“A-LOGICAL” CHARACTER OF INDONESIAN ADAT LAW BASED ON PAUL SCHOLTEN’S PERSPECTIVE

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Diah Pawestri Maharani[1]
1 University of Brawijaya

ABSTRACT

Starting from a view of the logical and a-logical element in law, Prof. Mr. Paul Scholten in his book entitled de structuur der rechtswetenschap sharply criticized about the “Reine Rechtslehre” or The Pure Theory of the Law initiated by Hans Kelsen. This view separates between the doctrine of the law from the influence of the other sciences, as well as other factors beyond the law itself. Even a legal doctrine must be separated from the influence of the soul in relation to the establishment of legal institutions and legal developments. This paper will discuss about the existence of Adat law in Indonesia as a legal system that was born and influenced by a-logical elements outside of the law itself, like Adat (customary) in society, the internal of psychological flow (aliran kejiwaan/volkgeist) and historical factors. As a country that tends to embrace the Continental European legal system or the Civil Law, the regulation which have binding legal force should be set out in an Act of systematic or already codified. But in reality, Indonesia is a multicultural, multi-ethnic and race that already have adat law as the applicable law, so long before the enactment of statutory law. The Existence of Adat law in the future still into a long debate, especially with increasing conflicts involving indigenous people although the rules of Adat law has been accommodated in the written law (National Law). In addition, in this paper it would be necessary to describe the status of Adat law as a part of Jurisprudence through an ethnographic approach, as well as a material in the formation and development of national laws with a historical approach and the facts that occurred in the middle of society as part of a-logical element of Law.

KEYWORDS

Paul Scholten, Adat Law, A-logical

CITE AS

Concept, do not cite

INTRODUCTION

In a formulation of the Legal theory domain, there is a tradition in Indonesian legal education which divides of legal theory into two major groups. The first group is to introduce the concept of *Rechtideelehre, Begriffsjurisprudenz, Analytical Jurisprudence, Rechtsdogmatiek* or *Reine rechtslehre*. This group sees the law as a closed unit technical rules and formal-legalistic or legal centralism,[1] where the law is considered born by the State as a legal regularity or positive legal order.[2]

In line with the Legal theory group in above, Paul Scholten offend *Reine rechtslehre* theory which is stated by a positivist Hans Kelsen.[3] Through the doctrine of *"The Pure Theoryof Law"*, Kelsen tried to affirm the autonomy of the National Law (State Law) through the orderly judicial and assumes that the doctrine of the law should be separated from all the elements outside of the law itself like *sociologicalscience,the ethical postulates, symptoms civilization*, as well as *relation of economic and community*. For Kelsen, construction of law and application of the law should be totally ruled out from sociological and historical considerations. Even the law must be separated from the view of life as well as the internal view of legislators and law enforcer. Even the law also should be removed from the influence of religious and morals values.[4]

Furthermore, Kelsen said that the law was just an overall product of law that was arranged in *"logical"*. Legal substances derived from the content of the law itself as contained in the constitution, the acts, regulations and verdicts which were binding on a country in a particular time.[5] Paul Scholten sees this thought as a narrow perspective because the law only characterized on one side, that is logical character only, while it should be exist as basic element in a legal field. According to Scholten, because of the character of The Positive Law must be obeyed and prevail in a particular area and particular time, it causes that Law cannot be separated from the customary (Adat) in society.[6]

The second group of The Legal theory are about *Theory of Natural Law, Interessen Jurisprudenz, Freie Rechtslehre, Sociological Jurisprudence, Jurisprudence Realism, Critical Legal Theory, Human Jurisprudence, Jurisprudence Psychoanalytic* and several other theories. This group was considered having emerged as the insistence of the social conditions that regarded the first group is have been failed in the face of social regularities (social order). The second group saw the law as an open unit and touch the social mosaic of humanity. This was in line with the views of Scholten who interpret the law as a structure within the scope of which was much more complex.[7]

Related to the discourse, the authors interested in the views of Paul Scholten which states that the law cannot be separated from an *"a-logical"* element.[8] To verify it, Scholten offend Adat law in Indonesian which is widely studied by the Dutch people. Indonesian Adat law is considered to have a characteristic as a science as well as the original law of Indonesian society long before the concept of State establishment. Referred to what had been written by B. Ter Haar in the publication *"De betekenis van de tegenstelling participerend-kritisch denken in de rechtspraak naar adatrecht "*, explained that Adat law cannot be separated from the element of relationship between the history and the folks. In fact, elements of Adat law influenced the logical elements of a statutory law in Indonesia.

