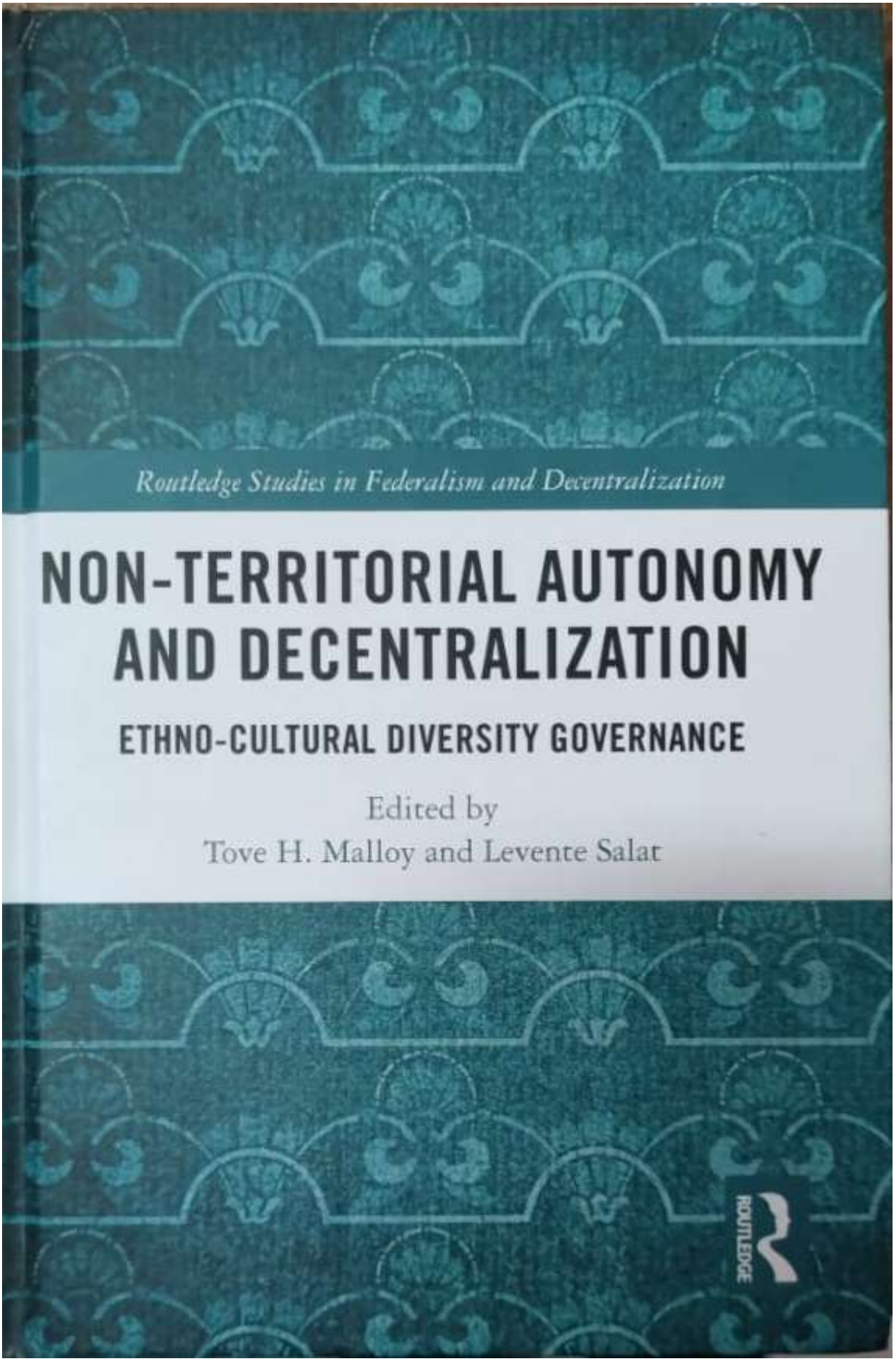
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ETHNO-CULTURAL DIVERSITY GOVERNANCE
Edited by
Tove H. Malloy and Levente Salat
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Non-Territorial Autonomy and Decentralization

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Indigenous cultural rights in Indonesia

Introduction

This Chapter examines the dynamic of indigenous peoples' rights in Indonesia, particularly their cultural rights as part of their Non-Territorial Autonomy (NTA). The "autonomy" in this respect is not in the sense of tangible autonomy, but more in the intangible sense which is based on cultural affiliation and activities.[1] In this respect, the notions of "rights" and "autonomy" are interrelated yet problematic; "rights" are considered as the normative-philosophical values that intrigue the aspiration to autonomy. On the other hand, "autonomy", basically means independence and free will of the "self,"[2] which is often pondered as a preliminary condition of having authority that eventually determines the "rights." Thus, this is a problematic assertion of "the chicken and the egg dilemma," which one came first?

