

ENHANCING LEGAL PLURALISM: THE ROLE OF ADAT AND ISLAMIC LAWS WITHIN THE INDONESIAN LEGAL SYSTEM

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ABSTRACT

The Indonesian Constitution prescribes that Indonesia shall be based upon the belief in the 'One and Only God'. The same constitution also says that "the State guarantees all persons the freedom of worship, each according to his/her own religion or belief". On the other hand, article 28B section 2 of the same constitution prescribes that "the state recognizes and respects traditional communities along with their customary rights..." This shows the importance of religion and custom in Indonesia, since it is estimated that 87.18% of Indonesia's population are Muslim (based on the 2010 census). Religion, especially Islam, plays an important role in the lives of the Indonesian people as it influences politics, economy and culture. Besides protecting religious and cultural freedoms, the constitution also prescribes that Indonesia is a rule of law country. By granting such a position to religion and custom (hereafter referred to as adat) within the country's legal system, the constitution has set the stage for the practice of legal pluralism in Indonesia. This paper examines the obstacles faced by Islam and customary laws (hukum adat) and how both legal systems have contributed in the development of the Indonesian law. The study reveals that despite their contribution, both Islamic law and customary law still face a number of obstacles that weaken not only the implementation of a stronger legal pluralism, but also the Indonesian legal system as a whole.

Keywords: Enhancing Legal Pluralism, Islamic Law, Adat Law, Indonesian Legal System.

INTRODUCTION

Indonesia consists of seventeen thousand islands divided into 33 provinces which are called home by nearly 17.000 ethnic groups. This made the work of setting up a post-independence legal system a nearly mission impossible for the so-called Indonesian founding fathers. Although they managed to keep the country together, to some extent, the legal system still faces several difficulties, as will be discussed later on. This study analyses the extent to which the co-existence of official and unofficial laws champion legal pluralism as the government endeavours to accommodate the ideas of rule of law, democracy and human rights within the country's legal system after nearly half a century of tyranny (Feith, 1968). It is a common belief that the law stands in close relationship to the ideas, aims and purpose of the society to which it applies. (Lukito, 2013) The debate over legal pluralism and the unification of

the law has driven enough ink and continues to do so. This paper does not advocate one system of law over its counterparts. Instead, it argues that empowering both *adat* and Islamic laws can significantly improve legal pluralism in Indonesia. The paper is organized as follow: firstly, a literature review on legal pluralism is provided to help readers see the void the paper seeks to fill. Secondly, the paper investigates the roles and challenges of both customary and Islamic laws in the development of the law in Indonesia. Thirdly, a conclusion is drawn as to whether or not the current legal mechanism promotes legal pluralism in Indonesia.

LEGAL PLURALISM: AN OVERVIEW

Discussions on the concept of legal pluralism began in the 1930s (Erllich, 1936). The ongoing debate has yielded a variety of definitions of legal pluralism. Among the proponents of this concept, much credit is given to John Griffiths who, in 1986, came up with the idea of “strong” and “weak” legal pluralism (Griffiths, 1986). According to Griffiths (1986), “strong” legal pluralism is when the state recognizes that not all law is state law administered by one government backed-institution. A “strong legal pluralism” is “an inexorable state of affairs in which all normative orderings regardless of their origin and mutual recognition by one another co-exist side by side within a normative universe, as Cover put it (Cover, 2005). While “weak pluralism exists when the sovereign commands different bodies of law for different groups in the population by incorporating their normative orderings into the central administration of law and courts”. Griffiths argues that this type of pluralism can be seen as a ‘technique of governance’ or a mere arrangement within state law, as the normative existence of non-state norms depends upon their recognition by the central administration” (Griffiths 1986). Echoing Griffiths (1986), Pospisil (1971) argues that no society has “a single consistent legal system, but as many such systems as there are functioning subgroups”. The manifestation of legal pluralism in society is what Pospisil (1971) calls ‘*legal level*’. However, Pospisil’s (1971) analysis of legal pluralism is only descriptive as he does not explain what law is to govern when conflict arises between two distinct ‘functioning groups’. Tamanaha (2000, 2008 & 2011), on the other hand, argues that because ‘state law helps establish rules for social intercourse and maintain social order does not mean that it is the main source of law. Tamanaha believes that multiple normative orders exist within every society and that colonialism not only engendered legal pluralism in former colonies but it did modify their indigenous laws and institutions. This claim of Tamanaha may hold true for some former colonies but it does not apply to Indonesia whereby long existing *adat* laws were dismissed by the Dutch (Amran, 1981). In sum, nearly all authors discussed above agree that there are laws other than state law that operates interdependently within the same social field. But they do not provide a comprehensible mechanism as to how the inherited Western law is to be successfully adapted to customary and Islamic laws so as to create a harmonious legal system.

