul of the society by referring to Savigny's *Volkgeist* model.<sup>7</sup> While the sole source of all laws that come directly from adat is evidence of its existence, the diversity of legal forms emerged from the general belief of the society, as feeling and inner need and not evolve based on deliberate natural reflection or reasoned considerations.<sup>8</sup> Forming the relationships between people and values makes society more comfortable to achieve the aims of the law. Hence, adat law becomes the anticipation of chaotic situations based on their customs related to social conditions.<sup>9</sup> In specific circumstances, the law was considered a feared ruler that the aim of the law could not achieve as a preventive aim.

The expansion of adat law has led to various regulations depending on the values and traditions.<sup>10</sup> It has begun in the Pre-Hindu era by covering a broad concept through cultural and religious acculturation.<sup>11</sup> Postulation is

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<sup>6</sup> Jeroen Adam, "Forced Migration, Adat, and a Purified Present in Ambon, Indonesia" (2008) 47:4 *Ethnology: International Journal of Cultural and Social Anthropology* at 231.

<sup>7</sup> Andreas Rahmatian, "Friedrich Carl von Savigny's Beruf and Volksgeistlehre" (2007) 28:1 *The Journal of Legal History* 1–29 at 8.

<sup>8</sup> Luis Kutner, "Legal Philosophers: Savigny: German Lawgiver" (1972) 5:22 *Marquette Law Review* at 285–286.

<sup>9</sup> Najmu Laila Sopian, "Informal Dispute Resolution Based on Adat Law: A Case Study of Land Dispute in Flores East Nusa Tenggara, Indonesia" (2015) 5:2 *Indonesia Law Review* 106–122–122 at 107.

<sup>10</sup> Laurens Bakker & Sandra Moniaga, "The Space Between Land Claims and the Law in Indonesia" (2010) 38:2 *Asian Journal of Social Science* 187–203 at 188–189.

<sup>11</sup> Ridwan Ridwan, Khudzaifah Dimiyati & Aidul Fitriadi Azhari, "Perkembangan Dan Eksistensi Hukum Adat: Dari Sintesis, Transplantasi, Integrasi Hingga Konservasi" (2017) 6:2 *Jurnal Jurisprudence* 106 at 109.

the historical legacy that has been used since the past to resolve disputes. In Bali, the adat village is a community of adat society whose hereditary traditions and manners generations are in the bonds of Kahyangan Desa that has an area of their property and has the right to manage the household. Existing Adat law in Bali on agreement contained in *awig-awig* and *pararem*, where the sanctions are in the form of reprimands and warnings for who commits a crime.<sup>12</sup> The legacy influences the community to solve problems based on values. The definition between custom and adat law should be different.<sup>13</sup> Custom is a habit, whereas adat law is a rule based on the custom. It facilitates establishing legal provisions for the community.<sup>14</sup> In 1927, the Dutch East Indies government had planned to codify adat law for indigenous people as their regulation.<sup>15</sup> The codification is systematically exposed to document adat laws from one locality to the others to advance the law and assist judges who must adjudicate according to Indonesian native law.

The proposal to codify adat law recently re-emerged, mainly when adat values were more abandoned, while rights recognition was restricted.<sup>16</sup> The rights protection of the indigenous people by adopting adat law into state law will eliminate adat values.<sup>17</sup> It asserts that the way to protect the right by codification and transforming adat law into state law will offer two impacts on adat law. The positive impact is protecting and recognizing the

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<sup>12</sup> Dewa Ayu Agung Intan Pinatih & Malik Akbar Mulki Rahman, "Awig-Awig and Legal Awareness of Community: How Does Customary Law Provide Security for Local People and Aliens?" (2020) 2:4 The Indonesian Journal of International Clinical Legal Education 491–502 at 493–494.

<sup>13</sup> Bakker & Moniaga, "The Space Between," *supra* note 7 at 188–189.

<sup>14</sup> Yantje Liauw, et al., "Adat Law in Designing of Land Law System" (2015) 8 at 43.

<sup>15</sup> Bono Budi Priambodo, "Positioning Adat Law in Indonesia's Legal System: Historical Discourse and Current Development on Customary Law" (2018) 02 Udayana Journal of Law and Culture 25 at 146.

