

# DYNAMICS OF ADAT LAW COMMUNITY RECOGNITION: STRUGGLE TO STRENGTHEN LEGAL CAPACITY\*

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## Abstract

*The existence of adat law community has been recognized since Dutch Colonial Era until today. State recognitions towards adat law community are dynamics. This paper is written based on legal normative research to describe dynamics of adat law community recognition. In the early of Indonesia independent, adat law community was considered as foundation of Indonesia nation state establishment. Since 1957 and during New Order era, there was systematic effort to abolish adat law communities because adat law was perceived as symbol of backwardness. After the amendment of the Constitution, adat law community and their traditional rights are recognized by law and enforced through court decision. Adat law community can determine their type of recognition to strengthen their legal capacity to manage Adat Forest; to organize Adat Village; or to hold communal land rights.*

**Keywords:** *adat law community, recognition, legal capacity.*

## Intisari

Eksistensi masyarakat hukum adat telah diakui sejak zaman Pemerintahan Kolonial Belanda hingga hari ini. Pengakuan negara terhadap masyarakat hukum adat bersifat dinamis. Tulisan ini ditulis berdasarkan penelitian hukum normatif untuk mendeskripsikan dinamika pengakuan masyarakat hukum adat. Pada awal kemerdekaan Indonesia, masyarakat hukum adat merupakan dasar terbentuknya negara bangsa Indonesia. Sejak tahun 1957 dan selama periode Order Baru, ada upaya sistematis untuk menghapuskan masyarakat hukum adat karena hukum adat dianggap sebagai simbol keterbelakangan. Pasca amandemen konstitusi, masyarakat hukum adat dan hak tradisionalnya diakui melalui hukum dan ditegakkan oleh pengadilan. Masyarakat hukum adat dapat menentukan jenis pengakuan yang dapat menguatkan kapasitas hukum mereka dalam mengelola hutan adat; mengorganisasi Desa Adat; atau dalam menyangand hak komunal atas tanah.

**Kata Kunci:** masyarakat hukum adat, pengakuan, kapasitas hukum.

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\* This article is part of paper submitted to Law and Globalization Class of Doctoral Program Faculty of Law Universitas Gadjah Mada 2017 under the supervision of Prof. Dr. Marsudi Triatmodjo, S.H., LL.M.

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## A. Introduction

The awareness that there were communities practicing legal order within the jurisdiction of Dutch Colonial Government had been recognized since 1891. Through his empirical study, Wilken found that native people had legal order according to their customs and influenced by religious law.<sup>1</sup> According to Snouck Hurgronje and Van Vollenhoven, legal order applicable originally to native people was *adat* law.<sup>2</sup> Van Vollenhoven classified the applicability of *adat* law according to its holder, the *jural* communities or *rechtgemeenschappen*. Van Vollenhoven referred the communities as *jural* communities because they are established based on law.<sup>3</sup> This *jural* communities referred to small autonomous communities based on kinship or territory which voluntarily associate for various purposes.<sup>4</sup> According to Van Vollenhoven, coercion and the authority of *jural* communities were the pillars where *adat* law depend.<sup>5</sup>

Van Vollenhoven categorized the application of *adat* law into nineteen *adat* law territories according to four types of *jural* communities grouping: kinship; kinship and territory; territory; and voluntarily.<sup>6</sup> Ter Haar further explained grouping of *jural* communities according to their kinship into *vaderrechtelijk*, *moederrechtelijk* and *alternerend*; while according to their territory into *de dorpsgemeenschap*, *de streekgemeenschaap* and *de dorpenbond*.<sup>7</sup> *Vaderrechtelijk* is kinship based

on fatherhood line, *moederrechtelijk* is lineage according to motherhood line and *alternerend* are mixture between fatherhood and motherhood line. *De dorpsgemeenschap* was the smallest organization of *jural* communities, such as village in Java or Bali. If village is part of larger organization, it is *de streekgemeenschaap*. If a village and its neighbor cooperate to conduct specific function, such as irrigation, it is called *de dorpenbond*. Since *jural* communities is basically communities based on *adat* law, it is later called as *adat* law community.

Recognition towards *adat* law community is dynamics and varied from time to time. During colonial period, population were classified into European; Foreign East, such as Chinese and Indian; and *adat* law communities. In the early colonial period, *adat* law communities were recognized as communities based on their religious law, especially in Java and Madura, the communities were ruled based on Islamic Law.<sup>8</sup> This later being critiqued by Snouck Hurgenje and Van Vollenhoven who argued that law applicable for *adat* law community was *adat* law which was indigenous law influenced by religious elements.<sup>9</sup> Since *adat* law communities lived within the jurisdiction of Colonial Government, not only *adat* law, but also Dutch Criminal Code applicable to them.

When Indonesia declared its independence in August 17<sup>th</sup>, 1945, there is no more classification of population living in Indonesia, except citizen and

<sup>1</sup> Djojodigono, 1950, *Adat Law in Indonesia*, MCMLI Jajasan Pembangunan, Djakarta, pg. 12; Verspreide genschriften I 1912, p. 622 in Van Vollenhoven, 1987, *Penemuan Hukum Adat*, 2<sup>nd</sup> Edition, Penerbit Djambatan, Jakarta, pp. 130-131.

<sup>2</sup> C. Snouck Hurgronje, 1906, *The Acehnese Vol. I*, translated b A.W.S. O'Sullivan, Late E.J. Brill, Leyden, p. 16; J. F. Holleman (Ed.), 1981, *Van Vollenhoven on Indonesian Adat Law*, KITLV, Leiden, p. XLII.

<sup>3</sup> J. F. Holleman (Ed.), *ibid*.

<sup>4</sup> *Ibid*.

<sup>5</sup> *Ibid*.

<sup>6</sup> Nineteen *adat* law territories are as follow (1) Aceh; (2) Gayo-, Alas-, Bataklands, Nisa Archipelago, and Batu Island; (3) Minangkabau and Mentawai Archipelago; (4) South Sumatera, including Engganau Island; (5) Malay: East Coast of Sumatera and Riau-Lingga Islands; (6) Bangka and Belitung; (7) Kalimantan, excluding Serawak and North Kalimantan; (8) Minahasa and Sangir Talaut; (9) Gorontalo; (10) South Sulawesi, including south coast of Buginese Island; (11) Toraja; (12) Ternate Archipelago; (13) Ambon and Maluku, including Tanimbah, Kei, dan Aru Islands; (14) Papua; (15) Timor its islands; (16) Bali, Lombok, and West Sumbawa; (17) Central and East Java, including Madura; (18) The central of Javanese principalities (Surakarta and Yogyakarta); dan (19) West Java (Pasundan) *Ibid*. pp. 44 & 45-52. See also Djojodiguno, unknown, *Asas-Asas Hukum Adat Kuliah Tahun 1962-1963* Djilid 2, Jogjakarta, Jajasan Badan Penerbit Gajah Mada, pp. 20-21.