***Adat* Law Revival and its Role within the Indonesian Legal System**

Vollenhoven (1933) spoke of *adat* law as ‘the totality of the rules of conduct for natives and foreign Orientals that have, on the one hand, sanctions and, on the other, are not codified. He emphatically used this term to emphasize that there was no sharp dividing line between legal and other aspects of *adat*. *Adat* has governed life in Indonesia for a long time and is still commonly referred to as one of the sources of law. Prior to the arrival of the colonists, the people of Indonesia had their own "native laws" known as "*hukum adat*" (Ali, 2001). Sadly however, until it was mentioned by the Dutch scholar Snouck Hurgronje in his book ‘*De Atjehers*’ *adat* law did not preoccupy Dutch colonizers very much (Mahmud, 2011; Jamie & David, 2007). This shows how irrelevant *adat* law was in the eyes of the Dutch. After independence in 1945, *adat* law and *adat* institutions remained as neglected and weakened as they were under the Dutch occupation. But *adat* law began to regain power when President Suharto and his *Orde Lama* (New Order) collapsed in May 1998 (Laws and regulations, 2014). This paved the way for the revival of *adat* law and throughout Indonesia (Jamie & David, 2007). Law No. 22/1999 on Regional Government allowed provinces to rebuild their village governance structures and directly deal with their economic, legal, political, environmental and social affairs together with conflict settlement. As a consequence, traditional institutions and village-like governments began to surface again throughout Indonesia. A good example is the *Minangkabau Pemerintah Nagari* (*Nagari* Government) in West Sumatra (Hilaire, 2015). This type of organization government is a form of traditional governance viewed as the smallest unit of local government in the province of West Sumatra. It is often referred to as the “village republic” (Franz & Keebet, 2013). This traditional form of self-governance has existed since mid-fourteenth century. Since 2001, *nagari* government has remained the lowest unit in West Sumatra administrative hierarchy (Hilaire, 2015). The existence of this traditional government in this part of Indonesia is the symbol of a “strong legal pluralism” envisioned by John Griffiths a few decades ago. Since the advent of decentralization, *Pemerintah nagari* has helped the Regional Government in West Sumatra cope with issues related to inheritance, marriage and divorce land tenure since it provides alternative dispute resolution mechanisms. To this day, it is the main traditional organization referred to not only for alternative dispute resolution but only for regional legislation, as it is consulted by the Regional House of Representatives legal drafting team before passing a piece of legislation. A concomitant strength of *adat* law is speed of action. Lengthy resolution processes can impact on the livelihoods of the poor, particularly where economic rights are at stake.

The Influence of Adat Law on Several Other Laws

One area of the Indonesian law where *adat* law has had great influence is the Agrarian Law enacted in 1960. When the Dutch occupied Indonesia, they imposed in 1870 a land law known as *Agrarische Wet* which divided land into two categories of designation: private property used for housing and business property for companies (Benda & Keebet, 2008). However, the enactment of the Agrarian Law known as *Undang-Undang Pokok Agraria* (UUPA) declared null and void the above mentioned colonial agrarian law along with many other such laws.¹ Article 5 of this law says that agrarian law throughout the nation shall be based on *adat* law as long as it does not contradict both regional and national unity and interests. This shows how *adat* law has impacted land law in Indonesia, a nation where a great majority of the population lives a pastoral

