

Adat Court in Indonesia's Judiciary System: A Socio-Legal Inquiry

*Journal of Asian
Social Science Research*
2022, Vol. 4, No.1: 43-62
<https://cassr.net/jasr/>
© The Author(s) 2022

Herlambang P. Wiratraman*

Universitas Gadjah Mada, Indonesia

Abstract

This article addresses the question of how the constitution drafters considered the existence of a plural legal system in Indonesia, especially the adat judicial system. There are several sociological arguments for constitutional pluralism, empirical and normative claims, and the necessity of formalizing adat court. Constitutional pluralism identifies the phenomenon of a plurality of constitutional sources and claims of final authority which create a context for potential constitutional conflicts that are not hierarchically regulated. Hence, this article argues that 'constitutionalizing' does not mean 'formalization', or even 'structuring the adat court under the state formal judicial system'. This should be critically assessed not merely on recognition, but also on protection, especially to exercise fundamental values of social significance. It considers the concepts of 'self-recognition based adat court' and 'regional recognition based adat court' as important in defending universal values to respect and protect the rights of the people, including their traditional systems. By doing so, this article aims to contribute to the studies on the importance of the plural legal system in plural societies like Indonesia.

Key Words

Adat court, constitutional pluralism, formalization, self-recognition, Indonesia

Introduction: Constitutionalizing Judiciary in Plural Societies

One of the challenges for a modern state is formulating a constitution for plural societies, even plural legal systems. When the drafters have successfully enacted a single constitution, the questions are whether such

* Contact:

Dr. Herlambang P. Wiratraman

Faculty of Law, Universitas Gadjah Mada, Yogyakarta, Indonesia.

Jalan Sosio Yustisia Bulaksumur No.1, Karang Malang, Caturtunggal, Kecamatan Depok, Kabupaten Sleman, Yogyakarta 55281 Indonesia.

E-mail: herlambang.perdana@ugm.ac.id

a document has been consistently interpreted and implemented in the field. Is that due to constitutional sources?

This article departs from the thesis that the constitution itself embodied plural perspectives and therefore unsurprisingly its interpretation and implementation would provide empirical evidence on constitutional pluralism (Wiratraman and Shah 2019). The idea of constitutional pluralism is not new, especially by looking at the debate on constitutionalism in European countries, especially by understanding the existence of the national legal system and European constitutional system. Therefore, discussing the constitutional law system in European countries would be inseparable from the regional constitutional system. Miguel Poiares Maduro, Professor of Law at the European University Institute, coined such a concept. He said that perhaps using constitutional pluralism has been the most successful attempt at theorizing the nature of European constitutionalism. Maduro (2012) introduced three different claims of constitutional pluralism: first, the empirical claims, which say that constitutional pluralism identifies the phenomenon of a plurality of constitutional sources and claims of final authority that create a context for potential constitutional conflicts that are not hierarchically regulated; second, the normative claim, which recognizes that there is a constitutional claim of final authority and therefore such claim is legitimate; and the third, the thick normative claim, which reflects current state affairs and provides a closer approximation to the ideals of constitutionalism.

This article prefers the empirical approach to overview the constitutionality of adat court. Borrowing such an approach would be a way to see the constitutionality of the plural legal system. Perhaps, it articulates various corners of laws which exist in society, namely adat law, religious law, and state law. International law would be part of the state law since it needs a political ratification process in enacting it into the national legal system.

Compared to Southeast Asian countries, especially Indonesia, such claims could refer to the early debates on how colonial rules resided legacies in its legal system. Therefore, understanding the development of the constitutional law system in Indonesia would importantly refer to the works and of course insights from a Leiden legal scholar, Cornelis Van Vollenhoven. One of his important influential publications was *De Ontdekking van Het Adatrecht* (The Discovery of Adat Law) (1928).

After he was appointed as Professor of Constitutional and Administrative Law of the Dutch Overseas Territories and the Adat Law of the Dutch East Indies, van Vollenhoven gave his inaugural lecture on

2 October 1901 which discussed ‘exact jurisprudence’ that had to meet a crucial test of the legal problems created by a changing policy.¹ He criticised the successful exploitation of the East Indies through agrarian production for the European market, through state enterprises, compulsory cultivation by Indonesians, and large private plantations. For him, the policy did not consider the role of adat law in the Dutch East Indies. Hence, he promoted a principle of administrative policy that was proclaimed as ‘moral responsibility. Since this was formulated as a Christian obligation, it would later expand to what is called the ‘ethical policy’ (Sonius 1981: xxix-xxx). Interestingly, albeit he visited Indonesia only twice, in 1907 when he was convinced of the importance of the indigenous system and in 1932 shortly before his death, van Vollenhoven always tried to promote and dedicate himself to defending Indonesian adat law as a prerequisite of justice.

During the colonial administration, the division of racial groups was re-introduced in 1920, namely *Orang Eropah* (European); *Bumiputera* (Native Indonesians); and *Orang Timur Asing* (Foreign Easterners). Such a division was indeed no longer relevant after Indonesia’s independence, especially in the context of Indonesian constitutional law. However, especially looking at the practice of indigenous communities in the field in resolving the cases, they still applied their legal system, including the role of the adat court. As Hooker (1978:134) writes, although Indonesia inherited the civil law system from the Dutch, the legal realities in Indonesia tend to complicate this inheritance. The courts face the questions of legal pluralism, the creation national legal system, and the demands of economic and legal modernization as well as the fact that a large proportion of Indonesia’s population is still governed by the adat systems.

