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Recognition of Customary Disputes Settlement in Law Number 6 of 2014 on Villages: A Responsive Law Review in Indonesian Legal Reform

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Abstract

Based on the development of the community's need for legal certainty on customary dispute settlement, Law No. 6 of 2014 on village which gives authority to adat *villages to resolve customary law dispute prevailing in* adat *village as long as it is in harmony with the principle of human rights by prioritizing the settlement by deliberation. In addition,* adat *villages are also given the authority to carry out an indigenous village justice peace trial. This normative recognition authorizes* adat *villages to apply the values or norms that have been lived and developed in the community closely related to the responsive law proposed by Philippe Nonet and Philip Selznick stating that responsive law is born from legal realism in society so that it appears laws that are more responsive to social needs (Arinanto, 2004, 117). This paper discusses* adat *dispute resolution in Law No. 6 of 2014 on Village in the review of Responsive Law in Indonesian Legal Reform.*

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INTRODUCTION

IN VARIOUS political regimes, especially the political regime of the new order, indigenous peoples are one of the most pressing groups of government, including the social order and customary law threatened by state law. Whereas in the sociological perspective the presence of customary law is a natural process that comes along with the development of social order built in its own society. The law is the resultant of the whole struggle of relations in society.[2]

One form of pressure from state law is that it is not uncommon for cases that have been resolved customarily by the community to be re-processed by law enforcement officials if either party reports or feels dissatisfied as in the case of No. 1/1956/Pdt dated July 30, 1956 namely the case of land disputes that have been settled through the village session but filed back to court.[3] This is due to the weakness of the legal status of the decision of the trial conducted by the village on the settlement using customary law mechanism.

In addition, the destruction of local autonomous institutions that have been the main pillar of the functioning of social processes in society is also carried out by the state or government by using various regulations. It shows that only laws and regulations that can be a means of social engineering to deliver the people of Indonesia to achieve prosperity, prosperity and justice. The government does not believe the customary law is able to bring the community to the national ideals.[4]

Whereas there is a tendency that Indonesians are better suited to using a persuasive and accommodative judiciary based on living values in society through non-litigation courts. This shows that people prefer to finish the case in a peaceful way using the principle of kinship and harmony of life. This mechanism uses peer-to-peer testimony, neighbors conducted in front of village peace judges with simple administration completed in arbitrator or intermediary dispute mediation with regular administration through living or community law or customary law.[5]

In its development, recognition of indigenous and tribal peoples is implied in the explanation of Article 67 Paragraph (1) of Law no. 41 of 1999

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[2] Bernadinus Steni, *Hukum Progresif, Pruralisme Hukum dan Gerakan Masyarakat Adat*" **on book**, *Satjipto Raharjdo dan Hukum Progresif Urgensi dan Kritik* (Jakarta: Epistema Institute, 2011) 263-267.

[3] Ilman Hadi "Kekuatan Hukum Putusan Adat" Retrieved from http://www.hukumonline.com/index.php/klinik/detail/lt4fbb44750563e/kekuatan-hukum-putusan-adat on October 17, 2016

[4] Satjipto Rahardjo, *Membedah Hukum Progresif* (Jakarta: Buku Kompas, 2006) 175.

[5] Tedi Sudrajat, "Aspirasi Reformasi Hukum dan Penegakkan Hukum Progresif melalui Media Hakim Perdamaian Desa", *Jurnal Dinamika Hukum* Vol. 10 No. 3 September 2010, 294

on Forestry. Specifically related to the agrarian law in Indonesia Article 5 of Law No.5 of 1960 on the Basic Regulation of Agrarian Principles. The law provides space for indigenous peoples to apply the law, but has not yet given widespread authority to resolve cases through customary law.