AN AFFIRMATION OF LIMITS BETWEEN ADAT LAW AND CUSTOMARY LAW ENTITIES

There are many terms used to refer to the customary law such as *Local law, Traditional law, Original law or the Folks Law*. Adat law as the living law conceived as a legal system that is formed by the empirical experience of the people in the past. That was considered fair and proper and have earned legitimacy of traditional authorities so that binding or compulsory obeyed. While meaning the Adat law itself can we quote from the opinion of some experts of Adat Law.

Cornelis van Volenhoven opine that Adat law is *"the overall rules of positive behavior that one side has sanctions (because of that it called as the law) and the other side in uncodified (therefore called as Adat)." Furthermore,* Van Vollenhoven stated that the Adat law is Living Law in indigenous communities in Indonesia with its own legal system for hundreds year existance before the arrival of the Dutch.[9]

Koesnoe stated that Adat law is the law which comes from the root of Indonesian people who are not familiar with codification. While Snouck Hurgronye viewed Adat law as *"taken for granted"* as the original itself without knowing the forms of separation as in western law. If the western legal discourse separate between individual entity from the public, Adat law is not in this case. Because of that, Adat law is pervaded by a spirit of kinship, the individual subject obey and serve the community rules.[10] Furthermore although boils down to the same goal which is to achieve harmony between the individual and society, western law (that have an individual character) has a primary goal in the implementation of the law to protect the interests of the individual, whereas the public interest will be considered if there is violation in the communities. In the Adat law (that have communal character), The primary goals is to achieve harmony between the individual and society.[11]

Along with the development of Indonesian society, codification system has been implemented in almost all the legal field. Adat law is often interpreted as the original law of Indonesian society that is rooted in customs and cultural values. It means that the basic mind of Adat law was binding and determine the mindset of the people of Indonesia.[12] Even the spirit and mindset has been outlined and recognized in the Constitution of Indonesia, namely "Undang-Undang Dasar 1945", confirmed that Adat law is part of the basic law of the state of Indonesia (*droit constitutionelle*). Thus, the existence of Adat law right now more depend on the written law (statutory law), like the constitution and legislation. Historically, the relationship of interdependence is an implication of the Dutch legal system that adopted by the Indonesian legal system through the principle of concordance.

At the time of colonialism Dutch East Indies, van Vollenhoven stated that the implementation of Adat law system was not based on rules and authorities of The Government of the Netherlands (Hindia Belanda).[13] Adat considered valid as the "law" was not depend on legislation that admit it, but because of actions by the indigenous peoples are considered appropriate and binding. In addition, indigenous peoples have the same confidence to maintain the Adat rules by the The Adat Chief (Kepala Adat) and other the law officers, as well as Adat containing sanctions was the one who really regarded as the law is Adat law.[14]

Bagir Manan gave an opinion regarding to the assertion of the boundaries between the two entities of Adat law and customary law in Indonesia. In Article II of the Transitional Provisions (Aturan Peralihan) of the Undang-Undang Dasar 1945 states that : *"segala badan negara dan peraturan yang ada masih langsung berlaku, selama belum diadakan yang baru menurut Undang-Undang Dasar ini"* ("all state institusions and the existing regulations is still effective immediately, during yet held the newly according to the Constitution of these". While in the explanation of the Undang-Undang Dasar 1945 states that: *""Hukum dasar yang tidak tertulis ialah aturan-aturan dasar yang timbul dan terpelihara dalam praktik penyelenggaraan negara meskipun tidak tertulis".* ("The basic of unwritten law is the basic rules arising and maintained in the practice of state implementation though it's not in written rules". According to Bagir Manan, the context of term "the unwritten basic rules" here was not in the sense of the context of Adat law that made by Adat Chief's decision, but in this context, it is more inclined to the notion of constitutional convention.[15] This Opinion was explained that there are differences between the conventions or customary law with Adat law.