<sup>7</sup> Ter Haar, 1979, *Asas-Asas dan Susunan Hukum Adat*, translated by K. Ng. Soebakti Poesponoto, Pradnya Paramita, Jakarta, pp. 31-32 & 178.

<sup>8</sup> Taufiq Hamami, 2003, *Kedudukan dan Eksistensi Peradilan Agama dalam Sistem Tata Hukum di Indonesia*, Bandung, PT Alumni, p. 19 in Nurhasanah, 2017, "Analisis tentang Teori Landasan Rumusan Kompetensi Pengadilan Agama", *Legal Research*, Faculty of Law Sriwijaya University, Palembang, p. 9.

<sup>9</sup> J. F. Holleman (Ed.), *Op. cit.*, p. 5.

foreigner; therefore, anyone living in Indonesia shall subject to Indonesian law. *Adat* law and *adat* law community entered new political contestation within the legal system of Unitary State Republic of Indonesia. This paper is written based on legal normative research by collecting secondary data to explain the dynamics of *adat* law community recognition after Republic of Indonesia independent, either by legislation, judiciary, or executive both in national and local level. Recognition towards *adat* law community are explained periodically from the early Indonesia independent; during the New Order era; and in the Post-Amendment of 1945 Republic of Indonesia Constitution. It is also explained options available for *adat* law communities to be recognized according to their empirical legal capacity and lesson learn from *adat* law community recognition from time to time.

## B. Discussion

### 1. *Adat* Law Community Recognition in the Early Indonesia Independent

After the independence of Republic Indonesia, *adat* law community's territory lies within the territory of Indonesia nation state.<sup>10</sup> There were more than 250 (two hundred and fifty) *zelfbesturendelandshappen* and *volkgemeenschappen*, regions which had original structure, in Indonesia's territory, such as village in Java and Bali, *nagari* in Minangkabau, *dusun* and *marga* in Palembang, and others.<sup>11</sup> Though the 1945 Republic of Indonesia Constitution did not explicitly mention *adat* law community, the recognition towards village in Java and Bali, *nagari* in Minangkabau, *dusun* and *marga* in Palembang as special regions expressed that the

state recognized the existence of territorial *adat* law community structure. Ter Haar, Djojodigono, and Sumardjono said that village was an example of *adat* law community structure based on territory.<sup>12</sup> By recognizing village, the state of Indonesia recognized the territory where *adat* law community lived.

The 1945 Republic of Indonesia Constitution ordered that all state regulations regarding special regions should consider right of origin. Unfortunately, the 1945 Republic of Indonesia Constitution did not explain what the meaning of right of origin was. Since special regions regulatory were put under Regional Government Chapter, special regions implementing regulation should also follow law and regulation regarding regional government. Law Number 22 of 1948 regarding Stipulation of Basic Self-Governing Law in Regions which Have Right to Regulate and to Administer Their Own Affair (Law 22/1948) regulated that territory in Indonesia was structured in three level: first, province; second, regency; and third, village, *nagari*, *marga*, etc. Each level of government had right to regulate and to administer its own affair.

Dimiyati said that in the beginning of Republic of Indonesia independent, Indonesia scholars tried to create law which substantially based on Indonesian value and culture.<sup>13</sup> *Adat* law was considered as legal material to create Indonesian legal norms.<sup>14</sup> Djojodigono explained that *adat* law was original Indonesian legal material which uncodified and applicable in Indonesia.<sup>15</sup> The existence and the articulation of *adat* law values which obtained intrinsically from Indonesian legal culture were more important and adequate to be developed as legal thinking equal to modern legal

<sup>10</sup> Article 18 the 1945 Republic of Indonesia Constitution (Before the Amendment), regulated that Indonesia territory was divided into large and narrow regions with government structure stipulated by the law which considered deliberation foundation in the state government system and right of origin in special regions.

<sup>11</sup> See Elucidation of Article 18 the 1945 Republic of Indonesia Constitution.

<sup>12</sup> Ter Haar, *Op. cit.*, pp. 31-32; Djojodigono, unknown, *Op. cit.*, pp. 20-21; Maria S.W. Sumardjono, 1982, *Puspita Selangkung: Aneka Masalah Hukum Agraria*, Andi Offset, Yogyakarta, pp. 3-4.

<sup>13</sup> Khudzaifah Dimiyati, 2010, *Teorisasi Hukum Studi tentang Perkembangan Pemikiran Hukum di Indonesia 1945-1990*, 10th Edition, Genta Publishing, Yogyakarta, p. 236.

<sup>14</sup> Sulastriyono and Sartika Intaning Pradhani, "Pemikiran Hukum Adat Djojodigono dan Relevansinya Kini", *Mimbar Hukum*, Vol. 30, No. 3, October 2018, p. 461.

<sup>15</sup> Djojodigono, 1960, *Harapan Hukum Adat Indonesia*, Badan Penerbit Gadjah Mada, Jogjakarta, p. 1.

thinking introduced by other state.<sup>16</sup>

Law 22/1948 recognized village, *nagari*, and *marga* as the smallest self-governing region in the history of Indonesia and its predecessor government system. During the Dutch Colonial era, village was granted *gemeente ordoonantie* which look like right to autonomy, but it cut down its authority since village no longer had source of finance and bound by un-living custom against the villager's interest. Wardo said that Dutch Colonial rejected right of origin concept, therefore the villagers lost their right to control and right to access natural resource.<sup>17</sup> According to Fitzpatrick, characteristics of Colonial Law which neglect traditional land right holder was subordination of autochthonous Indonesian system to formal laws and land title; and failure to facilitate autochthonous systems evolutionary development and eventual integration to national legal system.<sup>18</sup>

Conceptually speaking, after the independent, village administration was ideally based on the spirit of state right to control for optimal welfare of the people.<sup>19</sup> The position of village in Indonesia state structure should be the main foundation of Indonesia welfare because prosperity in Indonesia nation state should be started from the village. The integration of village within state organization structure required conditions. According to Soepomo, the state would recognize and respect the existing of law communities as long as the law communities considered themselves as part of the state.<sup>20</sup> The integration of *adat* law communities into the state as mentioned by Soepomo was similar to *de streekgemeenschap* introduced by Ter Haar where *adat* law communities as narrower law

communities united into larger administration, the State Republic of Indonesia.<sup>21</sup>

Maschab said that village as the smallest government unit in certain circumstances is the miniature of the state because village basic structure consisted of legislative, executive, and judicative function.<sup>22</sup> Village's right of origin shall be recognized, respected, and developed dynamically with the development of the state itself. State should also assist village to bring more joy to the people. That was why village was adopted by Indonesia founding parent as the smallest government structure in the Republic of Indonesia.