Based on the development of the community's need for legal certainty over customary dispute settlement, Law No. 6 of 2014 on the Village which gives authority to *adat* villages to resolve customary law dispute prevailing in traditional villages provided that it is in harmony with the principle of human rights by prioritizing the settlement by deliberation. In addition, *adat* villages are also given the authority to carry out an indigenous village justice peace trial.[6]

This normative recognition authorizes *adat* villages to apply the values or norms that have been lived and developed in the community closely related to the responsive law proposed by Philippe Nonet and Philip Selznick stating that responsive law is born from legal realism in society so that it appears laws that are more responsive to social needs.

Based on the fact that there is a legislation that recognizes and empowers *adat* villages to resolve disputes and execution of village assemblies, the decision form generated through indigenous settlement mechanisms has the force of law. In addition, villages are given the authority to explore the value and meaning of justice contained within the community itself.

Therefore, the law has a close relationship with the implementation of responsive law. Based on that, the writer is interested to discuss about "Responsive Law Review to Recognition of Indigenous Dispute Resolution in Law No. 6 Year 2014 About Village" in this writing.

BACKGROUND OF THE RECOGNITION CUSTOMARY DISPUTE SETTLEMENTT ON LAW NO 6 OF 2014 CONCERNING TO VILLAGES

Law is a set of rules or norms that have the power of sanctions that its implementation can be enforced by state or state organizers. In this case the law contains a set of rules that regulate most of the human life created to protect the values that live in society or customs that apply. Based on that law should meet the basic value include justice, certainty and legal benefits for the community.[7]

But in reality it is not so. Customary law which is declared as the main source in the formation of national law and judged as a law that is close to the justice of society is increasingly unclear position and function in the formation of national law, there is even the impression of a systematic effort to assert the existence of customary law that would eliminate existence customary law

[6] See Art. 103 point d dan point e jo Art. 19 (a) Law No 6 of 2014 concerning Village
[7] Tedi Sudrajat,*Op.cit,*. 293.

itself.[8] It causes the justice desired by the community more difficult to be realized.

Furthermore, in relation to justice in the judicial system in Indonesia to realize justice can be pursued through law enforcement. Law enforcement is seen as an activity for realizing legal wishes to become reality in order to realize basic values within the law. The main problem is that law enforcement is always bound by interest factors, both in terms of human and institutional. Therefore, to get the basic values of the law, it is natural that the community is given the choice of choice in the settlement of disputes through litigation and non-litigation.[9]

The litigation path is pursued through a formal court mechanism. While non-litigation paths can be pursued through out-of-court settlements that typically use values that live within the community. The out-of-court settlement is still alive and well preserved and developed within the community, especially in indigenous communities.

In connection with this, indigenous peoples have customary law that has a distinctive style, in contrast to the pattern of western law. Traditional law is traditional but dynamic, referring to its orthodoxy to the line of cultural continuity of the nation and its ability to adapt to the times and with unique or distorted cases.[10]

Furthermore, in Indonesian society, the settlement of disputes using the peaceful path cannot be separated from the conception of society which regards the regret and the bad reputation as an element of customary violation. In Indonesia's most cosmic traditional mind, the most important thing is the creation of a balance between the world of birth and the unseen world, between the community and the individual and between joinder with society in general.[11]

The settlement is conducted by indigenous peoples within the village. In Indonesian law the settlement of various disputes or offenses settled by *adat* villages is basically not expressly recognized in positive law. Although the recognition of customary law is contained in the Forestry Law and the Basic Agrarian Law, it is not in the context of solving the problem broadly.

The above matters resulted in the decision power generated by customary village court mechanisms having weak legal standing as in the case of dispute resolution No. 1/1956/Pdt dated 30 July 1956 which results of the decision of the village trial may be brought back into the trial and the district court overturned the decision of the village trial. This is due to the absence of an explicit recognition which gives authority over customary villages to resolve disputes within the Indonesian legal system. However, in the current

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[8] Satjipto Rahardjo, *Membedah Hukum Progresif* (Jakarta: Buku Kompas, 2006), 174

[9] Tedi Sudrajat, *Op.cit*,. 293

[10] Nurul Elmiyah, Rosa Agustina, Erman Rajagukguk, *Hukum Adat dalam Putusan Pengadilan* (Jakarta: Lembaga Hukum Ekonomi Fakultas Hukum Universitas Indonesia, 2007), 9.