COMMON LAW AS PART OF LAW SCIENCE BY PAUL SCHOLTEN AND VAN VOLLENHOVEN VIEWS

"Law is a thought". Legal Studies is an extension of the law; That is an assertion of Paul Scholten to describe Jurisprudence (legal studies) as a whole system of human relationships in a society where the law is manifested in a certain time. The system does not come from Legal Studies itself or from the power of the legislators, but already there in the consciousness of human law. Jurisprudence task is to circulate the system and not to create it.[16]

Law is a rule. The consequence of it is : “it needs The review about the law”. This review is what called as the legal studies. When the law experienced a certain development, that's where Legal Studies was born. Legal Studies is an extension of the law because they interpret the substances of law. It means that the Jurisprudence seeks to summarize the rules are not written in a particular formula. The task of Legal studies is explaining the rules laid down by the authorities, determine its scope (meaning) contained herein by tracing its history and purpose.[17]

Snouck and Van Vollenhoven has raised Adat law at the academic level as the object of knowledge and the teaching of its self that divide from other objects, and as a law that must be maintained by the judge (of gubernemen). In other meaning, Adat law is not merely practical but also theoretical and independently.[18]

As the legal expert that influenced by ideologies of positivism, van Vollenhoven see Adat law as a positive knowledge based on real evidence that irrefutable truth. In every science, the people have to keep adheres to the guidelines that rapprochement. So in this case, to be a positive legal science it must be fullfill for three conditions, namely considering the circumstances *(Gestelheid),* continuation *(verloop)* and regularity *(regelmaat).**[19]***

In preparing the frameworks of Adat law system in Indonesia, van Vollenhoven was much influenced by the provisions in force in the colonial period. This view leads that the point of Adat Law is a rule containing the sanctions, not codified and applies to *“Pribumi”* (indigenous people in Indonesia) and *“Timur Asing”* (foreign east).[20] His opinion is felt further away from Snouck Hurgronye by saying that so many jurisprudence that is not connected or based on factors religiusities in law *(religieuze factor in het recht)* as long as useful, giving the advantages and practical *(muttig voordelingen en practisch).* This does not valid to Adat law because for each institution and the rules Adat law are always in touch and be based on a world order that is beyond the reach of human ability *(Hoogere wereldorde)* which consists of the mystic atmosphere *(onzichtarw wereld),* the outside world *(buiten wereld)* and certain parts of the material world *(material wereld).**[21]***

In the process of the research, van Vollenhoven not much basing on the basic theories of traditional institutions in Indonesia. But he more saw the reality prevailing in the community in the form of behavior that should be done by the community and maintained by Adat law enforcer so that these behaviors become Adat law. It means that the entry into force of common law is not based on the will of the ruler but on what society deemed worthy (verijwillge naleving) and can be maintained by law enforcement *(geste*unde valeving).[22]

Although as academics used to think conceptually, van Vollenhoven also a practitioner that implements the conceptions in a concrete action. One of the struggle was opposition to the colonial government policy that outlines the preparation of a codification of legislation for the entire people of Indonesia. For him, there are no laws of the Netherlands that could be applied to people of Indonesia. Enforce the unified regulation for the whole population in Indonesia by ignoring customary law, will undoubtedly violate the rights of indigenous peoples.[23] According to him, Adat law can only be understood as a positive science by indigenous people themselves, because only them which are really feel the existance of customary law so as to prevent misunderstandings (miskenningen) of the Dutch officials for customary law.

In this case, van Vollenhoven agreed with Eugene Ehrlich opinion that the legal investigation which was live and thrive in society (die erforschung des lebenden volksrechts) must be done by the community concerned (die eigene wahrnemung).[24]

Propositions built by van Vollenhoven in all his works *(among others Het Adatrecht van Nederlands Indie, De ontdekking van het Adatrecht, Miskenningen van het Adatrecht and die Indonesier en zijn Grond)* is not only based on the perspective of Adat, but also in the perspective of Administrative Law. From his works, it has produced some of the concepts and terminology of fundamental customary law such as the concept of law society or association law *(rechtsgemeenschap),* land rights *(bescikking recht),* and areas or territorial circles of law *(Adatrechtskringen),* the agreement (contract) is an concrete act or tangible, construction Adat law which is too clear and the character of the family structure.[25]

A-LOGICAL ELEMENT IN ADAT LAW: AN ETHNOGRAPHIC, HISTORICAL FACTS AND LAW APPROACH IN THE COMMUNITIES

Adat[26] is customs/cultures of a society that is "steady" or ”ajeg” (performed continuously) and defended by its supporters as a guideline to behave. With reference to the human habit of expecting that his goal can be achieved, for example, peace, order, the common good, even order and justice. Gradually, a habit that is deeply rooted in the long term be transformed into a cultural (ethnic). Every nation or community has its own culture. Culture is a reflection of the personality of a nation and the incarnation of the soul of the nation that the identity and characteristics *(local genius or local prudencia).* Culture is what distinguishes between a nation with each other. Although the customs and cultures are always evolving, but as soon as any changes occur, does not change the roots and basic values, as a joint of life of the nation.[27]