life. (Hilaire, 2015) *Adat* law can quickly adjust to social and political changes. Its scope goes beyond agrarian law to include family law, inheritance law, (Benda & Keebet, 2008) and criminal law. *Adat* criminal law, which is as old as *adat* law itself, has influence the Indonesia Criminal Law. Evidence of this lies in article 284 (2) of the Criminal Code regulating fornication. This provision is inspired by the principles of *adat* criminal law. Moreover, there is also Law No. 48/2009 on Judicial Power which stipulates that, "Constitutional Justices and Judges shall explore, follow and understand the legal values and sense of justice living in the community" (Laws and Regulations, 2009). Basically, the phrases "legal values and sense of justice living in society", "law is absent or less obvious", "the source of unwritten law which is the basis for judgment" show the influence of customary law over Law No. 48/2009. Many of the *adat* criminal punishments are similar with some of those mentioned in the Criminal Code (KUHP) e.g. the punishments of the traditional criminal act of *Drati Kerama* in Bali or *Mapangaddi* (Bugis) *Zina* (adultery) in Makassar are comparable to the criminal act of adultery as stipulated in Article 284 of the Criminal Code.

***Adat* Law and State Law: A Long Existing Relationship of Superiority**

The relationship between state law and *adat* law, from colonialism to the present, is the major concern of this part of the paper. It argues that despite the government's continuing effort to improve Indonesia's legal system, *adat* law is still dominated by state law. This is what Griffith's describes as "weak legal pluralism", as discussed earlier. Prior to colonialism, *adat* law was presided over by leaders called *penghulu*, who were often knowledgeable of it (Lukito, 2013). Transferring the adjudication of *adat* law to formal courts has, in certain respects, caused *adat* law to lose its original strength, as Vollenhoven (1933) predicted (Benda & Keebet, 2008).² In fact, Van Vollenhoven and Snouck predicted that forced codification and subjugation to Dutch law would be counterproductive because it would strengthen conservatism and hamper development (Benda & Keebet, 2008). Baron de Montesquieu (1752) argues that "law should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another (Baron, 1989). Unfortunately, the post independent governments did not do very much to prevent the law of the Dutch from suiting the Indonesian people. In a view similar with that of Montesquieu, Thomas Paine (1776) argues that "most nations have let slip the opportunity and by that means have been compelled to receive laws from their conquerors, instead of making laws for themselves." (Thomas, 1975) Similarly, Wignjosoebroto (2006) claims that the Indonesian legal tradition does not fit with *Rechtsstaat* for it does not reflect the Indonesian cultures and way of life" (Wignjosoebroto, 2006). Supporting this view, Gautama and Robert (1983) argue that the purpose of the Dutch divisive colonial rules was to ensure the continuing domination of the ruling class. Amran (1981) claims that the Dutch had no respect whatsoever for *adat* law and *adat* institutions. He argues that the titles handed out to the Indonesian natives by the Dutch during colonialism had nothing to do with *adat* (Amran, 1981). Amran (1981) argues that the Dutch succeeded in influencing customary court system, thanks to their officials such as heads of village and chief *penghulu* whom they paid. Amran (1981) believes that this is the reason why a pure *adat* court system is no longer able to survive. Mark and Michael (2012) observe that the recognition of *adat* law in the 1945 Constitution is

very limited and that written state law will always trump customary law. Ambivalent and neglected during both Presidents Sukarno and Suharto's regimes, *adat* law became stronger thanks to the decentralization process initiated by the *Reformation Era*, which allows local governments some degree of democracy (Jamie and David, 2007) and freedom to run their own affairs (Mason, 2004). Despite these reforms, *adat* law still faces the issue of unification, (Laws and regulations, 1992; Laws and regulations, 2014) hence, the importance of a strong legal pluralism in Indonesia.