The former departs from the human rights perspective, while the latter is influenced by public administration and policy perspectives. This chapter, however, puts "rights" as an entry point to elaborate further issues on NTA in indigenous peoples' context. Since the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP) has stated the "right to autonomy" for indigenous peoples, it has been widely introduced.[3] Nevertheless, it does not mean "rights" higher than "autonomy" or vice versa; they are conceptually balance and interrelated.

The right to autonomy relates with some political and legal theories; the theories are inclusive in nature. In order to exercise the "right" inclusively, the government should employ a culture-friendly and fluid mechanism.[4] Unlike the Weberian government system which stresses strict top-down coordination,[5] the right to autonomy in the setting of pluralistic nation-state, Indonesia should be conveyed through legal pluralism-based policy mechanism. In this respect, the discussion of theories of network governance and legal pluralism become relevant, in which the network governance is the mechanism, while legal pluralism is the substance.

This chapter seeks to analyze in what way the network governance and legal pluralism can benefit indigenous peoples and their NTA in Indonesia. Furthermore, within the context of legal pluralism, it also analyzes what reforms are needed in the legislation system to protect indigenous peoples and their NTA.

In the following, this chapter discusses the theoretical framework outlining diverse and interrelated theories: network governance and legal pluralism, and other relevant governance concepts, such as decentralization, culture defence and the rights of minorities. Discussion on decentralization is important because it complements the network governance; an effective network is a decentralized network. Meanwhile minority rights are interlinked with indigenous peoples' cultural rights as part of their NTA. No doubt, indigenous peoples are inherently minorities. Additionally, a culture defence-based argument is pivotal to elevate their cultural rights and NTA.

The chapter presents and analyzes the existing legislation concerning indigenous peoples, NTA and decentralization policies, ending with a brief discussion about their drawbacks and the insights to remedy these drawbacks. But first, the chapter starts by giving some background to the topic, how the Indonesian government has evolved from a legal centralistic-authoritarian government to a democratic and legal pluralism-based government.

A context

Indonesia, the largest archipelagic state in the world, is facing challenges on the management of pluralism, particularly in balancing between indigenous peoples' aspirations and the demand of modernization and development.[6] The root of those challenges can be explained through historical description. Despite being persuaded by the colonial power, the Dutch, to be part of the Dutch-Indo federalism in 1940, the post-colonial Indonesia government was keen to be a unitary state, a fully-sovereign and independent country. Post-colonial Indonesia had challenges in constructing its newly established republic. The government tried to lessen colonial influences. However, not all efforts were successful and not all colonial influence was detrimental, for instance in legal aspect, until recently the Dutch civil law system has been prevailed to be adopted and practiced by the governance and Indonesian jurists.

With regard to pluralism policy, post-colonial governance took a different path from the Dutch who nurtured indigenous peoples, their traditions and socio-legal structures.[7] This was the early stage of Indonesian legal pluralism discourse. The post-colonial government, so-called the Old Order Regime, was nationalistic in nature by encouraging unification and codification of laws. As a result, the government abolished several old colonial Acts that recognized indigenous peoples' structure in some indigenous areas in Indonesia.[8] The government also codified the law and discarded *adat* law, the Indonesian customary law, from formal structure of the Indonesian legal system. However, the government still recognizes indigenous values and encourages judiciary to always consider *adat* law, as one of the legal sources, when dealing with indigenous issues.[9]

Despite having a crucial role in founding the state's structure, the Old Order regime was short-lived, due to the harsh conflict between the army, the communists and the President.[10] The next successor was the New Order regime lead by General Suharto, who was soon known as the smiling (yet lethal) General. Indonesia under the New Order regime was authoritarian. Suharto through his manipulative legal-political engineering lead the country for more than 32 years. The policy of unification was strengthened by the developmentalism paradigm, which considers indigenous culture to be a nemesis of development.[11] Indigenous peoples, in particular their cultural rights have been depressed since that era.

Through his pseudo-rule of the law system, Suharto created a pseudo-regional autonomy by regulating laws concerning regional and villages' administration. However, the substances of the laws were far from a participatory democracy and decentralization policies. There were simply centralized-based laws.[12] Diversity of rural areas was simplified by the government by unifying them into a single definition of "*desa*" (village). *Desa* simply became the smallest administration branch of government.[13] This policy is blind to the fact that rural areas in Indonesia are extremely diverse, thus it is impossible to simplify them into a single government-made concept. As a result of this policy, indigenous peoples living in rural areas have been forced to adapt for the sake of development.