This is in line with what was once expressed by adherents of Historical Mahzab, namely Friedrich Carl von Savigny (1779-1861) who said that in line with historical experience, the community and the law is always in the same development. Each community lived and ruled by the law which has the characteristic of each and rely on legal history (*rechtsgeschichte)* and social structure *(sociale structuur).* In this case, Savigny see the law as a historical phenomenon, so the existence of any law is different and depends on the place and time of entry into force of the law. The law must be seen as the embodiment of a nation's soul or spiritual (*volksgeist).**[28]***

Furthermore, he saw the law as a result of the historical development of the communities where is the law is applicable for them; legal content is determined by the development of customs of the people throughout history of the society in which the law applies.[29] That is why, shades of law in Indonesia is not the same as in other countries.The existance of Historical Mahzab is a reaction to the view of Thibaut in his pamphlet, which reads: *Uber Die eines Notwendigkeit Allgemeinen Burgerlichen Deutscland fur Rechts "(the purpose of the codification of the German Civil Code).**[30]*** Thibaut wanted in Germany formed the codification of civil law on the basis of French law (code Napoleon) for the creation of legal certainty. With the codification of this it is considered no longer need the law outside the Acts.

The matters which is have to be considered relating to the efforts to codify this after Indonesian independence, precisely on the provisions of Article 102 UUDS 1950, which establishes a new policy of legislation field, namely: "that the authorities will carry out the codification of the civil law, commercial law , criminal law, civil procedure and criminal procedure with the exception if the law considers it necessary to set some things in the law itself ". This codification is the first command mentioned in the Laws of the Republic of Indonesia. Von Savigny did not approve it because he

argued that the law was not made, but grow and develop with the community. Therefore, it is impossible if there is a universal law for all time.[31]

Similar with other opinion , Savigny cite from Eugene Ehrlich as a prominent of sociological jurisprudence which states that the positive law will only be effective if in harmony with the laws of life in society that reflects the values of life in it. In his book *Grundlegung der Soziologie des Recht (Fundamental Principles of Sociology of Law)* which states that: *"The center of gravity of legal development lies not in legislation nor in juristic science, nor in judicial decision, but in society itself".* In this case, Ehrlich replaces "volkgeist" terminology of Savigny with the term "legal facts" or Rechtstaatsachen and laws that live in the community. The most important thing is that he has put forward Ehrlich minimize the differences between the legal norms with the other social norms. Ehrlich assumes that:*"It is obvious that a man lives in innumerable legal relations, and that, with few expectations, he voluntary performs the duties incumbent upon him because of Reviews These relations, one performs one's duties ... which one obligated oneself. The rule of conduct, not infrequently, is quite different from the rule that is obeyed because of compulsion ".**[32]***

Furthermore, the sociological jurisprudence doctrine stems from the distinction between positive law with the law of life in society (living law). This is similar with Paul Scholten discourse in chapter necessity and reality. Scholten tried to discuss the relation between reality and necessity as well as between truth and justice. It is like comparing a positive law, the law that states what should happen (done) by other characters from the law (such as cultures in the community) and the historical value.[33]

Protection of the country through the means of compulsion that are specifically not been effective although it has been set. Essential legal institutions is always based on legal facts that emphasize the entire law on Habits, power, ownership and statements of will. Therefore, adherence to the law is not due to legal norms that force, but because of the social compulsion. To understand the legal reasoning above, arise the question of how is the patterns of the original laws of Indonesia? In other words, **can the arguments both of Paul Scholten (on the involvement of a logical elements of Law), Savigny (who see the law as a phenomenon social and history) and Kelsen (Law must be strictly separated from other influences), used as justification for existence The original law of Indonesia?**

The relationship between the law and history discussed by Savigny in legal reform concepts. For him: *"German had not the Appropriate 'calling' for the construction of an adequate code; indeed, its jurists lacked the Necessary legal vocabulary. A code would 'imprison' the development of law and would merely fix it in an unsatisfactory state ".* Then, it raises the principles of the people spirit of among others:[34]