[11] Tedi Sudrajat, *Op.cit,* 295

legal development, *adat* villages are given the authority to resolve disputes and criminal acts through customary law.[12]

If analyzed by the legal choice of the community to resolve the customary law or settlement informally then the community's choice of informal dispute resolution mechanism is not only due to the cheap, quick and easy mechanism. But a more important aspect is the adherence of citizens to an approach that provides a sense of order and tranquility within themselves and their communities.[13] Therefore, law which gives written authority for customary villages to resolve cases and conduct village meetings in accordance with customary law.

If viewed from the background of giving authority to *adat* village to resolve the dispute and conduct the village session independently then in this case there are two main principles underlying.[14] *First* is recognition of the right of village origin. Article 18 of the 1945 Constitution, for example, emphasizes this recognition perspective, which recognizes the existence of special areas and a number of 250 legal community units that have their original names and compositions. UU no. 32 of 2004 also gives recognition of authority or right of village origin, although its translation not too clear. Law No. 11 Year 2006 on Aceh Government also recognizes and even restores the position of *mukim* which formerly only a customary institution into a governmental unit located in the middle of the district and village (*gampong*).

Second is the principle of subsidiarity, namely the localization of authority over the village and local decision-making on behalf of the local community. With subsidiarity local-scale affairs are decided locally with village authorities, and local issues are also resolved locally. Subsidiarity contains the spirit of appreciating, trusting and challenging the village to move. Without subsidiarity, local village initiatives will be difficult to grow.

Indigenous peoples in Indonesia actually have a long experience in the practice of subsidiarity. The main examples are customary court or local dispute resolution in Aceh. The first *adat* justice is done at the village level and if not completed it is only brought up to the *mukim* level. This mechanism of subsidiarity is similar to that of the modern judicial mechanism in Indonesia, starting from a district court (at the district or city level), if not resolved recently brought up to the high court (provincial) level and finally on the Supreme Court appeal level.[15]

Meanwhile, if viewed from the characteristics of the people of Indonesia, the settlement of disputes with peace is a cultural value owned by

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[12] See Article 103 letter d and letter e *jo* Article 19 Sub-Article a of Law No. 6 of 2014 concerning Villages that grant authority over *adat* villages to resolve disputes and conduct village assemblies.

[13] This is one of the statements from the Religious Figure of Ambon, Maluku Province, **on** Laporan Penelitian Kekuatan dan Kelemahan Peradilan Non-Negara, 38.

[14] See Academic Manuscript Act No. 6 of 2014 on the Village that became the guidelines and the basis of the Act stipulated.

[15] *Ibid,* 83

the people of Indonesia since the first. This is stated also by Daniel S. Lev that Indonesian legal culture in resolving conflicts has its own characteristics that are caused by certain values. Compromise and peace are values that gain strong support from society.[16]

Based on the above paradigm, the perspective of village arrangement in the future should at least be able to answer the question of why the paradigm that is the basis of the regulation of the village is to provide the basis for independence, meaning that providing a strong foundation towards the establishment of a self-governing community is less viable.[17] Associated with the existence of village in NKRI hence there is recognition about existence of unity of indigenous people based on their origin right.[18]

Based on this, the recognition of the settlement by the *adat* village was born. In addition, *adat* villages are also given authority to organize village sessions as set forth in Article 103 of Law No. 6 Year 2014. The article can clearly be used as legal basis for indigenous and tribal peoples to maintain and apply the values and laws that are still alive and growing in society.