Soon after the New Order regime was dethroned by the reform movement in 1998, the post-authoritarian government planned to replace centralism policy into a participatory-

decentralization policy. However, the transitional phrase is challenging. Indonesia has moved from one of the most centralized governments, to one of the most decentralized governments in the world.[14] Decentralization is a realistic policy for a big archipelagic state like Indonesia; it consists of five big islands, around 17,000 small islands with 34 provinces, 416 regencies, 98 cities and 81,626 villages.[15] That diversity cannot be managed by centralized and top-down government system.

In a positive tone, the liberal-democracy setting helps to create a massive mobilization of indigenous peoples' activism. The government, through the Amendments of the Constitution recognize indigenous peoples' rights in two chapters: the first is in Article 18B (2) of the Regional Autonomy Chapter:

> The state recognizes and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law.[16]

The second is in Article 24 (2) of the Human Rights Chapter: "The cultural identities and rights of traditional communities shall be respected in accordance with the development of time and civilisations." There also is art 32 (1): "(1) the state shall advance the national culture of Indonesia among the civilisations of the world by assuring the freedom of society to preserve and to develop cultural values."[17]

Those articles recognize indigenous peoples' rights, particularly their property rights, but it also limits these rights by proposing several conditional requirements.[18]

The milestone of the movement was the judicial review of the 1999 Forestry Law in 2012. The Constitutional Court declared that the inclusion of indigenous forest to "state forest" was unconstitutional.[19] By divorcing indigenous forest from the state forest system, the Court implicitly granted indigenous peoples their communal rights over their forest/land. This territorial-based right thus means the recognition of intangible rights of indigenous peoples, such as their cultural and spiritual rights, which are part of their NTA.

However, the Constitutional Court's decision could not simply change the legal system. The decision should firstly be responded to by the executive (related ministries) and the legislature. The existing legislation regulates that in order to be recognized as legal entity, indigenous peoples must firstly be recognized by local governments. The central government has also stipulated many sectoral regulations that create over-lapping coordinators among ministries.[20] Yet, the more effective legislation would be the 2014 Village Law that opens a more realistic procedure for recognition.

The Village Law of 2014 opens opportunities for indigenous peoples to be recognized under the concept of *adat* (indigenous) villages with more cultural-based requirements than the Forestry Law.[21] It states that indigenous peoples should have both communal land (territorial requirement) and still in "de facto" exercise their cultural and *adat* law (cultural requirement). The government should protect and fulfil their rights on lands and cultural rights. This is the practice of state law pluralism.[22] Despite the fact that on paper this Act regulates a decentralized-based recognition, in practice there rarely are local governments that have good intentions to recognize indigenous peoples' rights. The logic of the local government is still dominated by the developmentalism paradigm. To make matters even worse, the steps of recognition by local government are highly political, bureaucratic and time-consuming. As a result, the recognition of *adat* village is slow. Until recently, there have been few formal recognition of *adat* village in Indonesia. The 2014 Village Law seems ideal, but its implementation is still challenging.

Furthermore, the Village Law is also paradoxical, because in practice it was not the local government that initiated the recognition for indigenous peoples, but the central government. In late 2016 the central government through the Ministry of Forestry and Environmental Conservation (MFEC) has stipulated nine recognition stipulations for the establishment of *adat* forest management permits. The permits can be used by indigenous peoples to establish their *adat* village, but most of local governments especially the provincial governments delay it. In some cases, for instance in Papua and Bali, the district governments initiated the establishment of 36 *adat* villages, but when the initiatives brought to the provincial government, they were rejected.[23] Judging from this fact, the hypothesis can be defended that decentralization system that ideally encourages public participation and bottom-up policy, has failed to empower and promote indigenous peoples' rights.

Furthermore, in the local context of the South Kalimantan Province, indigenous cultural rights which are manifested in cultural ceremonies and indigenous livelihood are often denied by the government. For instance, the indigenous thanksgiving ceremony, namely *aruh* is rejected by the local government, merely because they consume traditional alcoholic beverages and perform gambling activities in their ceremonies. These habits and traditions are considered illegal according to state law.[24] In Central Kalimantan, indigenous peoples are still practicing shifting cultivation; they move frequently from one area to another in period of three or five years circle. This indigenous people's communal practice is stereotyped as the source of the forest burning. Indigenous communal practices are also considered as obstacles to the massive project of palm oil plantation in that area.[25] The government forces indigenous peoples to embrace modernization by leaving their communal areas and stop doing shifting cultivation, because there is no legal certainty on land ownership. Legal uncertainty is not beneficial for investment. Indigenous peoples, particularly their distinctive cultural rights are still oppressed by the system.

Indonesian legal pluralism is clearly imperfect. Thus there is a need to ponder several concepts of governance to enrich the establishment of legal pluralism in Indonesia. The next section further elaborates some of these concepts.