<sup>16</sup> Komnas HAM, "Masyarakat Hukum Adat Wajib Dilindungi dalam Peraturan Perundang-undangan", (5 August 2021), online: <<https://www.komnasham.go.id/index.php/news/2021/8/5/1861/masyarakat-hukum-adat-wajib-dilindungi-dalam-peraturan-perundang-undangan.html>>.

<sup>17</sup> Jacqueline Vel, Yando Zakaria & Adriaan Bedner, "Law-Making as a Strategy for Change: Indonesia's New Village Law" (2017) 4:2 Asian Journal of Law and Society 447–471 at 4.

adat community's rights. The negative effect is that values of the law are not as sacral as unofficial law. The regulation of adat law executes in the form of *peraturan daerah* (by-laws) that believe suitable to protect adat law.<sup>18</sup> In this context, adat law will emerge the aims of the law because there is a relation between the law and society. However, the faith strengths and the integralist values contradict the state law values.

This study aimed to analyze the contextual development of adat law in Indonesia through a historical perspective and its applicability to its emerging positivization in the form of state law. It emphasizes the recent development of transforming adat law into state regulation through by-laws with the following prospects and challenges. According to this background, this study has three main discussions. The first part of the discussion enquires the characteristics of adat law and the relation between law and society, especially the regulation to protect human rights using a historical perspective. The second part explores the idea of transforming adat law into state law to be considered in Indonesia's legal reforms. The last part examines the accuracy of the concept of legal pluralism in Indonesia by reconstructing adat law in the Indonesian legal system due to the religious-communalistic background of adat law.

## II. METHODS

This study used the socio-legal method as it probed a normative framework and social customs following the application of adat law in Indonesia. In particular, it is a cross-disciplinary approach in nature through the form of analysis to the normative and contextual issues of adat law; between legal studies, history, and sociology. The research dealt with the decision-making process of the state administration system in the transformation of adat law into state law as a general rule. The data was collected from books, journal articles, doctrines, and news related to the transformation of adat law into state law in Indonesia.

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<sup>18</sup> Andy Omara, "Does The Current Regional Autonomy Support Legal Pluralism in Indonesia?" 10 at 427.

### III. THE CHARACTERISTICS OF ADAT LAW IN INDONESIA: A HISTORICAL OVERVIEW

Legal pluralism is a reality in developing to follow social changes in society.<sup>19</sup> One of legal pluralism is originated from the living law concept as proposed by Eugene Ehrlich.<sup>20</sup> Living law refers to the rules that do not begin from state authority but exist with state law. Pluralism is relevant to Indonesia because of the various religions, cultures, tribes, and customs.<sup>21</sup> Furthermore, Indonesia's diversity is the mindset and behavior that rely on social function as interactive relations to influence each other. Legal pluralism in Indonesia has occurred since the Netherland's East Indies rule with a discussion of Islamic law and adat law to determine the appropriate for the society.<sup>22</sup> Hurgronje and Vollenhoven pioneered the receptie theory that adat law has a higher position than religious law.<sup>23</sup> Even though the opinion is contrary to the concept of Islamic law and cannot be applied, it aims to show how adat cultures are not contaminating with modern ideas. There is controversy because it separates religion and politics, but the goal is how adat values are respected and used by the community itself.

With the legal pluralism concept, Indonesia has applied adat law, Islamic law, and state law (positive law) in the Indonesian legal system to solve complex problems.<sup>24</sup> Soepomo defines adat law as unwritten legislative regulations that include living regulations. Although it is unwritten or

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<sup>19</sup> Gerhard Anders, "Law at its limits: interdisciplinarity between law and anthropology" (2015) 47:3 *The Journal of Legal Pluralism and Unofficial Law* 411–422 at 417.

<sup>20</sup> Diah Pawestri Maharani, "'A-Logical' Character of Indonesian Adat Law Based on Paul Scholten's Perspective" 13 at 5.