It is against this background that this article discusses the adat court by focusing its analysis on how the constitution drafters considered the existence of a plural legal system in Indonesia, especially the adat judicial system. By doing so, it aims to contribute to a better understanding of the plural legal system in plural societies like Indonesia.

Adat Court and Its Survival in Colonial Period

Historically, the term ‘customary justice’ was acknowledged before the independence of Indonesia, at least through the laws and regulations of the Dutch East Indies. At that time, there were five types of judiciary, namely Governor/Government Court (*Gubernemen-rechtspraak*), Indigenous or Adat Court (*Inheemsche Rechtspraak*), Swapraja or Self-Governing Court (*Zelfbestuurrechtspraak*), Religious Court (*Godsdienstige Rechtspraak*) and Village Courts (*Dorpjustitie*) (Hooker 1978; Hadikusuma 1989).

The adat court has been existing since the Dutch colonial era, especially regulated in Article 130 of the *Indische Staatsregeling (IS)*, a fundamental rule in the Dutch government which determined the existing courts in the Dutch colonial era. The law recognized and allowed the entry of the local courts either in the form of customary courts in certain areas directly under the Dutch East Indies government and the *Swapraja* or self-governing court (Tresna 1978:73).

The judiciary for indigenous people, namely customary or Adat court and village court was recognized because the Dutch colonial government realized that they could not solve the whole problems facing the citizens of Dutch East Indie by themselves, especially by using the European judiciary. Therefore, there was the division of population formulated by the Dutch government as part of a solution to solve legal cases. As mentioned above, in Article 163 of the *Indische Staatsregeling (IS)*, the Dutch East Indies citizens were divided into three classes: *Orang Eropah*; *Bumiputera*; and *Orang Timur Asing*. Each class of citizens applied their own rule of law when they had a legal case.

At that time, the so-called indigenous or customary justice was a judiciary that was carried out by European Judges and Indonesian Judges, neither in the name of the King or Queen of the Netherlands nor under European law. This was based on customary law established by the Resident with the approval of the Director of Justice in Batavia. The authority to exercise this judgment was against indigenous people who were domiciled in the jurisdiction, who were the defendants or suspects. Plaintiffs or disputants could be non-local residents, including Europeans or non-indigenous people who felt disadvantaged. This judiciary used its own formal or formal law, including the rules of the judiciary of the Resident, such as the Regulation of Musapat Aceh Besar and Singkel (1934), Regulation on Kerapatan Kalimantan Selatan and Timur (1934), Gantarang, Matinggi and Laikan Regulation (South Sulawesi 1933) (Laudjeng 2003).

The position of customary or adat court, similar to the village court at the time, was a judicial trial carried out by the village judges within the jurisdiction of the governor. This court was authorized to adjudicate minor cases which were customary affairs or village affairs, such as land disputes, irrigation conflicts, marriage, dowry, divorce, adat status and other cases arising among the indigenous peoples. Village judges could not impose penalties that were provided in the Criminal Code. If the disputing parties were dissatisfied with the decision of the village judges, they could file their cases with the judges of the Governor (Laudjeng 2003). In such

context, no matter how hard the Dutch East Indies government attempted to undermine adat (indigenous laws), the law remained a space for indigenous communities to find justice amidst the dominance of European law.

During the Dutch East Indies administration, the recognition of adat court (*inheemse rechtspaark*) was written in Article 130 *Ind. Staatsblaad* and Article 3 *Ind. Staatsblaad* 1932 Number 80. Such regulation covered adat court outside Java and Madura. In regions mentioned in 1932 *Staatsblad*, local or indigenous communities were allowed to exercise their local court system, either 'self-governing court' (*peradilan swapraja*) or 'indigenous court' (*peradilan adat*). A 'self-governing court' had the authority to exercise legal cases either criminal law or private law in accordance with 'self-governing law'. Such court had been practiced in many regions, such as in Bengkulu, Kerinci, Palembang, West Kalimantan, Nias, Padang, Gorontalo, and Lombok. The 'self-governing court' was different to the local district court (*peradilan desa*), especially in Java and Madura.

Although there was a formal recognition over the indigenous court, as Haveman (2002: 16) said, further recognition was stipulated after an addendum of Article 3a RO. Such an article says that legal cases can be exercised by adat court and become an authority of local judges based on adat law. Although there was a unification of criminal law, the adat court could only exercise the authority of private, not criminal law. Nevertheless, the local court was supposed to be a supporting system for *Landraad* (equal to District Court System).

Such legal 'recognition' over adat court did change during the Japanese military occupation since the rule said that "all governmental institutions and their competences and all laws and regulations of the former government were recognized as still valid for the time being as long as they did not conflict with the regulations of the Japanese military government." The *Wetboek van Strafrecht vor Nederlandsch-Indie* as criminal code was still valid in continuation with previous laws, except for the population in certain regions in the directly governed territory, which was left its administration of justice, and the subjects of the self-governing lands, who were in principle subjected to adat law (Siong 1961:5; Soepomo 1957).

Constitutionalizing Adat Court

The transfer of authority in 1945 similarly recognized the existence and the acceptance of previous laws and institutions. This could be traced to transitional rules in the 1945 Indonesian Constitution. It meant that in the field in the regions, the role of adat courts was still allowed as an informal justice system at the local level.