Conceptual framework

The failure of decentralization to empower and encourage NTA of indigenous peoples in Indonesia is the core issue of this section. Many suggest that the failure happens because the local governments have no good intentions to the protection of the indigenous peoples. If indigenous peoples manage to obtain their autonomy on their lands and cultural rights, local governments would lose its chance to benefit from the development projects. In a political condition, it is called state-corporatism when a state has a strong linkage to extractive companies, thus indigenous peoples are suppressed.[26]

This chapter analyzes the issue from an assumption being made that the legalistic-Weberian system of government which has been adopted by the Indonesian government is insufficient to depict people's aspirations due to its strict vertical-hierarchical mode of governance. As a result it fails to produce a more inclusive public policy; there is a loop in government's practice which

is the lack of horizontal network. The government disregards indigenous peoples' aspiration by merely consider them as objects of development, not as active subjects of development.

Understanding network governance

This article follows the definition of network governance given by Sørensen and Torfing who elaborates it as:

> 1. a relatively stable horizontal articulation of interdependent, but operationally autonomous actors; 2. who interact through negotiations; 3. which take place within a regulative, normative, cognitive and imaginary framework; 4. that is self-regulating within limits set by external agencies; and 5. which contributes to the production of public purpose.[27]

This long definition can be divided into several aspects. First, with regard to the constitutive elements of network governance, the definition gives two main elements; "interdependent" and "autonomous." To build an equal network among parties, the precondition of interdependency is needed; all parties have interrelated interest, thus their interests can be negotiated.[28] To glue the interdependency relationship among parties, they should have their own internal autonomy which prevents the party from persuasive or coercive influences from other parties. However, this chapter argues that both of these elements are normative. In a fragmented social setting where injustice, discrimination and inequality do exist, the interdependency relationship is hardly achieved; unbalanced conditions are highly probable. We cannot say, however, that it is completely unachieved because the interdependency condition would exist but it would seem superficial.

Second, the network governance needs some instrumental tools, such as negotiations, regulative and normative frameworks and external agencies. Negotiation is typically a horizontal coordination tool, because it is informal and less bureaucratic than formal state mechanism. It emphasizes how the policies are discussed and conveyed. As fluid mechanism, negotiators realize that the public interest is not "black and white," rather it is a complex arena consisting of many vested interest parties. Yet, it also has drawbacks; unlike formal mechanism that has

binding power, it has no binding power making this mechanism vulnerable from parties who disobey the consensus. Thus Sørensen and Torfing elaborate:

> network-based government is a complicated and potentially chaotic process in which several interests, rationalities often fuse and collide[29] … the cultural, social and political differences between the relatively autonomous stakeholders prevent governance network into stable political institution.[30]

To remedy the deficiency, network governance combines its informal tool with some regulative and normative frameworks aiming to be a safeguard in order to prevent the consensus among parties not to be breached. "Normative" in this sense is not necessarily a legal concept, it could be a moral force than that bound all parties. Furthermore, the interaction among parties is controlled by external agencies, which should have no interest with all the parties; these agencies should be neutral and partial.

Thirdly, the aim of network governance is to reach the goal of public aspiration. Based on this purpose, network governance is closely linked with decentralization and participatory democracy. Decentralization aims to deliver people's demands to the authority by dividing the authority to some branches of authorities, while participatory democracy enables parties, particularly a group of interested people to upgrade their bargaining position over other powerful parties or stakeholders.

Therefore, to link theory of network governance to its implementation by governance network, the role of conventional administrative governance is needed. The two most important issues to make administrative governance relevant are the need of a certain degree of order and stability to social interaction.[31] Thus network governance needs to be hybrid to strengthen horizontal coordination, inclusive partnership, commitment and trust among parties or stakeholders, while keeping hierarchy and vertical control intact. In other words, network governance should remedy and empower the practice of decentralization.

Revitalizing decentralization through hybrid network governance

Decentralization is a limited government meaning that local government that embodies decentralization has limited authority devolved by the central government. However, local government has crucial roles and the authority to maintain public order, absorb public aspiration, initiate and execute community changes processes in local and rural communities. In other words, local government is the central development architects for local and rural communities.

Several theorists have claimed that decentralization is a more democratic governance system compared to the centralistic one. Crook and Manor say that "it encourages accountability within the system of government because communities actively participate in local politics through direct local election,"[32] while Ribot says that "it is more responsive to local needs, because local authorities live nearby and experience the way of living of local people, thus they can easily be aware of people's needs."[33] Lastly, Kälin elaborates that "it protects and accommodates minorities' rights and marginalized peoples, because local communities acquire more control over their own affairs."[34]

Nevertheless, the arguments are not entirely true both in theory and practice, for instance public participation does not always guaranteed a degree of accountability. And the local government does not always protect minorities. Instead, it often excludes their rights from political processes.[35] With regard to indigenous peoples, local politicians often exploit indigenous and ethnicity sentiments as a tool to gather voters in local elections. Local government often provides privilege for local elites, while negating local aspirations.[36] In a structural perspective, decentralization might establish several government organs which often work ineffectively, and it may contribute the weak coordination among them.