The Influence of Islamic Law on the Indonesian Legal System

Islam was brought into Indonesia by Islamic traders from India during the 13th century. By the end of the 16th century, Islam was ahead of Hinduism and Buddhism as the leading religion of the peoples of Java and Sumatra with the exception of Bali that retained a Hindu-practicing majority, while the eastern islands remained largely animist until the 17th and 18th centuries when Christianity became predominant in those areas (Jajat and Kees, 2013). Islam and Islamic Law have had a significant influence over the Indonesian legal system by helping to build much of its lexicon. In fact, it is estimated that about 10 to 15% of *Bahasa Indonesia*, the Indonesian national language, derived from Arabic. This made a great contribution in many subjects in Indonesia including law. The word *hukum* (law) as well as the word *ilmu* (science) originate from Arabic (Daniel, 1972). Both words put together, i.e., *ilmu hukum* means 'legal science'. *Hak* (right) and *wajib* (compulsory), *ke-adil-an* (justice) and *peng-adil-an* (court), *ke-hakim-an* (judiciary), *adat* (custom), *masalah* (case, problem), *resmi* (Formal/official), *soal* (question), *aman* (safe), *ke-aman-an* (safety), *hasil* (outcome), *izin-perizinan* (permit-licensing), *mahar* (dowry), *makna* (definition), *perlu-keperluan* (needed-need), *rakyat* (the people) and *sifat* (behavior) (Jones, 1978). The impact of Islam on the law in Indonesia can be seen through many Arabic expressions and terms including *musyawarah* (consultation) and *mufakat* (consensus) come up very often during hearings. Such lexicon is also used in names of institutions including *Majelis Permusyawaratan Rakyat* (the People Consultative Assembly), which was once the highest legislative body in Indonesia. Another area of Indonesian law where Arabic words are often heard is the Sharia Trade contract. In fact, in Islamic Law, *aqd* means the combination of offer (Ijab) and acceptance (qabul) which is lawful in accordance with Islamic law. In addition to this role, Islamic law also helps strengthen the spread of justice by impacting on many other areas of the law in Indonesia.

The Impact of Islamic Law

Although Islamic Law is not explicitly mentioned in the 1945 Constitution as the law to apply throughout Indonesia, Islamic Court is recognized as one of the official courts in Indonesia (Laws and regulations, 1945). The field of law where Islamic Law has had significant influence is family law. Matters related to marriage, divorce and inheritance are dealt with in accordance with religious law, mainly Islamic Law. Any marriage entered into not in accordance with religious law is deemed illegal in Indonesia (Laws and regulations, 1974). Evidence of how important Islamic law is can also be seen in the passing of Law No. 7/1989 on Religious Courts, which sets forth the uniformity of the jurisdiction of Islamic tribunals throughout Indonesia. This

law created First Instance Courts known as *Peradilan Agama* within each district and municipality and Provincial Islamic Courts of Appeal court (*Peradilan Tinggi Agama*) (Mark and Michael, 2012) However, Islamic courts ceased to be independent when their management shifted from the Ministry of Religion to the Indonesian Supreme Court in 2004. (Laws and regulations, 1989) This change clearly implied that the Supreme Court can overrule the verdicts of any Islamic Courts when it sees fit. Furthermore, the promulgation of Law No. 3/2006 on Religious Court has broadened the jurisdiction of Islamic law by including disputes related to Syari'ah Economy set forth in Banking Law No. 7/1992, which was repealed by Law No. 10/1998. These legislations are the results of the growing influence of Islam in Indonesia.