<sup>21</sup> Daniel Huizenga, "Articulations of Aboriginal Title, Indigenous Rights, and Living Customary Law in South Africa" (2018) 27:1 *Social & Legal Studies* 3–24 at 15.

<sup>22</sup> Keebet von Benda-Beckmann, "Anachronism, Agency, and the Contextualisation of Adat: Van Vollenhoven's Analyses in Light of Struggles Over Resources" (2019) 20:5 *The Asia Pacific Journal of Anthropology* 397–415 at 401.

<sup>23</sup> Léon Buskens & Baudouin Dupret, "The Invention of Islamic Law: A History of Western Studies of Islamic Normativity and Their Spread in the Orient" in *After Orientalism: Critical Perspectives on Western Agency and Eastern Re-appropriations* (Brill) (2015) at 4.

<sup>24</sup> Yusar Yusar, "The Youth, The Sciences Students, and Religious Radicalism" (2016) 16:2 *Al-Ulum* 330 at 343.

uncodified, the law is respected and supported by the community based on the belief in the power of law.<sup>25</sup> The adat law and Islamic law are developing in a specific community and not intended for all people as state law. The development of adat law determines by legal paradigm, legal politics, and the relation between the law and the community.<sup>26</sup> Adat law is a unique law because of unwritten law, so the source is only from the custom of the people. Law and the community have a crucial role in how adat law is still implemented and obeyed by the community. A good relationship will form an objective and alternative law to the societal problems and contrary if the law gives inconvenience for reasons of regularity will direct the law to be abandoned because it is no longer relevant.

On the other hand, the law is regarded as the soul of people and part of legal science. Savigny classifies the law into two viewpoints; natural law is the law of life, grows and develops in society as adat law, and state law is the law with technical character and control by the government.<sup>27</sup> The original law is adat law that lives in the community and always continues investigating and updating to be appropriate to society.<sup>28</sup> The power of law grows in a society that comes from the complexity of individuals and associations. It has a spiritual bond and becomes a unity of nation and soul.

Even though adat law is uncodified, it has a solid binding in society. Society gives specific sanctions for those who violate the adat law focusing on moral sanction.<sup>29</sup> The adat law arises in a community in a small scope

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<sup>25</sup> Bono Budi Priambodo, "Positioning Adat Law in Indonesia's Legal System: Historical Discourse and Current Development on Customary Law" (2018) 02 Udayana Journal of Law and Culture 25 at 147.

<sup>26</sup> Sarip Sarip & Diana Fitriana, "Legal Antropology Approach on The Application of Village Website in Digital Economic Era in Indonesia" (2018) 5:2 UNIFIKASI: Jurnal Ilmu Hukum 96 at 101.

<sup>27</sup> Olga Maratovna Belyaeva, "On The System of German Law In F.C Von Savigny's Doctrine" (2017) 10 6 at 1730–1732.

<sup>28</sup> *Ibid* at 1731.

<sup>29</sup> Herman Hidayat, et al., "Forests, law and customary rights in Indonesia: Implications of a decision of the Indonesian Constitutional Court in 2012: Forests, law and customary rights in Indonesia" (2018) 59:3 Asia Pacific Viewpoint 293–308 at 297.

with family and individuality concept adheres to community rules.<sup>30</sup> It is a communal character that puts the people's interests in advance of individuals. It differs from western law that separates an individual's interest from the community. Even though western law respects individuals and society, it more focusing on individual interests.<sup>31</sup> Despite achieving harmony between individuals and society, western law with individualism focuses on individual interests, while public interest will consider violations in the community.<sup>32</sup> In adat law context, the main aim of the communal values achieving harmony between individuals and society.<sup>33</sup> Every law has its viewpoints that cannot be generalized. The adat law interprets as the original law of the Indonesian community arising in customs and culture that indicates legal principle to binding and determining Indonesian paradigm.<sup>34</sup> The paradigm is the impact of habits that will influence the relationships between society and the environment that create the conformity between behavior and laws.