Like Soepomo, Yamin also gave preconditions to integrate *adat* law communities into state governance structure. According to Yamin, *nagari*, village, and any *adat* law communities which had been rationalized and modernized should be the foundation of state structure.<sup>23</sup> Rationalization and modernization of *nagari*, village and any *adat* law communities could be seen in the regulatory of special regions. Regions which had right of origin and before the establishment of Republic of Indonesia had special self-government, *zelfbesturende lanschappen*, should be stipulated as regions equivalent to province, regency, or village which had right to regulate and to administer its own affair. Equalization of *nagari*, village and any *adat* law communities into level of state governance structure was government's effort to modernize and to rationalize traditional community structure as mentioned by Yamin.

In 1957, Law 22/1948 was changed by Law Number 1 of 1957 regarding Basic Regional

<sup>16</sup> Ibid.

<sup>17</sup> Wardo, 1990, *Desa Hutan dalam Perubahan: Eksploitasi Kolonial terhadap Sumberdaya Lokal di Karesidenan Rembang 1865-1990*, Ombak, Yogyakarta, p. 15.

<sup>18</sup> Daniel Fitzpatrick, "Land, Custom, and the State in Post-Suharto Indonesia A Foreign Lawyer's Perspective", in Jamie S. Davidson and David Henley (Ed.), 2007, *The Revival of Tradition in Indonesian Politics The Deployment of Adat from Colonialism to Indigenism*, Routledge, New York, p. 132.

<sup>19</sup> State Right to Control was regulated in Article 33 sub-article (3) the 1945 Republic of Indonesia Constitution.

<sup>20</sup> A.B. Kusuma, 2004, *Lahirnya Undang-Undang Dasar 1945*, Badan Penerbit Fakultas Hukum Universitas Indonesia, Depok, p. 128.

<sup>21</sup> Ter Haar distinguished territorial bonding into three parts which each of them was the center of permanent or transition shape, namely *de dorpsgemeenschap*, *de streekgemeenschap*, and *de dorpenbond*. *De streekgemeenschap* is law community where narrow law communities created larger administration, such as *Kuria* and its *huta* in Angkola or Mandiling; and *marga* and its *dusun* in South Sumatra. See Ter Haar, *Op. cit.*, p. 57.

<sup>22</sup> Mashuri Maschab, 2013, *Politik Pemerintahan Desa di Indonesia*, Polgov, Yogyakarta, p. 8.

<sup>23</sup> A.B. Kusuma, *Op. cit.*, p. 98.

Government (Law 1/1957). Village was not recognized as unit of regional government in Law 1/1957 because regions in Indonesia territory were divided into first, second, and third level of autonomous region. In its elucidation, *adat* law was considered as a system of law which confined or restricted Indonesian from development. In both *adat* law system and autonomy system, territory where the people live was the main element where *adat* law was enforced or where the authority was transferred. By considering *adat* law as the main obstacle of autonomy implementation, *adat* law system of government, such as village or *nagari*, was not entitled to autonomy. Autonomy should only be limited in regency as second autonomous region because it was hard either to unite *adat* system of government into third autonomous region or to dissolve the *adat* law community itself.

## 2. *Adat* Law Community Recognition in New Order Era

Law Number 18 of 1965 regarding Basic Regional Government (Law 18/1965) changed Law 1/1957. Though this law was signed by Soekarno, this law was the legal basis of village administration during new order era. Law 18/1965 recognized and defined village as unity of law community with unitary ruler who had right to regulate and to administer its own affair. Though this law recognized the existence of village, this law weakened the position of village because village was not considered as unit of self-government in Republic of Indonesia state structure. According to this law, some of villages or equivalent to it should be united into third level region or district. District should replace *adat* law community because all Indonesia territory had been divided into regions which had right to regulate and to administer its own affair. By this regulatory, village was no longer an autonomous region because only district as third level region was considered as the smallest autonomous region from the state perspective.

To accelerate the establishment of district, Law Number 19 of 1965 regarding *Desapraja* as

Transition Form to Accelerate the Establishment of Third Level Region in All Republic of Indonesia Territory (Law 19/1965) was issued. This law regulated that *desapraja* should replace all terms of *volkgemeenschappen* as mentioned in the 1945 Republic of Indonesia Constitution, such as village in Java and Bali, *nagari* in Minangkabau, *dusun* and *marga* in Palembang; and others. *Adat* law communities in Indonesia should be integrated into third level region because this law was constructed based on understanding that law communities contained impeding feudal elements which became the basic of colonial's oppression and exploitation.

To abolish colonial's oppression and exploitation, Republic of Indonesia shall revoke all Dutch Colonial laws which had feudalism nature, including the establishment of *adat* law community. In the Unitary State Republic of Indonesia, there should not be any autonomous region below district; therefore, *adat* law community should be converted into district either by merging the *adat* law communities into district or recognizing an *adat* law community as district.

Law 18/1965 was changed by Law Number 5 of 1974 regarding Basic Government in Region (Law 5/1974). Law 5/1974 regulated that region should be established by considering economic capability, number of populations, area, national defense and security, and other requirements which enabled region to conduct development, political stability coaching and nation unitary in order to implement real and responsible regional autonomy. This law neglected special region's right of origin which should be considered when the state divided its territory into regions. Law 5/1974 was silent about village because village was regulated in separate law, Law Number 5 of 1979 regarding Village Government (Law 5/1979).

Law 5/1979 was issued based on construction that in the Unitary State Republic of Indonesia, village government should be uniformed. At this regime, law was a tool of social engineering to achieve state's interest efficiently and effectively. Putro said that the concept of law as tool of

social engineering was introduced by Mochtar Kusumaatmadja in 1970's in order to legitimize the use of law to engineer the society which had top-down or centralistic nature where all law making should come from the Central Government.<sup>24</sup> By this law, *adat* law communities' territory, such as village or any other equivalent to it, should be uniformed as village. Any territory under district, except village, should be declared as *Kelurahan*.<sup>25</sup>

### 3. *Adat* Law Community Recognition in the Post-Amendment of the 1945 Republic of Indonesia Constitution

Since 1999, the 1945 Republic of Indonesia Constitution was amended. One of pivotal article appears after the amendment is recognition towards *adat* law community and their traditional rights. Unfortunately, the spirit of Indonesian legislators to recognize and to respect *adat* law community was conditional. Recognition and respect are based on conditions that (1) the communities and their traditional right shall exist; (2) in accordance with community development and Unitary State Republic of Indonesia; and (3) shall be further regulated by law.<sup>26</sup> Bamba said that:

“by deliberately formulating conditions rather vaguely, the state is not only taking away with one hand what the other has given, but it also reserves for itself the right to decide on behalf of indigenous people what is good for them and what is not, what can be considered “in accordance with time” and

what “developed”, “modern”, or “civilized”, and in doing this the Indonesian state joins all those past and present colonialist powers who have used the obligation of fulfilling a “civilizing mission” to legitimize exploitation and oppression of peoples with different cultures and histories than their own.”<sup>27</sup>