Having such historical background, then the first issue is whether the adat court was debated during the making of constitutional law. There was a 'limited discourse' in debating adat court during constitution making process in 1945, although they had discussed the judicial system and governance relation. Adat, however, was a subject when they were discussing governance system, especially dealing with the relation between central and local governance, including 'autonomous village'. Such discourse, indeed, was very closely related.²

It was only Muhammad Yamin who addressed the adat court during the constitutional drafting process. Early conceptions of indigenous and tribal peoples were discussed in the past and crystallized during the discussion at the BPUPKI session, 10-17 July 1945. In a session, Yamin proposed that the constitution had to change the nature of subordinate governments to fulfil the wishes of the new era. Nevertheless, Yamin asserted, "... but what needs to be emphasized here is that the villages, lands, clans and others remain part of the Government of the Republic of Indonesia."

In another session, during the second hearing of the preparatory meeting on citizenship and the draft of the constitution, Yamin emphasized the necessity of a supreme court. In the Supreme Court, according to him, there are the Adat Court (*Mahkamah Adat*) and the Islamic Court (*Mahkamah Islam*), and/or the Civil Court and the Criminal Court. He highlighted that the Supreme Court would decide whether in line with adat law, sharia and the Constitution.

However, the strong debate on the adat court itself did not go further, except the Soepomo's disagreement with Yamin in which he refused the idea of adat law and Islamic law as review standards. Soepomo tried to compare other legal systems in other countries, especially in dealing with how to build a strong constitutional system which had a broader perspective on accommodating diverse societies. He compared the legal systems in Austria, Germany and Czechoslovakia. Since Yamin and Soepomo had different arguments, Radjiman Kaityoo, the chair of the meeting, asked the meeting members to vote. Finally, Yamin's idea was rejected by the majority of BPUPKI members (Minutes of BPUPKI, Plenary Meeting 15 July 1945; Kusuma 2004: 380-391; quoted also during Constitutional Amendment Drafting in 1999-2002. Vide: Naskah Komprehensif VI 2010:16).

Indeed, the constitution did not formulate all specific issues. It contains usually fundamental values, reflecting the basic necessities for societies and the state's ideology. However, the importance of adat (including the existence of adat court) in the context of the Indonesian plural legal system had to be maintained by strong law. Yamin opened

possible avenues to highlight the debate on adat court, although finally, his idea was unacceptable.

After such constitutional debates, all issues related to the adat court ended. Nevertheless, the adat court itself was still considered valid since a new transitional constitution rule brought the existing colonial constitutional law system into a new Indonesian state. Constitutionalizing the self-governing court and the indigenous court was absent in constitutional making debates in 1945, although the adat law and governance (non-judiciary) were firmly formulated in the following:

The division of the territory of Indonesia into large and small regions shall be prescribed by law in consideration of and with due regard to the principles of deliberation in the government system and the right of origin of special territories (Article 18).

Hence, the constitutionality of the adat court was based on merely transitional rules as it was not substantively discussed as a specific subject to address how to highlight its role and relation to the national judicial system. Therefore, a plural judicial system actually occurred in various regions in the early years of Indonesia's independence. Of course, this could be said as transplanting sources of colonial constitutional law system under new state constitutionalism, including the judiciary system.

On November 23, 1945, there was an effort to recognize the existence of a special region that was accommodated by arrangements in Article 18, especially in regulating local governance. Described in the State of Indonesia, there were approximately 250 *zelfbesturende landschappen* (self-governing regions) and *volkgemeenschappen*. The term used by the 1945 Constitution of the Republic of Indonesia (UUD 1945) refers to *volkgemeenschappen*, not to *rechtgemeenschappen*, although it was apparent that facts on the ground were found in customary law, village, *nagari* and clan, as well as other legal alliances (Wiratraman 2013).

Because of such a form of recognition (*volkgemeenschappen*), it had consequences for the recognition of the existence of an indigenous mechanism system to solve cases, especially referring to a local system that can be customary justice. This, which must be understood in the structure of the state administration of Indonesia, does not necessarily mean that the 1945 Constitution has deadened the existence of a local or customary court system (Wiratraman 2013).

However, such a dual constitutional law system in regulating self-governing courts in Java and Sumatra ended, especially after the enactment of Act No. 23 of 1947 (August 29, 1947, *Undang-Undang*

tentang Penghapusan Pengadilan Radja, or Zelf-bestuursrechtspraak). The jurisdiction of the self-governing court was transferred to the courts of the government. Albeit there was no specific formulation, the substitution of the courts of the government for the self-governing courts means the substitution of all laws of the government for the laws previously applied by the self-governing courts. In the field of criminal law, for instance, criminal adat law was no longer binding the persons formerly subjected to the jurisdiction of the self-governing courts in Sumatra. Other examples from Jogjakarta, S. 1941 No. 47, Paku Alaman, S. 1941 No. 577, Surakarta, 5. 1939 No. 614 and Mangkunegaran, S. 1940 No. 543 show that criminal adat law was no longer binding. The detailed and comprehensive analysis of such dynamics of the self-governing court and its relation to the government court was written by Siong in his book (Siong 1961:26-27).

The history of the constitution also leads to a shift in the direction of thought of its constitutional articles, especially based on the 1949 Constitution of the Republic of Indonesia (RIS) and the 1950 Constitution of the Republic of Indonesia. The regulation of indigenous peoples can also be observed in the provisions which govern the constitutional basis of adat law enforcement as mentioned in Article 146 Paragraph 1 of the 1949 Constitution of RIS and Article 104 Paragraph 1 of the Provisional Constitution of 1950. The articles state: "All court decisions must contain reasons and refer to the rules of customary laws and rules to make decisions."