Adat community thought that life originated from cultural values with identical religious magic. It is bonding between society and nature with other creatures.<sup>35</sup> Humans and nature become a unity that needs harmony, balance, and continuity to connect with the adat law. Adat community has rights and obligations both individually and socially. The recognition realized in Article 18B(2) of the 1945 Constitution regarding adat law and traditional rights community. It should comply with the principles of the Unitary State of the Republic of Indonesia. Article 28I(3) of the 1945 Constitution state the adat community's cultural identity and traditional

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<sup>30</sup> Rini Astuti & Andrew McGregor, "Indigenous land claims or green grabs? Inclusions and exclusions within forest carbon politics in Indonesia" (2017) 44:2 The Journal of Peasant Studies 445–466 at 16.

<sup>31</sup> Taufik Siregar, "Adoption of Ethnic Customary System (Adat) in Modern Conflict Resolution" (2018) 8: Sept Turkish Online Journal of Design Art and Communication 971–977.

<sup>32</sup> Mark Van Hoecke & Mark Warrington, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law" (1998) 47:3 International and Comparative Law Quarterly 495–536 at 10–11.

<sup>33</sup> George Frans Wanma et al., "The Existence of Adat Law Community in Indonesian Legal Regulations" (2015) 7 at 127.

<sup>34</sup> Anders, "Law at its limits," *supra* note 16 at 416.

<sup>35</sup> Liauw et al, *supra* note 14 at 41.



rights, respecting according to current civilizations. This article guarantees recognition and respect for the adat law community and its rights.

The right of the adat community is vulnerable to extinction because of the diversity and uncodified law. The rights are outlined in the Basic Regulations of Agrarian Principles Law (BAL) 5/1960.<sup>36</sup> The consideration to ensure the adat law was protected the communal rights optimally using natural resources for social interest.<sup>37</sup> It can be diverted through the individual orientation to marginalize people's prosperity. BAL can not guarantee that rights are protected, whether the implementation of regulations is not comprehensive or the content of the law is not filling the community rights.<sup>38</sup> BAL is one of the guarantees that adat law still exists to give positive impacts as a law.

BAL emphasizes Indonesian agrarian law as the adat law that is still in line with the interests of the nation and country and the state law in Indonesia. The substance controlling *ulayat* land by adat communities must be following the mandate of Article 33 of the 1945 Constitution that addresses the state control of natural resources for the greatest prosperity of the people.<sup>39</sup> The policymakers should have the same interpretation of this provision. So, people who have been protecting and maintaining adat rights from generation to generation can become a priority.<sup>40</sup> The relationship between the indigenous community and *ulayat* land does not limit. That land is a place to start life, survive, and have magical religious relations. This relationship illustrates that humans came from the land and will return to the earth. Therefore, the land is sacred and considered sacred in

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<sup>36</sup> Datu Napoh, "Recognition of The Customary Land Law in The Constitution of Indonesia and Malaysia" (2015) 2:2 Brawijaya Law Journal 1–19 at 17.

<sup>37</sup> Brigitta Hauser-Schäublin, "Adat and Indigeneity in Indonesia: Culture and Entitlements between Heteronomy and Self-Ascription" (2014) 29:3 Journal of Social Issues in Southeast Asia 769 at 7.

<sup>38</sup> *Ibid* at 125–127.

<sup>39</sup> Simon Butt, "Traditional Additional Land Rights Before The Indonesian Constitutional Court" 21 at 59.

<sup>40</sup> David Henley & Jamie S Davidson, "In the Name of Adat : Regional Perspectives on Reform, Tradition, and Democracy in Indonesia" (2008) 42:4 Modern Asian Studies 815–852 at 817.

the life of the adat community.<sup>41</sup> BAL will guarantee that *adat* law is an alternative to state law.

BAL has provided many benefits and protections for the adat community. Even though the implementation requires optimal appreciation, BAL has guided to solve many disputes in the community.<sup>42</sup> Presently, there is a development of by-laws with the substance of adat law, which raises a contrary about the rules.<sup>43</sup> The adat law refers to specific customs of a society that have different implementations as state laws because of the contradiction between the values and characters required to protect adat law through interpreting the adat law as the integralist and sacred values.<sup>44</sup> The evidence adat law sources from the behavior that actualizes the habits and rules developed in the adat areas. Naturally, the theory and implementation in each region are different, so by-law is the form to adopt the values of adat law with the boundaries that adat law cannot transform into state law.