1. The law was originally established by common law (custom) and feelings of the people (popular feeling), which is a silently operating forces
2. The law is a product of the genius of the nation. As language, it formed slowly and transformed into a characteristic of a nation
3. The law cannot accepted generally; it only can be applied to the nation where its made
4. The law is not static, it is subject to any progress and any developments as well as other matters are reflected in the life of a nation.
5. The law comes from instincts of a nation of what is considered to be true because in fact, the law was "discovered" not "made", a legislation would remove a vital sense of a common law

6. Therefore, the law is an expression of "the soul of a nation" (spirit of the people)

Starting from the idea of Savigny, Supomo argued that Adat law is the law of Indonesian people who are not originally written, composed of mostly small part of customary law and religious law. Adat law is a law of life because it embodied the feeling of a real law of its people.[35] While Mahadi and some experts of Adat law demonstrates that the basic force of Adat law is precisely through some of the written law.[36] Even in Indonesia ever been applied a provision that has the characteristics of Austinian, namely Article 15 General Provisions concerning Legislation (Algemene Bepalingen van Watgeving / AB) which states that: "*with the exception of the rules that exist for indigenous Indonesian and for they equalized with it, the habit can only be called the law if the law call ".* So it can be interpreted that a custom can become law, if the law allowed it. In A contrario if legislation does not specify it, the custom/adat cannot be legal.[37]

POSITIVATION COMMON LAW

Terms of common law positivation used by Dominic Rato in his book Hukum Adat Kontemporer. At first glance, he explained that since 1825 with the enactment of Indies Staatsregeling (IS), and refers to article 131 jo 163 IS which accommodates of the Bumiputera groups along with their Adat law, since it Adat law has been a positive law or positivied in a legislation.[38]

Positive law is based on the philosophy of Europe positivism concept initiated by positivism figures such as Herbert de Saint Simon, Auguste Comte, and Herbert Spencer. According to them, the manner to think of positivism is a way of thinking based on empirical facts that can be captured by the five senses (it can be seen, felt, touched, kissed, and heard). A science is called positive if it departs from the facts and data (factum en datum) that can be captured senses, searched for and found in the field (the real world, not the ratio, the idea / notion), can be measured and predicted.

So what about the science of law that must be transformed into positive law? While the law is a norm that cannot be captured by the five senses (it can be seen, felt, touched, kissed and heard). That is why the law should be positivied through legislation and specified by the State in the legislation form, and outside the (written) law is not law. Law = State (Article 11 Algemene Bepalingen van Wetgeving). Only the law of the State which may be called the positive law. Because the Adat law is not made by the State, then the question arises is how the status of Adat law in the legal system in Indonesia?

After Indonesia's independence on August 17, 1945, on August 18, 1945 The committee of PPKI was establishing the Indonesian Constitution (Well known as UUD1945).TAP MPRS No. XX / MPRS / 1966 has confirmed that this Constitution (UUD 1945) occupies the highest degree in the sort order for the legislation in Indonesia. It means that any legislation must have the validity of this constitution (UUD 1945). In other words, if it is associated with Adat law, so Adat Law enforcement is considered valid throughout based and does not conflict with the Constitution (Undang-Undang Dasar 1945).[39]

When it was examined within the Constitution Undang-Undang dasar 1945, there was no one any provisions which expressly mention of Adat law. It has been also disclosed Satjipto Rahardjo that *even though many people accept Adat law, but in the Constitution Undang-Undang dasar1945 as one of the sources of law did not mention it,*[40] however it must be recognized that in the 1945 Constitution contains crystallization principles of Adat law, as described in the General Explanation paragraph II, which mentions that:

To investigate the basic law (droit constitunelle) of a country, it is not enough just to investigate the articles of the Act essentially (Loi Constituinelle) alone but must also investigate how to practice and how the atmosphere of the spiritual.

Clause "atmosphere" can be interpreted that the constitution of Indonesia, has been imbued with the principles of Adat law .Therefore basic thoughts of why these ideals enshrined in the basic law of the country *(staatsfundamentalnorm),* namely Pancasila. Thus occurred the inauguration of Adat law are not merely legal, but people interpreted as rechtsidee. When the State of Indonesia has been able to make its own laws, namely Law No. 5 of 1960 UUPA, the Indonesian government started to pay attention to the law of his own people. In Article 5 UUPA said that the new agrarian law based on Adat law which has been purged of elements of feudal.