There was a shift, from 'special region' (*daerah yang bersifat istimewa*) to 'special area' (*daerah istimewa*). This means it referred to *zelfbesturende landschappen*, and did not include *volkgemeenschappen*. Nevertheless, this concept was not long maintained because since the Presidential Decree of July 5, 1959, in addition to the beginning of the Soekarno's Guided Democracy, the constitution was returned to the 1945 Constitution. This means returning to the original initial concept of the Indonesian state.

Although the unitary constitution confirmed the importance of customary laws, this subverted two basic statutes which were enacted and remained in force until the mid-1960s. The first is Supreme Court Act (No. 1 of 1950), and the second is the organization and procedure of civil courts, No. 1 of 1951.³ The second one is more important to note in adat court history since it abolished fully customary judiciaries, either for self-governing court or adat court. This law unified the organization, the competence and the procedure of the civil courts.⁴ According to Article 1(2), the courts of the (former) self-governing lands (*Pengadilan Swapradja*), especially in East Sumatra, West Kalimantan and East Indonesia, and the indigenous courts

(*Pengadilan Adat*) in the directly governed territory, had to be abolished gradually on dates to be fixed by the Minister of Justice, except the *Peradilan Agama* (religious court) if it was a separate part of the *Peradilan Swapradja* and the *Peradilan Adat*. Then, the transfer of authority was stated from such courts to local government courts (*Pengadilan Negeri*) (Siong 1961:54). However, behind such judicial policy, the drafters of the law were uncomfortable with the need to go slowly in abolishing all adat courts, but there was little choice. For two reasons, local resistance had set in, while administrative caution in Jakarta warned that there was a limited number of government judges (Lev 1973: 23-24).

Such gradual change was stricter to abolish adat court during Soeharto's administration, especially after the enactment of Act No. 14 of 1970 on Judicial Power.⁵ Since then, the court would be merely a state-based formal court. The court, following the regime character, was centralized and formalized under the Supreme Court, while it was structurally coopted by executive power. The strong role of the executive power in controlling the judiciary can be seen as well from the law which provides legitimacy to end any adat court and self-governing court. Article 39 of the Act on Judicial Power stipulated the abolishment of adat court and self-governing court by the government. The article further elucidated that the abolishment was based on Number 1 of the 1951 Emergency Law, which was aimed at provisional measures to organize the unity, structure, power and civil court proceedings of Article 1, Paragraph (2) by the Minister of Justice gradually to eliminate the adat and *swapraja* court in Bali, Sulawesi Province, Lombok, Sumbawa, Timor, Kalimantan, Jambi and Maluku. This is also supported by Presidential Regulation No. 6 of 1966 on the Elimination of Adat/Swapraja Court so that the Establishment of the District Court in West Irian, the Adat/Swapraja Court in West Irian was also abolished.

Moreover, when the court leaders were thoroughly co-opted, the limited control the court over lower court judges was directed towards the same purpose (Pompe 2005:124-125). As a result, by the end of the New Order, “[p]olitical interference in the course of justice became a routine matter” at the lower levels of the Indonesian judiciary, even in minor cases with no obvious importance to the regime (Pompe 2005:140).

In this context, the plural judicial system due to the constitutionality of adat court which was established by transitional rules under the 1945 Constitution was formally ended by Judicial Power Law in 1970. Nevertheless, the influence of the abolishment was not automatically and entirely at the local level since the adat court has its pride and effectualness in the heart of society. Therefore, there are two models of local courts

in responding to such restrictive state law, namely 'self-recognition-based adat court' and 'regional recognition-based adat court'.

First, 'self-recognition-based adat court'. Adat law and its court are still applicable for particular societies. The customary courts and other informal justice systems as part of adat court are not easily erased because the facts on the ground show that the judiciary still exists and continues.

Second, 'regional recognition-based adat court'. As part of the local governance system, local governments provide 'recognition' to local law in the form of regional legislation. For example, as Abdurrahman (2002) writes, in Tanah Batak, especially in Tapanuli, the local government issued the Local Regulation No. 10 of 1990 on Customary Institution of Dalihan Natolu, an adat institution established by the district government (regency), as a deliberative institution that involves traditional elders who truly understand, control and live on the customs of the neighbourhood (Articles 5 and 8). The existence of the customary institution of the Na Tolu Dalihan is expected to provide solutions to the cases related to the conflicts that arise among the indigenous community in Tapanuli. In Kalimantan, several laws and regulations provide recognition of the existence of adat law such as the establishment of the Kedamangan institution through the Provincial Regulation of Kalimantan Tengah No. 14 of 1998, followed by various district-level regulations, such as the District Regulation of Barito Selatan No. 17 of 2000, the District Regulation of Kapuas No. 5 of 2001, and the District Regulation of Kotawaringin Timur No. 15 of 2001.

Interestingly, after the demise of Soeharto's administration, the situation of 'regional recognition' continued and expanded. In Papua, for instance, in which adat law was once abolished, the local government enacted the Special Regulation Papua No. 20 of 2008 on the Customary Court. Similarly, the affirmation of Dayak customs is regulated by the local government through several regional regulations such as Kalimantan Tengah Regulation No. 16 of 2008 on Dayak Indigenous Institution in Kalimantan Tengah. Moreover, the regulation which provides 'guidance' for the customary court rules was enacted such as the Regulation of the Governor of Sulawesi Selatan No.42 of 2013 on the Guidelines of the Adat Courts in Sulawesi Selatan.