In the meeting minutes of the 1945 Republic of Indonesia Constitution Amendment, opinions of the legislators and scholars were noted regarding the formulation of *adat* law community recognition within the 1945 Republic of Indonesia Constitution. Luthfi reminded that unity and unitary of Indonesia which often interpreted as authoritarian regime by Central Government was not correct because Indonesia founding parent established Indonesia ideology based on unity in diversity.<sup>28</sup> Moniaga said that right of *adat* law community is not only limited on right to access natural resources, but also right to self-determination on how *adat* law community can regulate and administer its own territory.<sup>29</sup> Demand to self-determination is not only voiced by *adat* law community in Indonesia, but also indigenous people lives world-wide. Moreover, in the international level, United Nation and International Labor Organization have issued convention regarding indigenous peoples' right.<sup>30</sup>

Sinaga said that there was systematic effort from Central Government to abolish right of origin which has special nature for the sake of nation unity and unitary.<sup>31</sup> This effort created anxiety which led to nation disintegration. Moreover, there was

<sup>24</sup> Widodo Dwi Putro, “Peta Mahzab Hukum dan Metode Penelitiannya”, *article*, delivered at Legal Research Intermediate in Faculty of Law, Universitas Gadjah Mada, Yogyakarta, Indonesia on 2nd-4th October, 2017, p. 17.

<sup>25</sup> The main different between village and *Kelurahan* was the autonomy. Village had autonomy, while *Kelurahan* did not have autonomy. This law was aware that each *Adat* Law Community had its own distinct character; therefore, the uniformity of *Adat* Law Communities into village or *Kelurahan* should be conducted gradually.

<sup>26</sup> This amendment changed right of origin to traditional right. Unfortunately, there was no any explanation in the proceeding of the amendment why People Consultative Assembly chose the word traditional right instead of right of origin.

<sup>27</sup> John Bamba, “Recognition In Kind Indonesia Indigenous Peoples and State Legislation” in Christian Erni (Ed.), 2008, *the Concept of Indigenous Peoples in Asia A Resource Book*, International Work Group for Indigenous Affairs (IWGIA) and Asia Indigenous Peoples Pact Foundation, Copenhagen and Chiang Mai, p. 267.

<sup>28</sup> A.M. Luthfi was legislator from Reformation Fraction. See Mahkamah Konstitusi Republik Indonesia, 2010, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Latar Belakang, Proses, dan Hasil Pembahasan 1999-2002 Buku IV Kekuasaan Pemerintahan Negara Jilid 2*, 2nd Edition, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, Central Jakarta, p. 1114.

<sup>29</sup> Sandra Moniaga is speaker from Lembaga Studi dan Advokasi Masyarakat (Institution of Community Study and Advocacy), *Ibid.*, p. 1141.

<sup>30</sup> See International Labor Organization Recommendation concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries Number 104; International Labor Organization Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi Tribal Populations in Independent Countries Number 107; International Labor Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries Number 169; and United Nations Declaration on the Right of Indigenous Peoples.

<sup>31</sup> *Hobbes Sinaga* is legislator from Democratic Indonesia Struggle Fraction (Partai Demokrasi Indonesia Perjuangan). *Ibid.*, p. 1161.

effort to neglect the fact that *adat* law and *adat* law community were the main element of the Unitary State Republic of Indonesia establishment and the foundation of Republic of Indonesia Constitution.

Currently, protection towards rights of origin held by *adat* law community is urgent. Katjasungkana said that in the global trade, right of *adat* law community could be claimed by foreign entity for their own benefit.<sup>32</sup> He gave example where patent of Basmati, aromatic rice grown in India, was claimed by American Company, RiceTec Inc, through United States Patent and Trademark Office.<sup>33</sup> Mukherjee said that granting patent to RiceTec Inc violated Geographical Indications Act under Trade Related aspects of Intellectual Property Rights (TRIPs) agreement.<sup>34</sup> The use of Basmatic word for rice which was derived from Indian rice but not grown in India and did not have the same quality infringed Geographical Indication concept. By considering this fact, protection towards *adat* law community right of origin is a must. The community shall also be involved to determine what the most suitable protection to guard their interest.

Involvement of the community to determine the best legal protection to protect their interest can be implemented if their right to self-determination is respected. As Moniaga said, right to self-determination is very prominent for *adat* law community. Through right to self-determination, *adat* law community can identify themselves as distinct legal subject which has right to regulate and to administer its own land and territory. Daes

said that meaningful political and economic self-determination of indigenous peoples will never be possible without *adat* law community having the legal authority to exercise control over their land and territory.<sup>35</sup> Daes explained that the recognition of *adat* law community can lead to appropriate balance between the interest of the state and the community in the promotion and protection of the community's rights to self-determination towards their land, territory, resources and economic development.<sup>36</sup> By recognition based on self-determination, the existence of *adat* law community will not be accused as obstacle to development and investments; or symbols of underdevelopment, backwardness and obstacle of modernization.<sup>37</sup>

#### 4. Right to Self-Determination: What to Be Recognized and How It Works

The 1945 Republic of Indonesia Constitution has recognized *adat* law community since 2000. Unfortunately, from 2000 to 2018, there is no law which specifically regulates regarding the recognition of *adat* law community. At this current situation, recognition towards *adat* law community and their traditional rights are scattered in various law and regulations. To guide the recognition of *adat* law community, Minister of Home Affair issued Regulation Number 52 of 2014 regarding *Adat Law Community Recognition and Protection Guideline* (Minister of Home Affair Regulation 52/2014).

In Minister of Home Affair Regulation 52/2014, *adat* law community is defined as

<sup>32</sup> Nursyahbani Katjasungkana is legislator from Group Representative (Utusan Golongan). *Ibid.*, pp. 1335-1336.

<sup>33</sup> *Ibid.*

<sup>34</sup> Utsav Mukherjee, 2008, A Study of the Basmati Case (India-US Basmati Rice Dispute): The Geographical Indication Perspective, *article*, access from [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1143209](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1143209) on 06 February, 2018.

<sup>35</sup> Erica Irene A. Daes, 2004, *Prevention of Discrimination and Protection of Indigenous Peoples' Permanent Sovereignty over Natural Resources*, Sub-Commission on the Promotion and Protection of Human Right, Economic, and Social Council, United Nation, p. 5.