Back again in Adat law as a positive law, the existence of Adat law as a positive law that legally after the 1945 amendments into the Constitution of the Republic of Indonesia Year 1945 in Article 18 B (2) states: "*The State recognizes and respects units of Adat law communities along with their traditional rights for all are alive and in accordance with the development of society and the principles of the Unitary Republic of Indonesia, which is regulated by law ".* Furthermore, Article 28, first paragraph (3) the 1945 Constitution states: "*The cultural identity and the rights of traditional communities be respected in line with the times and civilization."* So the common law under article 28, first paragraph (3) is a cultural identity in accordance by article 28, first paragraph (4) shall be realized by the State.

Starting from the second chapter of the Constitution above, was born a couple Act as actualization, such as Law No. 39 of 1999 on Human Rights, Law No. 41 of 1999 on Forestry, Law Number 7 of 2004 on Water Resources (has been revoked by the Constitutional Court), Law No. 18 of 2004 on the plantation, Act No. 6 of 2014 concerning the Village and other regulations.

CONCLUSION

Nowadays, Adat law has changed a lot and experiencing rapid development, not only as an unwritten laws that live in the community, but has been transformed into rules of positive law power. From historical perspective, this change is caused by two things: the cultural and structural. Cultural is the change desired by its members, either because of a change of mindset, the will to change, assimilation, adaptation. While structural changes can be seen from the many Adat laws that accommodated in national law. So, This is what called as a-logical element in the law according to Paul Scholten theory. In the end it can be concluded, although in the Indonesian Constitution (UUD 1945) does not strict expressly special provision for Adat law, but it implicitly expressed therein, namely the opening and Company 1945 Constitution. Because Adat law is the only law that developed above the basic framework outlook on life people and nation of Indonesia, then the Adat law can be said to be the most important source in coaching the national legal order of the Republic of Indonesia.

[1] The division of the two major groups of legal theory is almost always found in all literature, philosophy and legal theory or traces discuss the development of legal thought throughout history. For example: The Idea of Law (by Dennis Lloyd, 1964), The philosophy of Law in historical Perspective (works CJ Friedrich, 1969), Ilmu Hukum (works Satjipto Rahardjo, 2000), Sejarah Hukum (work Emeritus John Gilissen, 2005), This classification can also be found in the book of : Bernard L Tanya, *Teori Hukum Startegi Tertib Manusia Lintas Ruang dan Generasi*. Yogyakarta, Genta Publishing, 2013, p.2. Also see Philippe Nonet and Philip Selznick, *Law and Society in Transition Toward Responsive Law*, San Fransisco : Harper and Row, 1971

[2] Rikardo Simarmata in the article *"Mencari Karakter Aksional Dalam Pluralisme Hukum"* mentioned dichotomy

between the law of the State Law and Adat law as an old concept. Rikardo mention to the first group as a Legal centralism, which is the regularity produced by state (taken from the book : Huma and Ford Foundation, *Pluralisme Hukum Sebuah Pendekatan Interdisipliner*, Jakarta, Huma, 2005, p.3

[3] Hans Kelsen with the Pure theory of Law try to enhance views of Austin that dichotomy between countries and the law as a distinct entity (The State associated as the Law maker or “the god of the world of law”. Austin assume that the law is the will of the state. Hans Kelsen tried to eliminate the dichotomy as what was raised by Austin. It likes the Pure of Jurisprudence abolishing the dichotomy between the law and justice, by stating that the State is identic with the law (see : I Dewa Gede Atmadja, *Fisafat Hukum, Dimensi tematis dan Historis*, Malang, Setara Press, 2013, p. 41, Also see Bruggink, J. J. H, *Rechtsreflectie : Grondbegrippen uit de rechtstheorie*, Den Haag, Kluwer-Deventer, 1993, p. 117

[4] Paul Scholten, *de structuur der rechtswetenschap* (translated by B. Arief Sidartha) p. 7, see online version in http://www.paulscholten.eu/cp/wp-content/uploads/2013/09/Judul-Struktur-Ilmu-Hukum-geheel.pdf

[5] In the 19th century, through the juridical positivism concept, the law was viewed as a formal-legalistic unit. In that time, positivism relied on some doctrine, namely (i) the only law which is accepted as the law is a positive legal order. (ii) The procedure of law is real and true not because it has no basis in social life (contra Comte and Spenser), or because the law is rooted in the national psyche (contra Von Savigny), nor as a mirror of justice and logos (contra Socrates) , but it gets the form of the positive law of the competent institution. (iii) The important thing in study of law is a juridical form, not the quality of its contents. (iv) the content of the material law is a field of non-juridical studied by other disciplines, and it’s only useful in the law making process (v) Justification of the law in terms of the formal-legalistic, both as a form of command ruler (version Austin) and the version derivation Grund norm (Kelsen version), see : Lawrence M. Friedman, *The Legal System : A social Science Perspective*, New York, Russell Sage Foundation, 1975, p. 167