REVIEW OF RESPONSIVE LAW ON RECOGNITION OF CUSTOMARY DISPUTE SETTLEMENT BASED ON LAW NUMBER 6 OF 2014 CONCERNING TO VILLAGE

RECOGNITION of the settlement of disputes under which the customary village's authority to conduct village councils and customary settlement gives people the freedom to develop and preserve what is in the community. This can facilitate the realization of justice because the settlement is done by deliberation and consensus in accordance with the will of the parties and the values that have been agreed. It is closely related to the culture of Indonesian society and the legal products and democratic system adopted by the state of Indonesia. Furthermore, based on the background and study why Law No. 6 Year 2014 was born then this is closely related to the responsive law.[19]

Indonesia itself as a democratic country should have a responsive legal product. The responsive legal development strategy will result in responsive laws against the demands of the various social groups of individuals in their societies. Thus responsive legal products are legal products that reflect a sense

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[16] Tedi Sudrajat, *Op.cit,*. 297

[17] See Academic manuscript of the formation of Law No. 6 Year 2014 on the Village which became the guidance of the birth of the regulation on village and custom village along with the customs and rights that are still inherent in the community.

[18] See Article 18 B of the 1945 Constitution of the State of the Republic of Indonesia. In this article it states that the state recognizes and respects customary law and its traditional rights as long as it is alive and in accordance with the NKRI principle.

[19] Responsive law is a continuation of modern theory. According to Jerome Frank this is the intent of the realists to make the law more responsive to social needs so that legal reasoning includes knowledge of the social context.

of justice and meet the expectations of society. In the making process is participatory, *ie* through individual social groups in society. When viewed from the function of the character responsive law is aspirational is to contain materials that in general in accordance with the wishes of the people it serves.[20]

In relation to responsive law in village legislation it can be seen clearly that customary villages are authorized to:[21]

1. Arrangement and implementation of governance based on original arrangement.[22]
2. Arrangement and management of *ulayat* or custom territory.[23]
3. Preservation of social cultural values of Indigenous Villages.
4. Settlement of *adat* dispute based on customary law applicable in Adat Village in areas that are in harmony with the principle of human *rights* by prioritizing the settlement by deliberation.
5. Implementation of an indigenous village court peace trial.
6. Maintenance of tranquility and public order of Indigenous Villages based on customary law prevailing in *Desa Adat*, and
7. Development of customary law life in accordance with the socio-cultural conditions of Indigenous Villages.

The article is a form of recognition and respect for existing villages in accordance with their diversity, providing clarity of status and legal certainty to bring about justice for all Indonesian people. In addition to preserving and promoting the customs, traditions and culture of the community and encouraging initiatives, movements and participation of villagers to develop the potential to achieve common prosperity, improve socio-cultural resilience of rural communities in order to realize rural communities capable of maintaining social unity.[24]

In addition, in the formulation of Law No. 6 of 2014 is based on academic texts consisting of experts using historical rationale, contextual philosophical thinking, juridical thinking and sociological and psycho-political thinking.[25] The urgency of the academic texts in the process of formulating village regulations is, among other things, a real medium for community participation in the process of formation of village regulations, academic texts describing the reasons, facts and background on matters that

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[20] Krishna D. Darumurti, "Pengaturan tentang Daerah Otonom: Pusaran Politik Hukum Status Quo Penguasa", *Jurnal Ilmu Hukum Refleksi Hukum,* October 2010*,* 201

[21] See Article 103 letter a through letter e juncto Article 19 letter a Law No. 6 of 2014 on Village

[22] What is meant by the original structure is a system of customary village life organization known in their respective territories.

[23] What is meant by ulayat or adat territory is the living area of a customary law community.

[24] This is the objective of establishing the Village Law contained in Article 4 of Law No. 6 of 2014.

[25] See Academic Manuscript of Law No. 6 of 2014

encourage the formation of a problem or problem so it is very important and urgently arranged in village regulations.[26]

Psycho-politically this law was born because of the demands of the village government association and the Representative Body which always demanded better prosperity. If it is sociologically reviewed then the establishment of the law to create a just and prosperous society as mandated in the Preamble to the 1945 Constitution and to repair the social, economic and political damages of the Village.[27]

From the review of the background, objectives, substance and community participation in the process of making Law No. 6 of 2014, this Act is closely related and contains values in responsive law proposed by Philippe Nonet and Philip Selznick, namely by recognizing customary law and mechanism settlement by customary villages.