Despite all of its imperfections, decentralization is still considered as a 'lesser-evil', because it is able to encourage the growth of democracy, particularly a participatory democracy in a local context. It gradually educates people on what their rights are, and how to defend their rights through constitutional mechanism.

To make decentralization more effective and justice-oriented, hybrid network governance could play a significant role by combining two types of networks: legalistic-vertical mode and participatory-horizontal mode.

The first type of network is considered as a conventional mode because it relies on the classical hierarchical model of representative democracy.[37] Despite being considered as an "old-fashioned" model of governance, this type of network answers an important question on who can effectively steer network processes.

Local government usually takes on the role of leader that both indirectly and directly steers the network governance processes. It represents the formal organizing principles of local government.[38] Moreover, hierarchical order and majority vote become a basis of collective action which creates legal certainty and a more stable relationship among stakeholders. The steering model is uniform making it more simple and effective to be exercised. Nevertheless, this uniform steering requires a centralistic attitude of government; it tends to centralize the power structure which results in an exclusive and repressive government. This drawback could be soothed by a participatory-horizontal mode.

The second type, participatory-based network suggests an inclusive participation of all stakeholders. In this respect, local government does not exclusively steer the process, instead it becomes one of the participants.[39] However, in hybrid mode, local government as a participant can be a dominant and influential participant. As stated, hierarchical order is still maintained but the role is shared with inclusive communication and consensus which could create discretionary actions aiming to create innovative and justice-based public policy. By adopting these characteristics, local government decentralizes its power, making it more adaptive and approachable. Eventually, local government can stipulate a culturally based discretion to soothe the rigidity of law.

The outcome of inclusive participation, communication and consensus in hybrid governance network is discretion. However, the definition of discretion is problematic, because conceptually speaking, discretion has many meanings and scopes, for instance in the Common Law's context, discretion is closely related to judicial discretion in which " … judges (under authority given by contract, trust or will) can make decisions on various matters based on his/her opinion within general legal guidelines."[40] This definition and scope clearly do not fit to the network governance context.

The more precise concept for public administration was given by the Dutch legal concept; *vrij bevogdheid* that has a strong public-administrative law dimension. This concept divides discretion into two types of discretion. The first type is *beleidvrijheid* which means that a government has freedom to make policy if (i) written legislation or regulation does not regulate wholly which creates legal vacuum and uncertainty, or does not regulate clearly and completely about the subject matters (open-texture); and (ii) there is a potential conflict as a consequence of the absent of law.[41]

The second type is *beoordelingsvrijheid* which means that a government has freedom to interpret blanket norms in legislation or regulations.[42] These concepts have a slightly similar meaning to the German *freies ermessen*, which means the freedom to make a consideration on government affairs.[43] However, these kinds of discretions do not mean having no limit. The limits are the principles of good governance, and objective reasons that are based on facts, ratio, and the actual condition of the society. Additionally, it must be exercised in the spirit of good will.

The spirit of good will opens more elaboration on hybrid network governance. The discretion resulting from a diverse consideration from the local government should also consider the cultural imperatives that become the core of the issue. Culture has significant influence on individuals and communities (with regard to indigenous peoples), predisposing them to act in ways that correspond with their upbringing. In this regards, the hybrid network governance combines the notion of society-driven and government-driven. Government is still the architect of political order, but it should also prioritize societal dynamics. The reforms should dictated by functional requirements of social transformations and an increasingly complex and dynamic society. This premise should be acknowledged by the legal system, because it enshrines the spirit of inclusive and participatory-based justice.

The form of acknowledgment can be exercised through discretion containing official public policy. However, to prevent its misuse, there is a need for safeguards to make sure that indigenous cultural traditions do not breach other human rights. Normatively speaking, the safeguards are the universal human rights principles. Inhumane traditions or customs can be accepted under the universal norms, particularly human rights that are considered as non-derogable rights. To examine and review those cultural imperatives, local government must

carefully verify their empirical basis of claim, while guarantying and protecting their cultural rights from irreparable harm.

From the above arguments, the concept of culturally based discretion is strategic as a tool of hybrid governance network to achieve access to justice for marginalized and indigenous peoples. The aim is different with a legalistic-conventional network that results in pragmatic and temporary reconciliation among stakeholders. This hybrid governance network aims to create historical reconciliation meaning it is based on a holistic understanding of people's demand and factual condition. The core is the cultural imperatives of indigenous peoples.

In this regard, culture is often considered as one of the most crucial ingredients of lawmaking. Thus the element of culture cannot be separated from a legal discourse, particularly with regard to the ideal relationship between state law and non-state law which has been actively elaborated by legal pluralism theorists. The influence of legal pluralism for network governance will be further elaborated in the next section.