#### IV. ADAT LAW AND STATE LAW IN INDONESIA: AN APPROACH TO LEGAL REFORMS

Good law is the law that can adjust the development and community interest. In the democratic era, adat law contributes to the many principles of state law. The policymaker considers the good regulation for Indonesia sourced from the integralist values.<sup>45</sup> A fact can lead to the authoritarian of the government based on short-term political interests. There is no guarantee that policymakers will make rules that are always fair to many people, such as the BAL created during the guided democracy with an

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<sup>41</sup> I Nyoman Nurjaya, “Pengakuan Hukum dan Konstitusi Terhadap Komunitas Adat dalam Negara Multikultural Indonesia : Apakah Pengakuan Sejati atau Pura- Pura?” (2014) 14 at 417.

<sup>42</sup> Henley & Davidson, “In the Name of *Adat*,” *supra* note 37 at 841.

<sup>43</sup> Nurjaya, *supra* note 41 at 419–420.

<sup>44</sup> *Ibid* at 419.

<sup>45</sup> Birgit Bräuchler, “The Revival Dilemma: Reflections on Human Rights, Self-Determination and Legal Pluralism in Eastern Indonesia” (2010) 42:62 *The Journal of Legal Pluralism and Unofficial Law* 1–42 at 3.

authoritarian government system.<sup>46</sup> There was a relation between legal relevance and the power of policymakers where legal reform will occur if there is influence from the government. In the democratic era, many laws are born with an integralist background to direct authority regulations.<sup>47</sup> The regulations propose transforming adat law into state law moreover to protect adat law also can be used as a tool of political power.

Having many laws encourages Indonesia to become an adherent of legal pluralism. The law presents the distribution process to create a direction of the discipline and becomes the framework for creating a productive society. The law works to create a developing people following the values of the archipelago. Legal pluralism refers to the various rules that exist and is adhered to as a source of law.<sup>48</sup> Legal pluralism in Indonesia is not contributing with tools to determine the best laws used in resolving a particular case, which shows Indonesia tends to have a weak legal pluralism. Several laws have not functioned as effective legal settlements instead of creating confusion of the application. Therefore, the reason for transforming adat law into state law, except to protect the rights of the adat community, also minimize legal confusion that occurs in Indonesia.

On the other hand, weak legal pluralism occurs when the state recognizes the other elements of legal systems outside of state law.<sup>49</sup> However, these non-state legal systems are obedient to enforcement under state law. Meanwhile, strong legal pluralism exists when the state recognizes the existence of non-state law and the legal system has the same enforcement capacity as state law.<sup>50</sup> It indicates that creating adat law under the state law

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<sup>46</sup> Ardiansyah, Lalu Sabardi & Widodo Dwi Putro, "National Law Relations with Customary Law in the Establishing of Regulation of the Recognition of Indigenous Peoples Rights to the Land of Ulaya" *IJMMU* at 429.

<sup>47</sup> Muhammad Bahrul Ulum & Nilna Aliyan Hamida, "Revisiting Liberal Democracy and Asian Values in Contemporary Indonesia" (2018) 4:1 *Constitutional Review* 111–130 at 124–125.

<sup>48</sup> Hauser-Schäublin, 2014b, at 11–12

<sup>49</sup> Keebet von Benda-Beckmann & Bertram Turner, "Legal pluralism, social theory, and the state" (2018) 50:03 *The Journal of Legal Pluralism and Unofficial Law* at 263.

<sup>50</sup> Brian Z Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30 *Sydney Law Review* at 382.

will tend to weak legal pluralism. Therefore, the adat law cannot be forced as state law due to several values, not in line with state law, such as religious values and customs, so how to make adat law have an equal position to be recognized and used as law. The law aims to regulate, maintain, and provide solutions to every community.