<sup>36</sup> *Ibid.*

<sup>37</sup> Erni said as follow "Economically, indigenous people's existence in their territories were considered as the main obstacle to development and investments where granting special rights to indigenous peoples in natural resources management would limit the government's access to these resources and prevent foreign investment in the specific sectors. It is also believed that granting indigenous peoples their special political and economic rights will cause jealousy on the part of other members of the society and result in discrimination and injustice. Socially and culturally, indigenous people's way of life was seen as symbols of underdevelopment, backwardness and the obstacle of modernization; therefore, their culture should be filtered, enhanced, and modernized so that they do not leave scan in the face of the country. It is perceived that the practices are highly unproductive so they must be replaced by big plantation, mining, and other industries." See John Bamba, "Recognition In Kind Indonesia Indigenous Peoples and State Legislation" in Christian Erni (Ed.), *Op. cit.*, p. 267.

Indonesian citizen who has distinct character; harmoniously lives in group based on *Adat* Law; has genealogy and/or territory-bonding; has strong relation with land and livelihood; and has value system which determines structure of economic, political, social, culture, law and hereditary utilization of territory. Soepomo said that *adat* law community as law community emphasized on unitary communal life (*levensgemeenschap*) where the members know each other; live together; and have the same interest for the joy of the community and its members.<sup>38</sup> Sasmitha said that recognition and protection of *adat* law community shall be started from the conception of *adat* law community itself.<sup>39</sup> *Adat* law community is not only right and obligation holder, but also a unit of communal living. As a unit of communal living, *adat* law community does not act as government institution (*gezagsgemeenschap*) because its organization is based on attachment on unitary values and belief; and an autonomous community which regulates, administers, and enforces its own law.

Administration of *adat* law community recognition in the Minister of Home Affairs Regulation 52/2014 is an effort to recognize *adat* law community as legal subject. According to this regulation, recognition and protection of *adat* law community shall be conducted through identification, verification and stipulation. Regent/Major through head of district shall identify the history of *adat* law community; *adat* territory; *adat* law; wealth and/or property; and *adat* institution/administration system. Result from the identification shall be verified and validated by Regency/Municipality *Adat* Law Community Committee (the Committee) and be informed to the *adat* law community within one month.

*Adat* law community can object the verification and the validation by submitting objection to the Committee. The Committee shall once re-verify and re-validate the objection. Regent/Major shall stipulate the recognition and protection of *adat* law community through head of region decision. If the community live in two or more regencies/municipalities, the recognition and the protection shall be stipulated by head of region joint decision. Critique towards subject based legal recognition is recognition towards subject does not automatically determine object which controllable. This challenge is illustrated in the complexity of *adat* forest recognition below.

Law Number 41 of 1999 regarding Forestry (Law 41/1999) distinguishes forest based on its status into state forest and forest with title. State forest is forest above the land which has no land title, while forest with title is forest above the land which has land title. *Adat* Forest is state forest in the territory of *adat* law community. The government stipulates *Adat* Forest if *adat* law community exists and being recognized. *Adat* Law Community recognition shall be conducted through regional regulation. Regional regulation shall be drafted by considering research report from *adat* scholars, local community aspiration, *adat* figures in the related region, and any stakeholders.

Law 41/1999 recognizes traditional rights of *adat* law community. According to this law, recognized *adat* law community is entitled to collect forest product to fulfill their daily life; to manage forest based on *adat* law and in accordance to the law and regulation; and to obtain empowerment in order to enhance their welfare.<sup>40</sup> This law orders to regulate further the research procedure, involved parties, research substance, and research

<sup>38</sup> Soepomo, 2000, *Bab-Bab tentang Hukum Adat*, 15th Edition, Pradnya Paramita, Jakarta, p. 50.

<sup>39</sup> Tody Sasmitha, "Masyarakat Hukum Adat: Persekutuan Hukum (*Rechtsgemeenschappen*) atau Subjek Hukum, *article*, delivered in Simposium Nasional Masyarakat Adat II in Universitas Pancasila, at 16th-17th May 2016, conducted by cooperation between Epistema Institute, Aliansi Masyarakat Adat Nusantara (AMAN), HuMa Association, Djodjodigono *Adat* Study Center Universitas Gadjah Mada, Human Right National Commission, Faculty of Law Universitas Pancasila, and Network of Participative Mapping and *Adat* Territory Registration Agency. It was also part of research funded from Research and Community Service Unite, Faculty of Law, Universitas Gadjah Mada, p. 16.

<sup>40</sup> See Article 34 and 67 Law Number 41 of 1999 regarding Forestry (State Gazette of the Republic Indonesia of Indonesia Year 1999 Number 167, Supplement of State Gazette of the Republic of Indonesia Number 3888).

indicators of *adat* law community existence through Government Regulation.<sup>41</sup>

Law 41/1999 is issued to change Law 5/1967 but government's conception on *adat* law community reminds the same. *Adat* law community's traditional rights towards forest in its territory is neither recognized nor respected in both law. The definition of *adat* forest as state forest within the territory of *adat* law community denies the recognition towards *adat* law community as legal subject. With several conditions, *adat* law community is recognized as the right holder, but the community does not entitle to hold title. This regulatory supports Peluso's statement that state forest concept was born from forest management controlled by the state where forest was seen as the main source of state income; therefore, it is justified to utilize forest for the greatest good for the greatest number of people.<sup>42</sup> Warty added that state controls towards forest restrict people's access from forest resource because the state uses its right to control to exploit the natural resources.<sup>43</sup> The regulatory of *adat* forest which neglect *adat* law community's traditional right confirmed Peluso and Warty statement that in the post amendment it is still legitimate to abandon *adat* law community interest under the claim of state right to control.

Court has pivotal role to settle disputes on rights of *adat* law community.<sup>44</sup> In May 16<sup>th</sup>, 2013, Constitutional Court through Decision Number 35/PUU-X/2012 decided that *Adat* Forest is not state forest located within the territory of *adat* law community. *Adat* Forest is forest with title. *Adat*

Forest as forest with title is forest located in *adat* law jurisdiction and managed based on traditional right held by the community. This decision strengthens *adat* law community position as legal subject which has right to control its legal object, *adat* forest, through traditional right.

To follow up Constitutional Court Decision Number 35/PUU-X/2012, Minister of Environment and Forestry issued Regulation Number P.32/Menlhk-Setjen/2015 regarding Forest with Title (Minister of Environment and Forestry Regulation 32/2015).<sup>45</sup> Traditional right of *adat* law community to manage territory is also known as *Ulayat* Right. Minister of Environment and Forestry Regulation 32/2015 defines *Ulayat* Right as communal ownership right of *Adat* Law Community which recognized by Central or Regional Government in accordance with law and regulation. *Adat* law community is defined as a group of hereditary community who lives in particular territory based on genealogical bonding, livelihood bonding, and value system which determines their economic, political, social, and law structure.<sup>46</sup>

The definition of *adat* law community in Minister of Environment and Forestry Regulation 32/2015 has correctly referred to the conception of unitary communal living with distinct characters, but there is misconception in the definition of *Ulayat* Right. Hammar said that relation between *adat* law community and its land and territory is not only ownership relation (private), but as Van Vollenhoven said, it is *beschikkingrecht* where it has public-private and non-alienable nature.<sup>47</sup> By

<sup>41</sup> Since 1999 to 2018, there is no any Government Regulation which follow up the order of Law 41/1999 to further regulate regarding *Adat* Law Community's Right and Recognition. But in 2015, Minister of Environment and Forestry issued Regulation Number P.32/Menlhk-Setjen/2015 regarding Forest with Title. This regulation regulates the procedure to obtain forest with title, including procedure for *Adat* Law Community to obtain stipulation for their *Adat* Forest.