What can legal pluralism offer?

As the substance of the network governance, legal pluralism influences the organizational and government studies through its appreciation of diversity and cultures. It is a descriptive theory that deals with the fact that within any given field, the law of various provenances may be operative.[44] Both theories: legal pluralism and network governance more or less have a similar standpoint; they are against a conventional way of thinking: a rigid and overly formal-hierarchical government. Nevertheless, in the current discourse both theories accept modification from state law and its hierarchical modes. In that regards, legal pluralism offers additional perspectives to network governance.

Legal pluralism provides the linkage between state law and non-state law entities, not only in the sense of inter-mingling relationship between substantive laws, but also their institutions and actors (indigenous peoples and other interest groups). With regard to relationship with state law, John Griffith was the first to provide categories of legal pluralism: between the so-called weak and strong legal pluralism.[45] Despite both concepts having some differences, they are considered as socially observed facts.[46]

Strong legal pluralism is a situation in which not all of the law is formal-state law, nor is all of it administrated by a single set of state legal institutions.[47] In this type of legal pluralism, there is strong separation between formal-state law and non-formal laws.[48] This type of legal pluralism is more commonly implemented amongst indigenous villages or, to use Sally Falk Moore's concept, "semi-autonomous social fields."[49]

Implementing strong legal pluralism can be a strategy to protect indigeneity. Nevertheless, it could also jeopardize upon state sovereignty as the state has neither direct access to nor control over indigenous laws. This strategy also could impede modernization processes because the indigenous laws are fully separated from state law. Thus, the indigenous laws cannot be utilized by the state as a medium to channel the state to indigenous communities.[50] This type of legal pluralism is not functional to be merged with the governance network.

To effectively convey indigenous laws and aspirations to the state spectrum, a technique of governance on pragmatic grounds through state legal pluralism is needed.[51] This is often referred to as weak legal pluralism. Woodman states, "if the norms of the culture can be seen as legal norms, as are the norms of state law, this is a condition of state law pluralism".[52]

In this setting, indigenous laws are contaminated by the formality of state law through formal recognition. The state conveys its authority and political power toward indigenous communities. This approach is slightly similar to Hart's inclusive approach of "the rule of recognition"[53] and Kelsen's normative approach of the validity of law.[54] Both theories emphasize that the state law linkage is an inevitable consequence of the modern state. In this type of legal pluralism, there is only a diversity of legal sources. It is pluralism within state law.[55]

There is a disadvantage of state law pluralism. Woodman sheds light on the ground of justice by arguing that state law pluralism could jeopardize the principle of equality before the law, because by definition a pluralistic state provides for different norms to be applied to different individuals in the same situation.[56] This state-centred legal pluralism is often questioned for failing to take account of the diverse aspects of the complex relationship between indigenous laws and "semi-autonomous social fields."[57]

In order to be fairly implemented, state law pluralism must consider indigenous communities, their laws and NTA as elements of modernization, not as resistances to it. Through this strategy, the state may provide the glue between the two levels of laws: state law and indigenous law by using responsive legal postulates to create a bridge from the values of indigenous laws to the state law and vice versa. Legal postulates, a concept introduced by Chiba,[58] are compromising medium connecting government and its formal law with indigenous societies and their customary law. It should be transmitted by policymakers, so they can play an active role in promoting access to justice, and diversity, particularly NTA of indigenous communities.

The implementation of state law pluralism can be seen in Indonesia's context in the definition and requirements of "indigenous peoples" in the Constitution and the current laws. The recognition is asserted in two chapters: Article 18B (2) of the Regional Autonomy Chapter and Article 24 (2) of the Human Rights Chapter:

> The state recognises and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law.[59]
>
> The cultural identities and rights of traditional communities shall be respected in accordance with the development of time and civilisations.[60]

Those articles recognize indigenous peoples' rights, particularly their property rights, but it also limits their rights by proposing several conditional requirements.[61] In other words, indigenous peoples whose indigenous laws have been contaminated by state law can still be protected by the state, but within the authority of state law pluralism. The state can then selectively choose or forsake indigenous laws by integrating them into the state law system.[62] The strategy can be implemented through hybrid governance network, particularly in Indonesia.

Based on the above descriptions and arguments, legal pluralism, particularly state law pluralism contributes to the development of hybrid network governance and NTA in two ways. First, it initiates realistic and pragmatic perspectives rather than normative in dealing with pluralism and its problems. Public needs should be answered on the basis of factual conditions, thus the

solution should be customized to respond the issues. Second, it encourages government to postulate cultures as the departure point of all public policies. However, not all cultures can be used as references. The limits are the universal values of human rights.