The Shortcoming of Islamic Law

The historical roots of Islamic law in the archipelago according to some historians began in the first century (*hijriyah*) or around the seventh and eighth centuries (Hutabarat, 2005). As the gateway into the archipelago, the northern region of Sumatra Island was then used as the starting point of Muslims entering Indonesia. Slowly, they formed the first Islamic community in *Peureulak*, East Aceh. The rise of the Muslim community in the region was then followed by the founding of the first Islamic empire in the country in the thirteenth century. This kingdom is known by the name of *Samudera Pasai* which was located in Northern Aceh (Effendy, 1998). The influence of Islamic propagation has led to the creation of several Islamic kingdoms after that of *Samudera Pasai* in Aceh. These kingdoms included the *Malacca* Sultanate, the Sultanate of *Demak* on the island of Java, *Mataram* and *Cirebon* kingdoms, then in Sulawesi and Maluku stood the Kingdom of *Gowa* and the Sultanate of Ternate and Tidore. Islamic law was the law that applied in all these kingdoms and it remained much the same under the Dutch and Japanese occupations. After independence, the Investigating Committee for Preparatory Works for Independence or *Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan (BPUPK)* was set up in March 1945 by the Japanese military authority to provide blueprints for the new nation's legal and political systems. The committee consisted of members such as Dr. Radjiman Wediodiningrat (chairman), Ichibangase Yoshio (vice-chairman), Suroso (vice-chairman), Abdul Gafar Pringgodigdo (co-secretary), Sukarno, Mohammad Hatta, Besar Mertokusumo, Mansur, Dewantara, Agus Salim, Soepomo, M Soetardjo Kartohadikoesorno, Sumitro Djojohadikusumo, Abikoesno Tjokrosjojoso, Bagus Hadikusuma, Abdul Wahid Hasyim and Muhammad Yamin. These individuals are regarded by many as the Indonesians founding fathers. The two plenary meetings: 29 May-1 June and 10 July-17 July 1945 held by BPUPK, were mainly discussions about the ideology of an independent state, in particular whether there would be a role for Islam and Islamic law. On the final day, 1 June 1945, Sukarno came up with the idea of *Pancasila*-the five principles that would form the ideological basis of the new state. The concept was well-received by everyone but Islamic leaders who feared that it would not preserve Islamic values. They wanted a greater role for Islam, but did not have enough support to win the two-thirds majority to push through their proposals. Instead, they supported the government's proposal to return to the 1945 Constitution on condition that the obligation on Muslims is re-inserted in the preamble. Several unsuccessful attempts (1949 and 1950) were made that intended to bring about a condition whereby Islamic law would become the primary source of law Indonesia. This lack

of success is partly attributable to geopolitical reasons. Proclaiming Indonesia as an Islamic State could cause many parts of the country to secede. Islam was one of the main reasons the people of Aceh wanted to withdraw from the Indonesian Republic. They abandoned their cause when President Bambang Susilo offered them a peace deal in 2004 that allowed them to apply Islamic Law as an autonomous territory. (Laws and regulations, 2014) Much like *adat* law, the failure of Islamic leaders to impose Islamic Law throughout Indonesia is also due to the fact that the majority of Indonesian people adhere to different Islamic schools of thought, hence making it difficult to agree on one (Mardani, 2009).

Interaction of *Adat* Law and Islamic Law

In Indonesia, *adat* law and Islamic law are so close that it is nearly impossible to draw the line between the two. The institutions of both system of law sometimes rely on one another to resolve the issues of individuals who call upon them. One area where *adat* law and Islamic Law institutions interact very often is common property ownership in marriage. As Al-Quran, the foundation of Islamic Law, does not say much about how the properties of two individuals married to one another is to be shared in case of divorce, this traditional concept that has evolved to become an Islamic rule in Indonesia. The Compilation of Islamic Law issued by Indonesian Islamic scholars, is the result of the collaboration of *adat* law with Islamic Law to minimize some of their shortcomings. In Indonesia, both *adat* law and Islamic Law complement one another in matters related to inheritance of the family wealth by an adopted child. According to Islamic law, only children having blood connection with their parents can become their heirs while *adat* law recognizes that an adopted child, too, can become the heir of his/her adopting parents. In order to avoid conflict, the Compilation of Islamic Law, here again, provide a framework whereby the principles and concerns of both systems of law are dealt with without recourse to courts of law. Evidence of this strong collaboration and dependency lies in the following quote well-known to the Indonesian people: “*Adat bersendi syarak, syarak bersendi Kitabullah*”, which means that *adat* law is based on Islamic law, which is also based on Al-Quran. The quote also means that *adat* law and Islamic law should not contradict one another and that both should be kept in mind by the Indonesian people in their everyday activities.

CONCLUSION

Despite their weaknesses, both *adat* and Islamic laws have immensely contributed to the enrichment of the Indonesian legal system. Both systems of law create an environment whereby ordinary people resort to several systems of law to deal with their everyday problems (issues related to inheritance, marriage, divorce and land tenure, etc.). Despite this contribution as well as the existence of some constitutional recognition, however, both *adat* and Islamic laws remain under the control and domination of the national law. This makes it difficult for a “strong” legal pluralism to flourish in a culturally, religiously and ethnically diverse nation such as Indonesia. Legal pluralism can be enhanced to offer more access to justice and conflict resolution when both *adat* and Islamic laws complement one another and when they are free from the hegemony of the government.

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