<sup>42</sup> Nancy Peluso, 1992, *Rich Forest, Poor People: Resource Control and Resistance in Java*, Berkeley University of California Press, Berkeley, p. 8.

<sup>43</sup> Warty, *Op. cit.*, p. 15.

<sup>44</sup> Sartika Intaning Pradhani, 2018, "Traditional Rights of Indigenous People in Indonesia: Legal Recognition and Court Interpretation", *Jambe Law Joournal*, Vol. 1, No. 2, 2018, p. 181.

<sup>45</sup> Minister of Environment and Forestry Regulation 32/2015 is changed by Minister of Environment and Forestry Regulation Number P.21/MENLHK/SETJEN/KUM.1/4/2019 regarding *Adat* Forest and Forest with Title (Official Gazette of the Republic of Indonesia Number 522 of 2019).

<sup>46</sup> See Article 1 number 11 Minister of Environment and Forestry Regulation 32/2015.

<sup>47</sup> Roberth Kurniawan Rusiak Hammar, 2017, *Penataan Ruang Berbasis Kearifan Lokal Implikasi Penataan Ruang terhadap Hak Ulayat Masyarakat Hukum Adat*, Calpulis, Yogyakarta, p. 22.

considering that *Ulayat* Right has private-public nature, recognizing *Ulayat* Right simply as private ownership reduced the legal capacity of *adat* law community to perform its public competence in regulating and managing their forest.

Administration of *Adat* Forest according to Minister of Environment and Forestry Regulation 32/2015 requires several mandatory steps. *Adat* law community shall initially request to the Minister of Environment and Forestry to stipulate *Adat* Forest with three conditions. First, *adat* law community shall have been recognized by regional government through regional law product either by regional regulation or head of region decision. Second, there is forest within *adat* territory either partially or entirely. Third, there is statement letter from *adat* law community that explain the proposed area is under the jurisdiction of *adat* law community and willingness to be stipulated as *Adat* Forest with protection, conservation or production function. If there is no map of *adat* territory in regional law product which recognize *adat* law community, Minister of Environment and Forestry and regional government can facilitate the community to map their territory.

Minister of Environment and Forestry Regulation 32/2015 regulates that recognition of *adat* law community shall be in the form of regional law product. This regulatory has purpose to bridge the regulatory of *adat* law community recognition between Law 41/1999 and Minister of Home Affair Regulation 52/2014. Law 41/1999 orders that recognition of *adat* law community shall be stipulated by regional regulation, while Minister of Home Affair Regulation 52/2014 orders that recognition of *adat* law community shall be stipulated by head of region decision or head of

region joint decision. Regional regulation, head of region decision and head of region joint decision are regional law product; therefore, to accommodate all the legal instrument which recognizes *adat* law community, Minister of Environment and Forestry Regulation 32/2015 choose regional law product as legal term.<sup>48</sup>

Right to self-determination is not only manifested in the recognition of *adat* law community as legal subject through regional decision or regulation; or stipulation of *Adat* Forest by Minister of Environment and Forestry Decision, but also through stipulation of *Adat* Village and communal rights. *Adat* law community can be stipulated as *Adat* Village if there is living *adat* law community which has traditional rights and has territorial, genealogy or functional nature; in accordance with people's development; and in line with Unitary State Republic of Indonesia.<sup>49</sup>

Law 9/2014 constructs the standard of living *adat* law community as obligation to have territory; and fulfilment of one or combination between communal bonding to live as union, *adat* organization structure, *adat* wealth, and/or *adat* norms. *Adat* law community is considered as in accordance with people's development if their existence is recognized by either general or sectoral law; and the substance of their traditional rights is recognized and enforced by the community and in harmony with human rights. *Adat* law community is in line with Unitary State Republic of Indonesia principle if the existence does not infringe sovereignty, integrity and continuation of the state; and substance of *adat* legal norm not in contrary with law and regulation. Administration of *Adat* Village stipulation shall be started from identification, verification and validation of the history, law,

<sup>48</sup> Based on legal principle *lex superior derogat legi inferior*; the higher regulation shall overrule the lower regulation; therefore the regulatory of *adat* law community recognition in Law shall overrule the regulatory of *adat* law community in Minister Regulation because Law has higher hierarchy than Minister Regulation according to Law Number 12 of 2011 regarding Establishment of Law and Regulation. But in this case, by considering the legal history of *adat* law community struggle, usefulness and justices shall come first than legal certainty. Whatever the regional law product, either regional regulation, head of region decision, or head of region joint decision the spirit of *adat* law community recognition is effort to strengthen *adat* law community position to access and to control its land and territory for their optimal welfare.

<sup>49</sup> See Article 97 (1) Law Number 6 of 2014 regarding Village (State Gazette of the Republic Indonesia of Indonesia Year 2014 Number 7, Supplement of State Gazette of the Republic of Indonesia Number 5495).

wealth and organization of the community. Once the community is stipulated as *Adat Village* by regional regulation, they have legal certainty to conduct their traditional rights, such as to regulate and to manage their territory according to *adat* law; and to enforce law through *adat* judiciary.

Another option to recognize traditional rights of *adat* law community is through communal rights stipulation. Minister of Agrarian and Spatial Planning/ Head of National Land Agency issues regulation Number 9 of 2015 regarding Procedure to Stipulate Communal Rights of *Adat* Law Community and Community in Particular Area.<sup>50</sup> Administration of communal rights shall be started from *adat* law community request to the head of region to stipulate the existence of *adat* law community and their land. According to the request, regional government will identify, verify and conduct field examination to analyze normatively and empirically the existence of *adat* law community and their land; and the location where (under what title) the land of the community is situated. If it is found there is *adat* law community and their land, head of region will stipulate the existence of *adat* law community and their land through regional regulation. Once the communal rights is stipulated, *adat* law community has legal certainty to use and to utilize the land with third party; or to manage land transaction according to *adat* law.

## 5. Lesson Learn from *Adat* Law Community Recognition from Time to Time

*Adat* law community and their dynamics exist since before the establishment of Indonesia nation state until today. Interactions between *adat* law community and state law are also varied according to how the regime perceives and administers the existence of the community and their traditional rights. In the beginning of Indonesia nation state

independent, *adat* law was considered as the original legal material of Indonesian law and *adat* law community was traditional legal structure which shall be maintained as foundation of Unitary State Republic of Indonesia.