Having such a historical outline of the dynamics of the adat court, regardless of no specific constitutional debates on the adat court about the judicial system, I agree with Bedner and Huis (2008) who say that the constitution stipulated a formulation of protecting indigenous communities more than the latest amendment of the constitution (1999-2002), especially

on governance article, although during constitutional making process there was a lot of support for better recognition of adat law and its institutions.⁶

The amended 1945 Constitution contains two related formulations in response to indigenous people, namely Article 18b (2) and 28i (3), as follows:

The State shall recognize and respect entities of the adat law societies (*adat rechtsgemeenschap*)⁷ along with their traditional rights to the extent they still exist and are in accordance with the development of the society and the principle of the Unitary State of the Republic of Indonesia, which shall be prescribed by laws (Article 18b (2)).

The cultural identity and the right of traditional societies shall be respected in harmony with the development of the age and civilization (Article 28i (3)).⁸

The conditionality under Article 18b (2) seems like ‘four-level barrier arms’, which could be easily misused or disadvantageous to indigenous communities due to its state formal interpretation in its every ‘barrier arm’. Such four barrier arms are (1) ‘still exist’, (2) ‘in accordance with the development of the society’, (3) ‘in accordance with the principle of the Unitary State of the Republic of Indonesia’, and (4) ‘shall be prescribed by laws’.

Unsurprisingly, the implementation of the constitutionality of recognition would go much further to restrict and affect the position and existence of indigenous communities, including their adat governance and judiciary systems. This is different to the previous constitutional basis of indigenous communities in that Article 18 formulated the adat law more clearly than Article 18B (2), even if over time the Indonesian Republic has reduced the rights attached to the special status (Bedner and Huis 2008).
Top of Form

Article 18B Paragraph (2) of the 1945 Constitution is a form of conditional recognition for the existence of indigenous and tribal peoples. This model of conditional recognition is inherited from the colonial government (Simarmata 2006). Article 18B Paragraph (2) of the 1945 Constitution mandates that recognition and respect for the existence and rights of indigenous peoples ‘shall be prescribed by laws’. In legal terminology, the phrase ‘shall be prescribed by laws’ should be interpreted as ‘arranged in law’ (*diatur dalam undang-undang*), meaning that the elaboration of provisions on the recognition and respect for indigenous people’s existence should not be made in a single law alone. This is

different from the constitutional provision states ‘regulated by law’ (*diatur dengan undang-undang*), which means that it requires the elaboration of a provision by a separate and specific law. Hence, the protection and recognition of indigenous people under Article 18B paragraph (2) of the 1945 Constitution is not a special law on indigenous peoples.

Nevertheless, the Indigenous Peoples Alliance of the Archipelago (Aliansi Masyarakat Adat Nusantara), a national coalition for defending the rights of indigenous peoples, struggled to acquire recognition for years. There is also a special draft prepared to propose a law, namely ‘The Recognition and Protection of Indigenous Peoples Rights (*Rancangan Undang-Undang tentang Pengakuan dan Perlindungan Hak Masyarakat Hukum Adat*). The House of Representatives even had drafted the law but had not enacted it yet.⁹ A landmark decision made by Constitutional Court concerning this issue was decision No. 35/PUU-X/2012 (16 May 2013), which admitted the absence as well as the importance of law, by stating “... [L]aws mandated by Article 18B Paragraph (2) of the 1945 Constitution until now has not been formed. Because of the urgency requirement, a lot of legislation was enacted before the mentioned Act. It can be understood in order to fill the legal vacuum to ensure legal certainty.” (p. 184).

It seems that constitutionalizing the adat court had limited space in the last constitutional amendment process. However, the demand to have stronger legalization of adat law and better recognition is still a serious concern among many groups of Indonesian society.

The Necessity of Formalizing Adat Court

Constitutionalizing does not mean formalization or structuring the adat court under a state formal judicial system. Constitutionalizing is a recognition and protection as an attempt to exercise fundamental values of social significance. However, legal formalization of adat law, including governance and judiciary system, is unavoidable, especially when looking at Indonesian legal development toward modern law.

In this context, van Vollenhoven established an important foundation to develop a legal system in a plural society. The practice of law in the current legal development cannot be expected to seek meaningful justice for indigenous communities in the Indonesian archipelago.

From time to time, the constitutionality of Article 18B Paragraph (2) of the 1945 Constitution has been interpreted in multiple ways. In some ways, this strengthens the position and existence of indigenous peoples in Indonesia, but in others weakens the situation at the same time. To give an example, the legal criteria of indigenous people, who can be recognized and heard by the court, should refer to the Constitutional Court decision No.

31/PUU-V/2007, Review of Act No 31 of 2007 on the Establishment Tual City in Maluku Province. According to the court, there are five criteria for the unity of indigenous and tribal peoples: people, customary institutions, common properties, customary law norms, and an area where all this exists. A unity of indigenous and tribal peoples that fulfils all five criteria is domiciled as a legal subject and therefore has rights and obligations that are legally accountable. This might be accommodating, but it might be in reverse excluding (Wiratraman 2007, 2014).

Constitutionalizing also means a shift or at least a process revisiting from the old paradigm of ‘integralistic state’¹⁰ to ‘constitutionalism state’. Constitutionalism in this regard prefers to approach ‘human rights-based constitutionalism’, not merely considered as ‘structural-functional based constitutionalism’. It means that supporting the establishment of the adat court is not based on mere successfulness to reconcile its position and relation to the constitutional system or state judicial system, but also on considering the effectualness of the court itself in a plural legal system. Positioning the adat court in the eyes of a state-based constitutional system would lead to ineffectiveness and even inappropriateness for indigenous people’s sovereignty.