After elaborating on some of the concepts and theories above, the concepts of hybrid network governance and state law pluralism are then put on the pivotal position as parameters to critically analyze the current Village Law of Indonesia. The two concepts seek to find out whether the Law has sufficiently regulated some important aspect of governance network and legal pluralism, or whether it still has a conventional standpoint.

The 2014 Indonesian Village Law

The adoption of the new legislation, the 2014 Village Law was highly anticipated in Indonesia. Its crucial aim is to recognize indigenous people's rights within their village. Constitutionally speaking, the legislation aims to answer constitutional issues concerning the recognition of indigenous people's rights, as guaranteed by the Constitution.[63] The ideal characteristics of the Indonesian village (*desa*) as an organic construction of the Republic of Indonesia are: (1) the state exists to protect, nurture and serve the interest of society as a whole, not just individuals or interest groups; (2) the bond between the government and the people should be cemented by spiritual value, *manunggaling kawulu lan gusti* (the oneness of leaders and people); (3) the state is a joint venture of the people based on the principle of *gotong-royong* which means "rendering aid to the community for the common benefit" ; and (4) the state is based on the familial concept.[64]

The legislation still has drawbacks particularly with regard to the abolition of the village which can be based on "strategic national interests."[65] First of all, Article 9 is a flexible provision that can be interpreted differently by the government for its own purpose. This provision would open opportunity for "development/economics in command" to gain benefits, even though several Acts have explained the term "national interests."[66] The criteria of "national interest" and its mechanism remain unclear. Thus the implementation of this legislation must always be done cautiously.

Second, the provincial and regional level local legislation must confirm the status of *adat* villages.[67] Moreover, the *Implementing Regulation* states that the Ministerial Regulation is needed for establishing *adat* villages.[68] These bureaucratic procedures make recognition ineffective.[69] The implementation of *Village Law* relies on the good intentions of the national and local governments. Several claims over indigenous lands and forests have been submitted by indigenous peoples in several regions. However, regional governments which have authority to formally recognize indigenous peoples through local legislation are still notoriously corrupt, making it hard for indigenous peoples to convince their regional government to issue regional legislation within a responsible time.[70]

Third, the recognition of indigenous peoples and their land/forest is separated. Recognition of the people is through regional legislation issued by district or provincial government; whereas *adat* land/forest must be registered by the BPN (National Agency of Land Registration). This separated process is ineffective. Recognition must be holistic, because when the indigenous peoples have been recognized, it will also mean that the state recognizes their land/forest.

Moreover, there are some crucial issues discussed by this legislation. This chapter divides the discussion into the substance: legal pluralism and the procedure: network governance.

The substance: Legal pluralism

With regard to legal pluralism, this legislation covers many crucial issues, as follows:

First, generally speaking, the first paragraph of the 2014 *Village Law* enshrines the principle which states that the state recognizes the right of original possession and traditional rights within the village.[71] As a result of this recognition policy, villages are re-categorized into two forms: (regular) villages and *adat* villages.[72] The legislation merges two concepts of government: self-governing community through the *adat* village and local self-community in the (regular) village. The first is a manifestation of local democracy, the second is the implementation of public administration. By channelling *adat* aspiration into formal-state mechanism through *adat* village, the government exercises the practice of state law pluralism.

According to Koentjaraningrat, traditional village structure should be reduced to three patterns: (1) a village administration centred around a council; (2) a village administration based on dual leaderships; and (3) a village administration based on single leadership.[73] Based on these social facts, it is impossible to unify the village structure. The government must use a pluralist-driven policy to accommodate this social condition.

Within the *adat* village, villagers have privileges to manage their *adat* government by employing *adat* law, as long as the *adat* law is not in conflict with human rights principles, the principles of the unitary state, and the state legal system. This proposition was made to avoid separatism within the villages. Importantly, there is no further explanation on the conditionality of the "state's interest."[74] This provision can be a hurdle of legal pluralism, and an entry point for developmentalism practice.

Second, unlike the previous legislation, this legislation uses more moderate criteria for indigenous peoples in which it is stated that the indigenous people must have their own *adat* (cultural) territory and at least one of the facultative criteria.[75] However, this provision is still problematic, because despite the fact that territory plays as an important aspect in *adat* law system and indigenous peoples, non-territorial aspects are also equally pivotal. Indigenous peoples in Indonesia can be categorized both from their territorial and their genealogy or heredity.[76] In other words, their genealogy may surpass their territorial bond. Ideally, indigenous peoples can still be recognized as indigenous, even though they have been took away their communal lands, which has mostly done by government through its resettlement policy. They are still considered as indigenous, as long as their still keep their cultural-religious heritages intact. Based on this description, indigenous peoples can be considered as vulnerable minority groups.