[6] Paul Scholten, *opcit.*, p 32

[7] After the 19th century, the law is return associated with social and human mosaic. Radbruch re-associate between the law and justice. Rechtsdogmatiek Tradition which is only see the law as a building of regulation that assessed systematically and logically has started being abandoned. The elements of a logical, like humans, society and welfare being embraced in legal thought. That is why, Rechtsdogmatiek is still strong at Law field in Indonesia, and it is just one of the diverse types of legal concepts throughout human civilization. (see : Emeritus John Gilissen, *Sejarah Hukum Suatu Pengantar*, Bandung, Refika Aditama, 2005, p. 91

[8] The view that the law is a-logical also mentioned by Satjipto Rahardjo which states that "the legal scope is an intact reality, with all their dimensions, and there are not just about text, but also the context, both numerically and spatially, bio-physical, and social culture. In the Legal theory book essay by Bernard L Tanya, also mentioned that the law is "multi-faceted" and "multi logic". The establishment of a rule always departs from the needs, struggles thoughts, ideas, expectations and special interests. In the time that Law was made by the rules, there was a battle of ideas and interests that will eventually be articulated and formulated in a color specific language into a regulation. (see : Satjipto Rahardjo, *Ilmu Hukum*, Bandung, Citra Aditya Bakti, p. 26. Also see : Imam Koessoetiksno and Imam Koeswahyono, Norma dan Keputusan : Telaah Kritis atas Teori Logeman & Scholten Serta Kaitannya dengan Kajian Socio Legal, Malang, Inti Media,2014, p. 20

[9] Term of Adat law is actually not coming from original Indonesian terminology, but a translation of the Dutch "het

adatrecht" introduced by eastern literary experts from Netherlands called Snouck Hugronye (Soerjono Soekanto, *Hukum Adat Indonesia*, Jakarta, Raja Grafindo Persada, 2010, p. 49). Also see : Imam Koessoetiksno and Imam Koeswahyono, Norma dan Keputusan : Telaah Kritis atas Teori Logeman & Scholten Serta Kaitannya dengan Kajian Socio Legal, Malang, Inti Media,2014, p. 20

[10] Soekanto, *Meninjau Hukum Adat*, Jakarta, Soeroengan, 1955, p. 40

[11] Description of Supomo speech in the inauguration Adat law on Rechtshooge Batavia on 31 March 1941, *De verhouding van Individuals en Gemenschap in het Adatrecht*. Batavia: JB Wolters, 1941 that translated and recorded in Supomo with title : *Hubungan Individu dan Masyarakat dalam hukum Adat*, Jakarta Prajna Paramita, 1951, p 10-12

[12] Moh Koesnoe, *Hukum Adat sebagai Suatu Model Hukum bagian I (Historical)*, Bandung: Mandar Maju, 1992, p 24

[13] Van Vollenhoven, *Het Adatsrecht van Nederlandsch Indie*, Volume I, Leiden, 1925, p 7

[14] Van Vollenhoven, *Het Adatrecht van Nederlandsch Indie*, Volume II, Leiden, 1928, p 398

[15] This Thought is indicated by the last sentence "arise and maintained in the practice of state administration even though in unwritten form, see Otje Salman Soemadiningrat, *Rekonseptualisasi Hukum Adat Kontemporer*, Bandung, Alumni, 2002, p. 45

[16] Paul Scholten, *de structuur der rechtswetenschap*, opcit., p.21. Also see Sudikno Mertokusumo, *Mengenal Hukum : Suatu Pengantar*, Yogyakarta, Liberty, 2003, p. 14

[17] *Ibid*

[18] Dominikus Rato, *Pengantar Hukum Adat*, Yogyakarta, Laksbang Pressindo, 2009, p. 7

[19] By paying attention to these three prerequisites, Jurisprudence can be science that is positive (exacte), see Otje Salman Soemadiningrat, p 110

[20] Otje Salman, *Rekonseptualisasi Hukum Adat Kontemporer*, Bandung, Alumni, 2002, p 2

[21] In Soerjono Soekanto, *Hukum Adat Indonesia*, Rajawali Press, Jakarta, 2010, p 62