Indeed, the adat court is neither entirely satisfying for all parties, nor at all without any mistake. Since it is similar to other types of courts, the non-formal justice system is supposed to be critically assessed (Arizona 2013; Wiratraman 2013; Wiratraman and Steny 2013). In general, following Bedner and Arizona (2019), this article argues that those ideas that promote a new understanding of adat communities are needed, especially the ones that attempt to push recognition for the rights of adat communities. This will be connected to the current global rise of resistance against inequality.

Adat court as part of indigenous people’s rights has obvious constitutional importance in the context of Indonesia’s plural legal system. It is not merely institutionalizing the court into the state’s judicial system which should be carefully considered, due to subjugation of adat’s legal system. It is also necessary to bring the message of representing universal values for human and people’s rights. The state should be able to provide possible avenues for seeking an informal justice system rather than pushing the formal mechanism or bureaucratization of adat court. This might be different to one another within the country, depending on social consensus and mainstreaming of social significance for the practice of adat court. As Harper (2011) and Simarmata (2013) point out, the ideal characteristics of the indigenous justice system philosophically reflect three values: harmony, restorative and consensus.

Conclusion

This article has pointed out two issues. First, as Otto stated in his inauguration speech which is relevant to understanding the present context of law in Indonesia, “[t]his requires the enactment of adequate legal rules, but it calls above all, as Van Vollenhoven and Asia’s great philosophers have said, for respect from each and every one of us for the public sphere of law and state, so that decent public officials can thrive; it calls for self-control and compassion for our fellow men and women, from whatever ethnic or religious background they may be” (Otto 2017).

Second, perhaps, if van Vollenhoven was still alive in the present days, I would imagine that he would criticize constitutional and administrative law scholars who articulate their ideas on state laws rather than consider the plural legal system in Indonesia’s societies. They seem to enjoy orchestrating and puzzling ‘structural-functional based constitutionalism’, instead of highlighting the importance of defending universal values to respect and protect the rights of the people, including their traditional systems. Therefore, considering the adat court as human rights advancement is not a delusion, but rather a bridge to constitutional pluralism that respects and recognizes the indigenous laws and fundamental rights.

Acknowledgement

The author thanks Dian AH Shah and Gary F Bell for their helpful comments on an earlier draft of this article, especially when I was completing this manuscript at the Center of Asian Legal Studies, Faculty of Law, National University of Singapore (CAL S NUS).

Notes

The initial draft of this article was presented at the International Conference on “Adat Law 100 Years On: Towards A New Interpretation?”, National Museum of Ethnology, Leiden, 22-24 May 2017, organized by Van Vollenhoven Institute for Law, Governance and Society (VVI) Leiden Law School and KITLV/Royal Netherlands Institute of Southeast Asian and Caribbean Studies.

- 1 Cornelis van Vollenhoven, a professor from 1901 until his death in 1933, was a brilliant legal scholar who excelled in three different domains: the living customary law, especially the *adat* law of the Netherlands-Indies; the country’s constitutional law; and international law. He uncovered a wide diversity of local *adat* law norms, which he was able to incorporate into an organic corpus of local, national and international law (Otto 2017).
- 2 Constitutionalizing indigenous communities was related more to governance model than the protection of people’s rights. The adat court, unfortunately,

was excluded from such discourse on governance system. However, many regulations adopted the constitutional basis of indigenous communities' governance in relation to local governance, except the 1960 Basic Agrarian Law (Simarmata 2006: 55).

- 3 *Undang-Undang Darurat No 1 Tahun 1951 tentang Tindakan-Tindakan Sementara untuk Menyelenggarakan Kesatuan Susunan, Kekuasaan dan Acara Pengadilan-Pengadilan Sipil*, L.N. 1951 No. 9, binding from January 14, 1951.
- 4 In order to implement this law, especially related to abolishment of indigenous court, the government followed up numerous regulations under Ministry of Justice, which are: (1) Ministry of Justice Regulation No. J.B.4/3/17 (TLN 276), 21 August 1952, on abolishing self-governing court and adat court in Sulawesi; (2) Ministry of Justice Decision No. J.B.4/4/7 (TLN 462), 30 September 1953, on abolishing adat court in Lombok; (3) Ministry of Justice Regulation No. J.B.4/3/2 (TLN.641) 21 June 1954 *jo.* Ministry of Justice decision letter No. J.B.4/4/20 (TLN.642), 18 August 1954, on abolishing self-governing court and adat court in Kalimantan; (4) President Regulation No. 6 of 1966, on abolishing self-governing court and adat court and the establishment of District Court in West Papua.
- 5 This law replaced Act No. 19 of 1964 on Judicial Power (LN 1964 No. 107).
- 6 During the constitutional making, the support for adat law and its institutions came from various actors not only from human rights groups and academia, but also from parliament members itself. For instance, Ihdhal Kasim was concerned with indigenous land rights dispossession and threatened customary rights (Naskah Komprehensif I 2010:426-425). Sandra Moniaga was also concerned with a comprehensive perspective to protect and recognize indigenous peoples, including the principle of self-determination and in accordance to ILO Convention No. 169 (Naskah Komprehensif IV (2) 2010:1141). From academics, Mariana R.W. Sumardjono was concerned with indigenous land rights dispossession in forestry areas (Naskah Komprehensif I 2010:571-572). Interestingly, the issue of constitutional recognition to indigenous peoples and adat law/institution attracted members of parliament, such as Indonesia Democratic Party's Hobbes Sinaga on the issue of indigenous peoples position in decentralization (Naskah Komprehensif IV (2) 2010:1161, 1238, 1244, 1246); Crescent Star Party's Hamdan Zoelva (Naskah Komprehensif IV (2) 2010:1169, 1174, 1317, 1354); Party of the Fuctional Groups' Hatta Mustafa (Naskah Komprehensif IV (2) 2010:1183-1184), Happy Bone Zulkarnaen (Naskah Komprehensif IV (2) 2010: 1324-1326, 1350, 1366, 1373-4,) and T. M. Nurlif on the issue that realization of autonomous governance should refer to adat law and native rights, and consider plural and special status (Naskah