In its development, adat law has raised to the state law. The evidence is that many regions that created Adat law as a regional regulation (by-laws) indicate the position of adat law changed, mainly the impact on the community's obedience to the law.<sup>51</sup> The aim to transform adat law into state law is the recognition as written law because the binding power of state law is more complex than adat law.<sup>52</sup> It is proven that codification makes more understanding because the law is socialized to the people to make applied generally. Transforming the adat law into state law will implement good regulation because people obey it based on their customs. Adat law is considered more relevant in the updates of Indonesian law when it originates from traditional values that the social relation is close.<sup>53</sup> In addition, transformation aims to achieve maximum legal purposes by providing legal benefits for the community.

A new concept appears that Westerners deny the oral and unwritten law as traditions of the indigenous people but recognize the adat law in Indonesia.<sup>54</sup> They are equipped to recognize these laws, exposed and codified, and explained using Western concepts practiced by Dutch scholars in Indonesia.<sup>55</sup> Meanwhile, codification is written law from the Western as a guideline for implementing and resolving disputes.<sup>56</sup> The adat law originates from religious values and is contradictory transforming into

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<sup>51</sup> Iskandar Muda, "The Effect of Allocation of Dividend of the Regional Government-Owned Enterprises and the Empowerment Efforts on the Revenue of Regional Government: The Case of Indonesia" 16 at 246.

<sup>52</sup> Vel, Zakaria & Bedner, "Law-Making as a Strategy for Change," *supra* note 14 at 8–9.

<sup>53</sup> Anders, "Law at its limits," *supra* note 16 at 18.

<sup>54</sup> Priambodo, *supra* note 15 at 156.

<sup>55</sup> *Ibid* at 141.

<sup>56</sup> Henley & Davidson, "In the Name of *Adat*," *supra* note 37 at 848.

state law. Thus, adat law is interpreted as a variety that becomes a unity.<sup>57</sup> The debate between adat law and western concepts becomes a dilemma when adat law modifies into state law to respect adat law communities.<sup>58</sup> It means a good law from community values but people in every region has different culture and habits.

It will be more critical if adat law is considered a law that binds the community with inherent characteristics such as magic religious, and integralist values that emphasize family law.<sup>59</sup> The adoption of adat law into state law does not aggravate adat values. However, appear the possibility of the values disappearing and eroding because there is no legal stability between the society and the rules. The consequence is that the laws have different purposes because the character forced applied and developed in distinct areas.<sup>60</sup> The codification is evidence of a legal discrepancy between adat and state law. It certainly reduces the Adat law's concept because the power of the law has disappeared.<sup>61</sup> Transforming adat law into state law should be neutral law to satisfy the community.

Not all types of Adat law can be used as state law because it will leave the adat law's meaning.<sup>62</sup> Western scholars view adat law based on two false assumptions. First, adat law can be discussed through the written aspect, translated from original documents, or approved by religious laws.<sup>63</sup> Second, adat law is systematic in parallel with western laws. As a result of understanding the paradigm of western people, then Adat law is seen by the wrong side with all consequences, which are evident in subsequent

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<sup>57</sup> Jaap Timmer, "Being seen like the state: Emulations of legal culture in customary labor and land tenure arrangements in East Kalimantan, Indonesia" (2010) 37:4 *American Ethnologist* 703–712 at 705.

<sup>58</sup> Gary F Bell, "Minority Rights and Regionalism in Indonesia – Will Constitutional Recognition lead to Disintegration and Discrimination?" (2001) 24 at 792.

<sup>59</sup> Liauw et al, *supra* note 14 at 41.

<sup>60</sup> Irzal Rias, "The Effect of Policy of Rural Administration on Customary Villages; Experience of Rural Administration in West Sumatera Indonesia" (2015) 6 8 at 410.

<sup>61</sup> Huizenga, *supra* note 21 at 15.

<sup>62</sup> Omara, *supra* note 18 at 423.

<sup>63</sup> Jacqueline Vel and Willem van der Muur, "Report of the Conference 'Adat law 100 years on: towards a new interpretation?'" 2017 at 4–5.

developments.<sup>64</sup> This understanding continues how adat law will transform into state law that is considered parallel to the absorption of western law into state law.