The responsive law itself assumes that the law should provide something more than just a legal procedure. The law must be competent and fair should also be able to recognize the public will and be committed to the achievement of substantive justice.[28] In addition, the responsive law is a tradition of the realists (legal realism) and sociological (sociological jurisprudence) which has one main theme is to open the barriers of legal knowledge.

Responsive law search is an ongoing effort by modern legal theory. The responsive law seeks to overcome the dilemma between integrity and openness, a responsive institution retains strongly the essentials of its integrity while still observing or accounting for the presence of new forces within its environment. To do this the responsive law reinforces the ways in which openness and integrity can support each other despite the clash between them.[29]

Responsive law regards social pressures as a source of knowledge and an opportunity to self-correct. Therefore, it needs guidance in the form of objectives, these goals set standards to criticize established actions and hence open opportunities for change. At the same time, if it is truly a goal guide it can control administrative discretion, thereby reducing the risk of institutional overruns. Conversely, the absence of goals is rooted in rigidity and opportunism. Responsive law assumes that goals can be made quite objective and powerful enough to control the making of adaptive rules.[30]

As has been pointed out by the responsive legal theory that responsive law accommodate societal values that favor pro-demands and justice

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[26] Yurika Maharani, Ibrahim, I Nengah Suharta, *Sistem Pembentukan Peraturan Desa Berdasarkan Undang-Undang Nomor 6 Tahun 2014 Tentang Desa.* (nd), 3

[27] See Academic Manuscript of Law No. 6 of 2014

[28] Philippe Nonet dan Philip Selznick,. *Op.Cit.*, 117-118

[29] *Ibid,* 120

[30] Luthfiyah Trini Hastuti, *Studi tentang Wacana Hukum Responsif dalam Politik Hukum Nasional di Era Reformasi,* Thesis Postgraduate Program Universitas Sebelas Maret Surakarta, 2007, 27

contained in legislation and policies issued by the authorities. The responsive nature implies or means that responsive law is useful to society. The type of responsive law according to A. Mukhtie Fadjar has two prominent features, namely: a) shifting emphasis from rules to principles and objectives; and b) the importance of populist character, both as a legal objective and a means of achieving it.[31]

Meanwhile, according to Philippe Nonet and Philip Selznick responsive law has the following characteristics:[32]

1. The dynamics of legal development increase the authority of purpose in legal reasoning.
2. The purpose of making legal obligations more complicated, thus loosening the legal claims and opening up the possibility of a law that is not too rigid and more civil perceptions of the public order.
3. If the law gains openness and flexibility, legal leaders take on the political dimension resulting in pressures that help improve and change legal institutions but also threaten to reduce national integrity.
4. In the depressed state the sustainability of the authority of the legal objectives and the integrity of the legal order depends on the form of more competent legal institutions.

More wises the flow of responsive law, which basically states the validity of the law is based on substantive justice and rules are subject to principles and wisdom. It means that the visible morality is the morality of cooperation, while the legal and political aspirations are in an integrated state. Here disobedience is judged in terms of substantive losses and is seen as a growing problem of legitimacy. Opportunities for participation are expanded through the integration of legal aid and social assistance.[33] In addition, this responsive law is also a search for implicit values in various rules and policies.

In the legal context in Indonesia the responsive law theory proposed by Nonet and Selznick was then widely adopted and developed by Satjipto Rahardjo,[34] but he did not directly take what Nonet and Selznick delivered in his responsive theory. He gave different terms about responsive law that is progressive law, but expressly argued that progressive law has a responsive type.[35]

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[31] Muhammad Suharjono, "Pembentukan Peraturan Daerah yang Responsif dalam Mendukung Otonomi Daerah", *DIH, Jurnal Ilmu Hukum*, February 2014, Vol. 10, No. 19, 31

[32] Philippe Nonet dan Philip Selznick,. *Op.Cit,* 122

[33] Agus Budi Susilo, "Penegakan Hukum yang Berkeadilan dalam Perspektif Filsafat Hermeneutika Hukum: Suatu Alternatif Solusi terhadap Problematika Penegakan Hukum Di Indonesia", *Jurnal Perspektif* Volume XVI No. 4, 2011, September, 220

[34] Satjipto Rahardjo is a professor of law sociology. He sparked the idea of progressive law as a legal lantern for the Indonesian nation and consistent to build law from a social base. His ideas are expressed in a wide variety of articles and books used to pioneer progressive law into the public sphere and influence law enforcement, activists and academics.