- Komprehensif IV (2) 2010:1183-1315); United Development Party's Lukman Hakim Saifuddin (Naskah Komprehensif IV (2) 2010:1321-1322; and the Group Representative's Nursyahbani Katjasungkana (Naskah Komprehensif IV (2) 2010:1335-1336).
- 7 The meeting was helped by Bagir Manan who explained the position of 'adat rechtsgemeenschap' during the constitutional making (Naskah Komprehensif IV (2) 2010:1356, 1362).
 - 8 This article seems similar to Article 6(2) of Act No. 39 of 1999 on Human Rights: "The cultural identity of indigenous and tribal peoples, including the right of *ulayat* land, is protected in harmony with the altered times."
 - 9 "DPR siapkan UU Pengakuan Hak Masyarakat Adat", kontan.co.id, 19 April 2012, <http://nasional.kontan.co.id/news/dpr-siapkan-uu-pengakuan-hak-masyarakat-adat> (accessed 12 March 2017).
 - 10 The idea of integralistic theory of state was adopted from Prof. Mr. Dr. R. Soepomo's speech at the meeting of *Dokuritsu Junbi Cosakai* on 31 May 1945 in Jakarta. Soepomo described three forms of state theory: individualistic theory, class theory, and integralistic theory. He mentioned that integralistic theory is adopted from Spinoza, Adam Müller, Hegel, etc. He said that the state is formed not for the benefit of individuals or groups, but to guarantee the interests of the whole society as unity. The state consists of an integral social structure, encompassing all classes, all parts, and all members that are interconnected with one another and united in an organic society (Kusuma [ed]. 2004:124-125). For further readings, see Simanjuntak (1994) and Assiddiqie et al. (2015).

References

- Abdurrahman. 2022. "Peradilan Adat dan Lembaga Adat dalam Sistem Peradilan Indonesia", paper presented at *Workshop on Adat Court, 2nd Congress of AMAN*, Mataram, 20 September 2002.
- Arizona, Yance. 2013 "Kedudukan Peradilan Adat dalam Sistem Hukum Nasional", paper presented at *Strengthening of Adat Court in Central Kalimantan for Access to Justice Empowerment*, 11 June 2013.
- Asshiddiqie, Jimly et al. 2015. *Pergulatan Tafsir Negara Integralistik: Biografi Intelektual, Pemikiran Hukum Adat dan Konstitusionalisme*. Jakarta: Pustokum-Yakins-Thafa Foundation.
- Bedner, Adriaan and Stijn van Huis. 2008. "The Return of the Native in Indonesian Law: Indigenous Communities in Indonesian Legislation." *Bijdragen tot de Taal-, Land- en Volkenkunde* 164 (2/3):165-193.

- Bedner, Adriaan, and Yance Arizona. 2019. "Adat in Indonesian Land Law: A Promise for The Future or A Dead End?" *The Asia Pacific Journal of Anthropology* 20(5): 416-434, <https://doi.org/10.1080/14442213.2019.1670246>.
- "Filosofi dan Prinsip Peradilan Adat". 2013. Paper, *Workshop on Strengthening Adat Court Capacity through The Making Adat Court Guidance in Central Kalimantan*. Jakarta: SAJI Project UNDP and Bappenas/Ministry of PPN.
- Hadikusuma, Hilman. 1989. *Peradilan Adat di Indonesia*. Jakarta: Miswar.
- Harper, Erica. 2011. *Customary Justice: From Program Design to Impact Evaluation*. Rome: IDLO.
- Haveman, Roelof H. 2002. *The Legality of Adat Criminal Law in Modern Indonesia*. Jakarta: P.T. Tatanusa.
- Holleman, Johan F. 1981. *Van Vollenhoven on Indonesian Adat Law (Selections from Het Adatrecht van Nederlandsch-Indie)* (Volume I, 1918, Volume II, 1931). Leiden: KITLV.
- Hooker, M. Barry. 1978. *Adat Law in Modern Indonesia*. Kuala Lumpur: OUP.
- Kusuma, R.M. A.B. (ed). 2004. *Lahirnya Undang-Undang Dasar 1945: Memuat Salinan Dokumen Otentik Badan Oentoek Menyelidiki Oesaha-Oesaha Persiapan Kemerdekaan*. Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia.
- Laudjeng, Hedar. 2003. *Mempertimbangkan Peradilan Adat*. Jakarta: HuMa.
- Lev, Daniel S. 1973. "Judicial Unification in Post-Colonial Indonesia," *Indonesia* 16 (Oct. 1973): 1-37 (Southeast Asia Program Publications at Cornell University).
- Maduro, Miguel Poiares. 2012. *Three Claims of Constitutional Pluralism*. Retrieved 11 February 2017 (https://www.wzb.eu/sites/default/files/u32/miguel_maduro_three_claims_of_constitutional_pluralism_hu-coll_may_15_2012.pdf).
- Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Buku I: Latar Belakang, Proses dan Hasil Pembahasan 1999-2002*. 2010. Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi.
- Otto, Jan Michiel. 2017. "Unity in Diversity. The Topicality of Professor C. van Vollenhoven", *Dies Lecture*, the 442nd Dies Natalis, Wednesday 8 February 2017, de Pieterskerk, Leiden, The Netherlands.