It is crucial to review adat law theories interpreted precisely as a part of Indonesian law.<sup>65</sup> Most western scholars consider that adat law concepts are not in line with Indonesian need that their perspective is based and sourced from Indonesian cultural values.<sup>66</sup> Maintaining adat values and characteristics is an obligation if western law is dominant in adopting adat law because it can eliminate the adat value.<sup>67</sup> So the recognition and protection of the adat law do not fully justify adopting adat law into state law. Adat law will guarantee to exist within the scope of indigenous peoples. Thus, transforming adat law into state law is not the best way to provide applicable law for the community. Adat law is the only benchmark for making a state law. Besides, Adat law also cannot be applied universally to all people. At the same time, the government's role seeks to protect and preserve by allowing indigenous peoples to implement their laws as long as they do not contradict national law.

## V. A STRUGGLE TO MAINTAIN ADAT LAW IN INDONESIA

The appearance of strengthening Adat law occurred after the Reformation caused the military regime's control of community power to weaken. At the same time, the power organized all aspects, including the village-level government.<sup>68</sup> The adat law is supposed to influence all sectors because it has emerged from indigenous values that are morally bound. The political sector is how the headman can manage people to obey the rules based on their political strength.<sup>69</sup> Moreover, Police and judges need respect from

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<sup>64</sup> *Ibid* at 6.

<sup>65</sup> Butt, *supra* note 39 at 66.

<sup>66</sup> Vijesh V Krishna et al., "Land markets, Property rights, and Deforestation: Insights from Indonesia" (2017) 99 *World Development* 335–349 at 336.

<sup>67</sup> Dominikus Rato, *Hukum Adat Kontemporer* (Laksbang Justicia, 2015) at 69.

<sup>68</sup> Ridwan, Dimiyati & Azhari, *supra* note 8 at 111.

<sup>69</sup> *Ibid* at 112.

society to enforce laws. Its circumstance showed that the indigenous values are defeated the power of state institutions.

Adat law with various sanctions has psychological and physical sanctions such as beatings, expelling from the village, paraded around, destruction of property which adjusted to the type of violation committed.<sup>70</sup> In reality, the sanctions of violating adat law have more deterrent effects than the sanction is limited to execution and how the perpetrator does not repeat the action. It is the difference between adat and state law because people can avoid sanctions.<sup>71</sup> After all, it does not contain the values, just limited to abort obligation because of the codified law that has clear sanctions.

Observing the power of adat law as a legal solution for society should be supported by the government infrastructure and policymakers as part of the adat community. The aims are that the law will be appropriate and understood by policymakers and the people who implement it. The state more respected the state law in the national legal system. The claim is strength on national legal development paradigm that relies on codification and unification.<sup>72</sup> That paradigm does not permit legal pluralism in Indonesia, even though the 1945 Constitution and some provisions on legislation provide opportunities to present adat law to solve problems in the community. However, the reality of adat law has no proper place to exist. The evidence is how many law enforcement officers, such as the Police, prosecutors, and judges, override adat law's role.<sup>73</sup> As pragmatism by the government (*law enforcement*), it is not uncommon in cases and certain regions to recognize legal pluralism.<sup>74</sup> Several districts in Indonesia prove adat law has a substantial influence on people's lives, but the power possessed is not as high as state law.

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<sup>70</sup> Bakti (Bobi) Setiawan & Sudharto P Hadi, "Regional autonomy and local resource management in Indonesia" (2007) 48:1 Asia Pacific Viewpoint 72–84 at 77.

<sup>71</sup> Astuti & McGregor, "Indigenous land claims or green grabs?", *supra* note 30 at 14–15.

<sup>72</sup> Edward Aspinall, "Democratization and Ethnic Politics in Indonesia: Nine Theses" (2011) 11:2 Journal of East Asian Studies 289–319 at 294.

<sup>73</sup> Simon Butt, "Regional Autonomy and Legal Disorder: The Proliferation Of Local Laws In Indonesia" (2010) Singapore Journal of Legal Studies at 4.

<sup>74</sup> Stepanus Makambombu, "Access to Agrarian Justice in Sumba, Eastern Indonesia" 22 at 4.