Since 1957 and during the New Order era, the state focus on national development and considered *adat* law as legal order which validate backwardness and obstacle of development. According to Bamba, this kind of recognition shifted away from strong and clear recognition by founding parent in the 1945 Republic of Indonesia Constitution (before the amendment) to manipulative, ambiguous, and false recognition.<sup>51</sup> He said that since Soeharto Era (1967-1999), the paradigmatic changed in the state's concept of indigenous peoples in Indonesia had first and foremost been driven by its interest in the natural resources that had long been managed by indigenous peoples.<sup>52</sup> Since the government intensified the exploitation of natural resources, regulations had been produced to deny *adat* law community's rights, such as Law 5/1967. This law neglected *adat* law community as legal subject since *adat* forest was defined as state forest located within *adat* law community's territory.<sup>53</sup>

Started from this paradigm, *adat* law community structure was systematically transformed into state legal structure. Law 1/1957, Law 18/1965, Law 19/1965, Law 5/1974 and Law 5/1979 were state legal instruments to engineer transformation of traditional community structure into state legal structure. Basically, this regulatory neglected the historical fact that village was the smallest government unit established by *adat* law community to regulate and to administer its own territory and people.

Sumardjono said that *adat* law community was community which emerged spontaneously in certain region.<sup>54</sup> Djojodigono further explained

<sup>50</sup> This regulation is changed by Minister of Agrarian and Spatial Planning/ Head of National Land Agency Regulation Number 10 of 2016 regarding Procedure to Stipulate Communal Rights of *Adat* Law Community and Community in Particular Area (Official Gazette of the Republic of Indonesia Number 568 of 2016).

<sup>51</sup> John Bamba, "Recognition In Kind Indonesia Indigenous Peoples and State Legislation" in Christian Erni (Ed.), *Op. cit.*, p. 260.

<sup>52</sup> *Ibid.*

<sup>53</sup> Law Number 5 of 1967 regarding Basic Forestry (Law 5/1967) is changed by Law 41/ 1999.

that village was not legal organization established by king or state but based on people's aspiration to unite and to live together.<sup>55</sup> This community established territorial administration, such as village, in order to regulate and to administer its own land and territory for their optimal welfare. Villages were not established based on the order from the Colonial Government, but they were established based on the solidarity between the members to utilize its territory natural resources for their welfare.

Sumardjono and Djojodigono opinions are proven by the fact that after the fall of New Order era, *adat* law community remain in existence. By considering this fact, the existence of *adat* law community and their traditional rights are conditionally recognized and respected by the state through the 1945 Republic of Indonesia Constitution. Another milestone of recognition towards *adat* law community and their traditional rights can be found in Constitutional Court Decision. After the third amendment of the 1945 Republic of Indonesia Constitution in 2001, Indonesia established new court, Constitutional Court. One of Constitutional Court's authorities is to review law against the Constitution.<sup>56</sup>

State Rights to Control has pivotal role to determine the position of *adat* law community's traditional right in natural resources management (*Ulayat* Right). Constitutional Court has reviewed laws on natural resources in order to interpret what State Rights to Control is. Sasmitha said that Constitutional Court interprets State's Rights to Control as public right than private right.<sup>57</sup> State is not the owner of land and natural resources, but the regulator and the supervisor of land and natural resources tenure. Constitutional Court also contributes to the interpretation of *adat* law

community's *Ulayat* Right within State Rights to Control regime.

Constitutional Court Decision Number 001, 021, 022/PUU-I/2003 on December 15<sup>th</sup>, 2014, said that controlled by the state shall cover broad meaning of state's control source from the concept of Indonesia nation sovereignty towards all-natural wealth "land, water, and natural resources in its content", including public ownership by collective people towards natural resources. Collective people, constructed by the 1945 Republic of Indonesia Constitution, give mandate to the state to make policy (*belied*), to regulate (*regelendaad*), to administer (*bestuurdaad*), to manage (*beheerdaad*) and to oversee (*toezichthoudensdaad*) for the optimal welfare of the people.

State's function to administer is conducted by its authority to issue and to revoke permit, license, and concession facility. State's function to regulate is conducted by House of Representative's authority to legislate together with the government and regulation made by the government. State's function to manage is conducted by share ownership mechanism and/or direct involvement of state/regional owned enterprise as state instrument to utilize its power towards natural resources for the optimal welfare of the people. State's function to oversee is conducted by the government, on behalf of the state in order to oversee and to supervise the implementation of state right to control towards land, water, and natural resources for the optimal welfare of the people

Constitutional Court Decision Number 3/PUU-VIII/2010 tries to answer whether right to manage coastal water contradicts to state right to control towards natural resources for the optimal welfare of the people; and whether the absent of community as party in the deliberation formation

<sup>54</sup> Maria S.W. Sumardjono, 2005, *Kebijakan Pertanahan antara Regulasi dan Implementasi*, Kompas, Jakarta, p. 56.

<sup>55</sup> Djojodigono, *unknown*, *Op. cit.*, pp. 71-72.

<sup>56</sup> Article 24C sub article (1) the 1945 Republic of Indonesia Constitution.

<sup>57</sup> Tody Sasmitha, *et.al.*, Pemaknaan Hak Menguasai Negara oleh Mahkamah Konstitusi (Kajian terhadap Putusan MK No. 35/PUU-X/2012; Putusan MK No.50/PUU-X/2012; dan Putusan MK No. 3/PUU-VIII/2010), *research report*, Pusat Penelitian dan Pengabdian kepada Masyarakat Sekolah Tinggi Pertanahan Nasional, Sleman, p. vi.

of management coastal water and small islands action plan violate *adat* law community's right. The decision interprets that "for the optimal welfare of the people shall be the state's main guideline to determine the administration, the regulatory, and the management of land, water, and natural resources therein which consider the existing right, either individual right, collective right held by *adat* law community (*Ulayat* Right), or other rights guaranteed by the 1945 Republic of Indonesia Constitution, such as right to access; and right to acquire good and healthy living.

In the aforementioned decision, Right to Cultivate Coastal Water regulated in Law Number 27 of 2007 regarding Coastal and Small Islands Management (Law 27/2007) will potentially endanger the position of *adat* law community and traditional fisherman who rely their life hereditary from natural resource in coastal water and small islands. Right to Cultivate Coastal Water gives opportunity to private entrepreneur with big capital to take benefit from coastal water but limits the access of *adat* law community and traditional fisherman. Moreover, there is no any special treatment towards *adat* law community to obtain Right to Cultivate Coastal Water; therefore, the community is threatened to lose access to the natural resources where they rely their life on. By this decision, the Court decided that Right to Cultivate Coastal Water is contrary to the Constitution; therefore, it is not legally binding.