- Peradilan Adat dan Utopia Kekuasaan?*.2013. Jakarta: HuMaNews.
- “Perlindungan Hukum Masyarakat Hukum Adat”. 2014. *Laporan Tim Pengkajian Hukum, Pusat Penelitian dan Pengembangan Sistem Hukum Nasional*. Jakarta: BPHN.
- Pompe, Sebastiaan. 2005. *The Indonesian Supreme Court: A Study of Institutional Collapse*. Ithaca, NY: Cornell Southeast Asia Program.
- Risalah Sidang Badan Persiapan Usaha-Usaha Kemerdekaan Indonesia (BPUPKI)-Panitia Persiapan Kemerdekaan Indonesia (PPKI)*.1995. Jakarta: Sekretariat Negara Republik Indonesia.
- Simanjuntak, Marsillam. 1994. *Pandangan Negara Integralistik: Sumber, Unsur dan Riwayatnya dalam Persiapan UUD 1945 Sumber, Unsur dan Riwayatnya dalam Persiapan UUD 1945*. Jakarta: Pustaka Utama Grafiti.
- Simarmata, Rikardo. 2006. *Pengakuan Hukum terhadap Masyarakat Adat di Indonesia*. Bangkok: UNDP Regional Initiative on Indigenous Peoples’ Rights and Development (RIPP).
- Siong, Han Bing. 1961. *An Outline of the Recent History of Indonesian Criminal Law*. Leiden: KITLV/M. Nijhoff.
- Soepomo, R. 1957. *Sistim Hukum di Indonesia*. 3rd. Jakarta: Noordhoff-Kolff N.V.
- Sonius, H.W. J. 1981. “Introduction”. Pp. xxix-lxvii in *Van Vollenhoven on Indonesian Adat Law (Selections from Het Adatrecht van Nederlandsch-Indie)* (Volume I, 1918, Volume II, 1931), edited by Johan F. Holleman. Leiden: KITLV.
- Tresna. 1978. *Peradilan di Indonesia dari Abad ke Abad*. Jakarta: Pradnya Paramita.
- Vollenhoven, Cornelis van. 1928. *De Ontdekking van Het Adatrecht*. Leiden: Brill.
- Wiratraman, Herlambang P. 2007. “The Human Rights Situation concerning Indigenous Peoples and Ethnic Minorities in Indonesia”. *A Research Report*. Bangkok: Forum Asia.
- Wiratraman, Herlambang P. and Dian AH Shah. 2019. “Indonesia’s Constitutional Responses to Plurality.” Pp. 115-142 in *Pluralist Constitutions in Southeast Asia*, edited by Jaclyn Neo and Bui Ngoc Son. Oxford: Hart Publishing. DOI: 10.5040/9781509920488.ch-005.

- Wiratraman, Herlambang P. and Bernadinus Steny. 2013. "Pluralisme Hukum dalam Konteks Gerakan Sosial." Pp. 215-234 in *Pluralisme Hukum: Sebuah Pendekatan Interdisiplin* (2nd Edition), edited by Rikardo Simarmata. Jakarta: HuMa.
- Wiratraman, Herlambang P. et al. 2013. "Peluang Peradilan Adat dalam Menyelesaikan Sengketa antara Masyarakat Hukum Adat dengan Pihak Luar." *Laporan Tim Pengkajian Hukum, Pusat Penelitian dan Pengembangan Sistem Hukum Nasional*. Jakarta: BPHN.

Author Biography

Dr. Herlambang P. Wiratraman is senior lecturer at Constitutional Law Department, Faculty of Law, Universitas Gadjah Mada, Indonesia. He is head of LP3ES Law and Human Rights Program, advisor for Indonesian Caucus for Academic Freedom (KIKA), and member of Scientific Committee for ALTERSEA, Observatory of Political Alternatives in Southeast Asia (Centre Asie du Sud-Est) di EHESS-Ecole des hautes études en sciences sociales (since 2020). He has published many works on law, human rights and constitution studies such as "Constitutional Struggles and the Court in Indonesia's Turn to Authoritarian Politics", *Federal Law Review* June 2022; "Protecting Freedom of Expression in Multicultural Societies: Comparing Constitutionalism in Indonesia and Canada" (with Sebastien Lafrance), *Yuridika* 36(1), January 2021; "Does Indonesian COVID-19 Emergency Law Secure Rule of Law and Human Rights? *Journal of Southeast Asian Human Rights* 4 (1), 1 June 2020; "The Challenges for Teaching Comparative Law and Socio-Legal Studies at Indonesia's Law Schools", *Asian Journal of Comparative Law* 14, Supplement S1, October 2019; "Freedom of Expression, Law and Politics in Indonesia", in Azmi Sharom and Magdalen Spooner (eds), *Human Rights and Democracy in Indonesia and Malaysia*, Kuala Lumpur: University of Malaya-SHAPESSEA, 2019; and "Indonesia's Constitutional Responses to Plurality", in Jaclyn Neo and Bui Ngoc Son (eds), *Pluralist Constitutions in Southeast Asia*, Oxford: Hart Publishing, 2019.