[35] Luthfiyah Trini Hastuti, *Op.Cit,.* 30.

He argues that legal reform begins with a comprehensive, basic, rapid, and drastic deconstruction of the law as discourse in the type of progressive law. At the theoretical level, the deconstruction of the law was done by restoring the development strategy in Indonesia as mandated by the founders of the republic, namely to make the living law that existed in the heart of the pluralistic nation of Indonesia as the main source of legal development.[36]

Progressive law extends the legal content that responds to the human ideal and ideal of happiness. Culture itself is none other than Indonesia which according to progressive law is very different from the introduction of modern law that enters and influenced Indonesian law. Modern law is realized impossible to be abolished but it needs to be given the spirit of life of Indonesian culture to become an Indonesian law. The law is like the conscience of the people so that the law is responsive, namely the law based on the culture of society itself.[37]

Progressive law departs from the empirical reality of the workings of law in society in the form of dissatisfaction and concern for performance and quality and law enforcement in Indonesia at the end of the 20th century. In this context the law is only used as a means of guaranteeing and preserving human needs.[38]

In its enforcement itself progressive law is a concept whose assumptions are full of views from the social approach to law. According to Satjipto, progressive law enforcement must go on two dimensions: *First* is that its legal functionaries should be communal rather than liberal. In addition must also consider the interests and integrity of the nation rather than playing with articles, doctrines and procedures. *Second* is the rise of academics, scientists and theorists who are able to free themselves from the philosophical doctrine of liberal law.[39]

CONCLUSION

The background of the recognition of customary dispute resolution contained in Law No. 6 of 2014 is based on two principles namely: *First*, recognition of the right of village origin. *Second* is subsidiarity, *ie* localization of authority over villages and local decision-making on behalf of the local community. In addition psycho-politically this law was born because of the demands of the village government associations and the Representative Body which always demands better welfare.

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[36] *Ibid,*.33.

[37] A. Sukris Sarmadi, "Memberikan Positivisme Hukum ke ranah Hukum Progresif (Studi Pembacaan Teks Hukum bagi Penegak Hukum)", *Jurnal Dinamika Hukum,* Vol. 12 No. 2, May 2012,.335

[38] Suteki, "*Rekam Jejak Pemikiran Hukum Progresif Satjipto Rahardjo*" dalam Buku Satjipto Rahardjo dan Hukum Progresif, Urgensi dan Kritik, (Jakarta: Epistema Institute, 2011) 34.

[39] Rikardo Simarmata, "Socio-Legal Studies dan Gerakan Pembaharuan Hukum", *Jurnal Digest Law, Society & Development,* Volume I Desember 2006-Maret 2007, 7.

A responsive legal review of the recognition of the settlement of disputes by customary villages in Law No. 6 of 2014, when analyzed closely with the responsive law contains materials that are generally in accordance with the wishes of the people it serves. It can be seen from the background based on the principle of recognition and subsidiarity, the one of which is to preserve and promote the customs, traditions and culture of the community and encourage the initiative, movement and participation of the village community. In addition, in terms of substances contained in Article 103 and community participation in the process of making the Village Law.

Recognition of customary dispute settlement as set forth in Law No. 6 of 2014 should be utilized by the public and law enforcement apparatus to truly realize responsive laws and be used as a means to achieve community justice. The government in this case the legislator should create more responsive legal products in the legislation system in Indonesia. It aims to provide justice easily and quickly, especially some of the laws that apply in Indonesia is a legal product of the colonial country.

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