Legal pluralism recognized by the government makes misinterpretations to protect the rights of indigenous peoples.<sup>75</sup> When people want to admit and preserve the adat laws, the government adopts adat law into state law. This intention should appreciate, but some provisions should anticipate that adat law has contrasting values with the modern society that tends to cause new problems if applied to plural society. Not all regions have adopted adat law to be by-law.

The example is By-law 5/2008 on guidelines for establishing village community organizations of adat law is originated from the identity and habits of indigenous peoples, so it has not been able to become a fair law to all parties.<sup>76</sup> State law makes a binding policy for society in specific legal areas. However, implementing adat law as state law will reduce the sacred values of adat law.<sup>77</sup> It should be that the adat law is a comparison and benchmark for how the state law can implement adjusting the adat values that are more suitable for a plural society.

Adat law is proper to recognize, protect, and preserve by the community and government, but the government is the structure and facilitator to execute the protection. The adat law is an unwritten law with indigenous values and habits that grows with the community. So whatever the reason, adat law could not become a state law that applies to the general community. It is a guide making state laws or people in certain areas, both in terms of personality and habits, also the modern characters of society that continue to develop.<sup>78</sup> In addition to the contradiction between adat law and state law, transforming adat law into state law is potentially removing the law's sacredness values.<sup>79</sup> While state law has the strength to bind the broader community, if the state law wants to combine the custom values, it should be adapted to the community's circumstances and legal necessity.

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<sup>75</sup> Omara, *supra* note 18 at 421.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid* at 425.

<sup>78</sup> *Ibid* at 422.

<sup>79</sup> Henley & Davidson, "In the Name of *Adat*," *supra* note 37 at 835.



The question is how to protect the adat law? Adat law can preserve the construction through the Recognition and Protection of Adat Law as national regulation.<sup>80</sup> If the government should codify the law, it is limited to the government's protection.<sup>81</sup> It is different from transforming adat law into state law because the content is the extent to which the government will protect adat law, the rights of indigenous peoples, and the division of tasks between the central government and local governments. Adat law will never be a state law because the adat institution has the right to regulate and has full authority over the law. The government recognizes and protects all adat law types. The government can adopt the adat law into state law as guidance in law-making that the implementation to establish discipline and still respecting adat law as original Indonesian law.

Adat law is uncodified because of the dynamic character which follows society's development to achieve justice. In the specific case, the government supports the law through adat court as the institution that can give legal advice and solution to the community based on the national regulation of adat.<sup>82</sup> However, the principle and values of the solution find on every adat law in the adat area. It provides to indigenous peoples the materialization of adat law protection executed by the government according to the dispute resolutions on national regulation.

Adat court forms in every region through by-laws and controls of the Supreme Court as the highest judicial power holder in the trial environment. The hierarchy of these provisions is not the responsibility of the Supreme Court because the Adat court can implement according to the values of judicial power and not disturb the judicial procedure that has been executed. It means that not all cases will be resolved by state court because the legal material is different from the indigenous values.

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<sup>80</sup> Setiawan & Hadi, *supra* note 70 at 76.

<sup>81</sup> Daniel Fitzpatrick, "Disputes and Pluralism in Modern Indonesian Land Law" 22 43 at 182.

<sup>82</sup> Frans Simangunsong, "Hukum Adat dalam Perkembangan: Paradigma Sentralisme Hukum dan Paradigma Hukum dan Pluralisme Hukum" 8 at 6–8.

## VI. CONCLUSION

A pluralistic culture influences legal pluralism in Indonesia. It raises adat law from the indigenous values of community and habits to be state law. The concept will trigger an integralist state that forms a semi-democratic system in Indonesia. It should be filtered to become a state law that will apply generally. In the contemporary era, the idea emerged to transform adat law into state regulation through by-laws. By-law is assumed to have law enforcement that binds the community because it comes from the habits of the community. It is identical to community trust and results in adat law that is not universally applicable to state regulation. It should indicate a new paradigm in recognizing and protecting adat law and not through by-laws because adat and state laws could not be a unity law, the government creates comprehensive rules to maintain adat values. Finally, it becomes a benchmark to adopt adat values that can apply in modern societies.

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## COMPETING INTERESTS

The author declared that she has no conflict of interests.

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