Not only judiciary, but executive either in national or in local level also plays important role in the recognition of *adat* law community's traditional rights, for example in the stipulation of *adat* forest by Minister of Environment and Forestry. In order to follow up Constitutional Court Decision Number 35/PUU-X/2012, Minister of Environment and Forestry issues several Minister of Environment and Forestry Decisions regarding Stipulation of Adat Forest, such as Ammatoa Kajang *Adat* Forest and *Adat* Forest Kasepuhan Karang. Stipulation of *Adat* Forest as explained before was begun from the recognition of *Adat* Law Community by regional

law product.

In 2015, Government of Bulukumba Regency issued Regional Regulation Number 9 of 2015 regarding Inauguration, Right Recognition, and Right Protection towards Ammatoa Kajang *Adat* Law Community (Bulukumba Regency Regulation 9/2015). By this regulation, the state recognizes authority of Ammatoa Kajang *Adat* Law Community to regulate communal life between the members of Ammatoa Kajang and their livelihood; to administer communal life of *Adat* Community based on *Adat* Law conducted by *Adat* institution; to manage and to distribute resources between *Adat* Law Community members by considering balance function and by guaranteeing equality for the beneficiaries; and to conduct distinct custom, spirituality, traditions, and *adat* judiciary system.

Bulukumba Regency Regulation 9/2015 was the legal basis for Minister of Environment and Forestry to issue Decision Number SK.6746/MENLHK-PSKL/KUM.1/12/2016 regarding Stipulation of ±313,99 (Three hundred Thirteen and Ninety Nine Per Hundred) Hectares Ammatoa Kajang *Adat* Forest in Kajang District, Bulukumba Regency, South Sulawesi Province (Decision 6746). This decision stipulates that ±313,99 (Three Hundred Thirteen and Ninety-Nine Per Hundred) Hectares Ammatoa Kajang *Adat* Forest in Kajang District, Bulukumba Regency, South Sulawesi Province as forest with title for Ammatoa Kajang *Adat* Law Community with protection as the main function. Decision 6746 restricts Ammatoa Kajang *Adat* Law Community and their hereditary to trade or to transfer Ammatoa Kajang *Adat* Forest to other parties.

Another example of recognition towards *adat* law community as legal subject and their *adat* forest are Lebak Regency Regional Regulation Number 8 of 2015 regarding Recognition, Protection, and Empowerment of Kasepuhan *Adat* Law Community (Lebak Regional Regulation 8/2015) and Minister of Environment and Forestry Decision Number SK.6748/MENLHK-PSKL/KUM.1/12/2016 regarding Stipulation of ±462 (Four Hundred and

Sixty Two) Hectares Kasepuhan Karang *Adat* Forest in Jagaraksa Village, Muncang District, Lebak Regency, Banten Province (Decision 6748). Lebak Regional Regulation 8/2015 recognizes the existence of Kasepuhan *Adat* institution which has authority to administer and to regulate the authorization, the management, and the utilization of *adat* territory and Kasepuhan's wealth; to enforce law and *adat* judiciary; and to represent *Kasepuhan* conducting legal relation with outsider.

Considering Lebak Regional Regulation 8/2015, Minister of Environment and Forestry issues Decision 6748. This decision stipulates that ±462 (Four Hundred and Sixty Two) Hectares Kasepuhan Karang *Adat* Forest within Halimun Salak Mountain Conservation Park located in Jagaraksa Village, Muncang District, Lebak Regency, Banten Province as Forest with title for *Adat* Law Community with conservation as the main function. Decision 6748 restricts Kasepuhan Karang *Adat* Law Community and its hereditary to transfer/to trade *Adat* Forest.

The practice of Ammatoa Kajang dan Kasepuhan Karang *Adat* Forest stipulation shows that though Minister of Environment and Forestry Regulation 32/2015 defines *Ulayat* Right as communal ownership right of *Adat* Law Community, ownership right is interpreted as *beschikkingrecht* where *Adat* Law Community does not have right to transfer the land to other party. It can be seen from Decision 6746 and Decision 6748 which restricts *Adat* Law Community and its hereditary to transfer/to trade *Adat* Forest. This regulatory is in line with Van Vollenhoven conception that one of *Ulayat* Right distinct character is its inalienability.

From above explanation, regional regulation which regulates recognition of *adat* law community plays very important role in the stipulation of *Adat* Forest by Minister of Environment and Forestry. *Adat* Law Community as spontaneous emerging

community exists if the community still perceives itself as a unitary community with distinct character and traditional rights. Recognition of *adat* law community through regional regulation does not determine the existence of *Adat* Law Community, but it is an effort to strengthen the position of *Adat* Law Community as legal subject to exercise its right and obligation. According to Simarmata, formalization of traditional land rights guarantees freedom to legally exercise control over territory.<sup>58</sup> Moreover, at this current situation, *adat* law community has more options to self-determine which kind of legal protection and which administration are the most suitable to be accessed to protect their interest. Simarmata and Steni said that choice of *adat* law community recognition will determine legal capacity of the community themselves.<sup>59</sup> By considering the implication of recognition *adat* law community to their legal capacity, *adat* law community and the state shall carefully analyze the empirical legal situation of the community to determine which recognition is best to protect the interest of the community.

### C. Conclusion

State recognition towards *adat* law community are dynamics. In the early of Indonesia independent, founding parents considered *adat* law and *adat* law community as foundation of Indonesia nation state where legal material and state structure found. Since 1957 and during New Order era, *adat* law was considered as the main obstacle of state development; therefore, there was systematic effort to abolish *adat* law communities by integrating the communities into state legal structure. This effort did not work. *Adat* law and *adat* law community are not symbol of backwardness but living legal norms and organization which hereditary practiced. *Adat* law community and their traditional rights evolved

<sup>58</sup> Rikardo Simarmata, "The Enforceability of Formalized Customary Land Rights in Indonesia", *Australian Journal of Asian Law*, 2019, Vol. 19, No. 2, p. 1.

<sup>59</sup> Rikardo Simarmata and Bernadus Steni, 2016, *Masyarakat Hukum Adat sebagai Subjek Hukum: Kecakapan Hukum Masyarakat Hukum Adat dalam Lapangan Hukum Privat dan Publik*, The Samdhana Institute cooperated with Pustaka Sempu, Bogor and Sleman, p. 170.

and remain exist until today. By considering this fact, *adat* law community and their traditional rights are recognized by law and enforced through court decision. To strengthen legal capacity of *adat* law community, the community can determine either to be stipulated as legal subject through regional law product as legal foundation to claim their

*Adat* Forest; to be stipulated as *Adat* Village; or to be stipulated their existence and their communal rights. This stipulation will legally protect legal capacity which can be exercised by the community; therefore, state and the community shall carefully identify the perfect recognition for the community' best interest.

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