[22] Van Dijk, *Pengantar Hukum Adat Indonesia* (translated by A. Soehardi), Bandung, Mandar Maju, 2006. P. 15

[23] Criticism of van Vollenhoven submitted to Nederburgh, those who argued that the Indonesian people must be whipped to enter the modern world and the unification of law and allow the implementation of an efficient administration. According to Daniel S Lev, vans Vollenhoven want to freeze the Indonesian people outside modern association so that it will still look traditional and old-fashioned (Daniel Lev, *law and politics in Indonesia, Continuity and Change*, Jakarta: LP3ES, 1990, pp 429-430). See also, Otje Salman, opcit, p 112

[24] Soekanto, *opcit*, p. 55

[25] Mahadi, *Uraian Singkat Tentang Hukum Adat Sejak RR Tahun 1854*, Bandung, Alumni, 1991, p. 58-77

[26] This article also want to correct the errors that Adat law is not a translation of customary law, however, the term is derived from the term adatrecht were first used by Christian Snouck in his book: De Atjehers (Indigenous itself comes from the Arabic Ada'ah). Keebet von Benda Beckmann in Article Pluralisme Hukum, Sketsa Genealogis dan

perdebatan Teoritis wrote that Adat law is a term used to refer to local laws, in addition to the original law, the law of the people, or traditional law. The term refers to the past as that seems unchanged despite any kind of law is always changing. Adat law is still applied in the courts, particularly in the local areas. Therefore, customary law and then grafted in state law and legal pluralism emerges. However, according to Keebet, the application of Adat law is only concerned with the substantive rules, while the state court procedure is still being done by the state.

[27] Dominikus Rato, *Pengantar Hukum Adat*, Surabaya, LaksBang Justitia, 2009, p 3

[28] Friedrich Carl von Savigny trigger this thesis in his book *"system des heutigen romischen Rechts"*, in 1840 in Volume I (there are 8 volumes) with many linking between law and history, (Quoted from Otje Salman, *Rekonseptualisasi Hukum Adat Kontemporer*, Bandung, Alumni, 2002, p 2

[29] Suroyo Wignjodipuro, *Pengantar dan Azas-Azas Hukum Adat*, Alumni, 1973, p 62

[30] Lili Rasjidi, *Dasar-dasar Filsafat Hukum*, Alumni, Bandung, h 40

[31] Lili Rasjidi, dan B. Arief Sidharta, *Filsafat Hukum Mazhab dan Refleksinya*, Remaja Rosdakarya, 1989, p 31

[32] Eugene Ehrlich, *Fundamental Principles of the Sociology of Law*, New York, 1936, p 21

[33] Paul Scholten, translated by B. Arief Sidharta from the article DE STRUCTUUR DER RECHTSWETENSCHAP, Speech at *Koninklijke Nederlansche Akademie van Wetenschappen*, *Afdeeling Letterkunde* meeting, March, 17 1942, p 31-32

[34] LB Curzon, *Jurisprudence*, *The M and E Handbook Series*, Macdonald and Evans, 1979, p 154, see also: Zulfa Djoko Basuki, *Mazhab Sejarah dan Pengaruhnya terhadap Pembentukan Hukum Nasional Indonesia*, dalam buku *Filsafat Hukum Mazhab, dan Refleksinya Remaja Rosdakarja*, Bandung , 1994, p 30

[35] Supomo, opcit, p.7

[36] Mahadi showed the number of laws and regulations on which the entry into force of Adat law since the days of the Dutch East Indies until the release of emergency Law No. 1 of 1951 (Undang-Undang Darurat). However, in these article, Mahadi not mention explicitly that the Adat law must be based on written law. Furthermore, in its own Article 67 (2) of the Constitution of the Republic of Indonesia Number 41 Year 1999 on Forestry states that: "Inauguration of the existence and abolishment of customary law communities as referred to in paragraph (1) shall be determined by the regional regulation" as by emphasizing that recognition de jure to the community common law (subject to the common law) is when it has been confirmed by the regional regulation.

[37] Otje Salman, opcit p 6

[38] Dominic Rato, *Hukum Adat Kontemporer*, Laksbang Justicia, Surabaya, 2015, p 69

[39] Otje Salman, opcit, p 18

[40] Satjipto Rahardjo, *Hukum Adat dan Ilmu Hukum adat dalam Konteks Perubahan Sosial*, In Magazine Masalah-masalah Hukum No. 5 of XXXI, 1983.p 52

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