Furthermore, *adat* law system in Indonesia has distinctive characteristic which combines both public and private rights in its indigenous system of government. Public rights imply to the authority of *adat* village which actively regulates legal relation among members of clans and tribes, such as: an authority to relocate lands for public needs and to preserve indigenous forest from arbitrary exploitation. Meanwhile, private rights imply to the rights of individuals to utilize their lands and natural resources, and to express their cultural rights as well.[77] Thus, it is clear

that *adat* law system in its private rights dimension has also appreciated personal autonomy. The discourse of NTA then needs to observe beyond "non-territorial" entities, but also to realize that "territorial" can be an entry point to construct and elaborate the concept of NTA.

Additionally, this legislation addresses the method of indigenous peoples' recognition which is bottom-up, and strongly considers public involvement and participation, although the role of regent or/and mayor is still vital in giving recognition through regional legislation.[78]

Third, the Village Law acknowledges the diversity of the Indonesia's villages by acknowledging the establishment of *adat* institution within the *adat* villages. The *adat* institution exercises traditional functions and its developments are based on local customs, active and non-discriminatory participation of all indigenous communities.[79] The *adat* institution has a significant role as an equal partner of local government to empower, converse and develop local customs and indigenous peoples' rights.[80] The Village Law accommodates *adat* law and preserves its tribal institutions.

With regard to the election of village head and the establishment of tribal institution, villagers can elect the head of village, or the tribal chief can fill the position through an *adat* mechanism. However, the regional government must firstly stipulate the structure of the *adat* institution and the *adat* village.[81]

Forth, Indonesian villages have two distinct mechanisms which are at the core of the village's social order: *gotong-royong* and *musyawarah*.[82] *Gotong-royong* means rendering aid to the community for the common benefit. However the legislation does not cover the preservation and use of this local wisdom in either regular villages or *adat* villages.

Musyawarah means deliberative discussion. These processes are considered as universal *adat* law principles and viewed as national characteristics.[83] The legislation covers *musyawarah* but it does not state the judicial function within the village through *musyawarah*.[84] The head of village must prioritize gender-based justice in his policy.[85]

In the *adat* village section, the legislation recognizes that *adat* practitioners shall manage their *adat* areas, the villages shall preserve their local cultures and knowledge and also resolve their

social grievances through traditional dispute resolution on the basis of *musyawarah*, respect for human rights principles, and correspondence with the state law.[86]

The legislation aims to lessen any disadvantages of indigenous government by arranging checks and balances between the head of the village or tribal chief and the Village *Musyawarah* Council.[87] Both village executive and Council must discuss strategic policy within the village *musyawarah* forum.[88]

Nevertheless, despite the fact that the legislation seemingly accommodates the spirit of legal pluralism, this legislation's norms are meaningless without a description of the procedure: network governance.

The procedure: Network governance

The focus of the procedure is in the process of recognition of *adat* village. It is important to examine, particularly in the context of inter-relationship between network governance and the appreciation of legal pluralism within the village. On paper, local governments are the main actor which steers, regulates and recognizes indigenous peoples and their *adat* villages administration.[89]

In establishing *adat* villages, the legislation allows villages to decide whether the villagers want their village to be recognized as an *adat* village or a (regular) village.[90] The legislation also allows two or more *adat* villages to merge.[91] The processes of establishment and merging embrace a huge amount of public participation by allowing indigenous peoples to conduct *musyawarah* (deliberative discussion forum) among them. The preliminary consensus is then communicated with the local government to be discussed further.[92]

These provisions depict an interdependent relationship between indigenous peoples and local government; indigenous peoples need state's recognition for their NTA, and local government also needs indigenous peoples as a justification that the local government has appreciated their rights. The legislation thus recognizes indigenous peoples for having autonomous rights over their NTA.

In general provision on villages (both for regular village and *adat* village), the role for managing the village is divided into two main actors: the central government, and the local government (including provincial and district governments).[93] Further provision states that in managing the village, the government must seriously consider public opinions, their right of original possession and traditional rights.[94] From these provisions, it can be interpreted that within the triangular relationship between government (central and local governments) and communities (including indigenous communities in *adat* village), all parties are entitled the right to initiate, regulate, and evaluate in managing the village.

However, the 2014 Village Law does not elaborate the mechanism that glues the relationship: negotiations and horizontal coordination. Furthermore, the final outcome is still stipulated by the local government. There is no clear description whether indigenous peoples are or are not involved in the final discussion.

In practice, the bargaining position of local government is far stronger than that of indigenous peoples.[95] Thus the interdependency condition might be ideal on paper, but in reality is not possible to reach. Interaction and negotiation among parties are unbalanced and partial, let alone delivering public services and nurturing trust among parties.

Moreover, the lack of this important provision makes the central government, particularly the Ministry of Internal Affairs (MIA), tend to interpret the triangular relationship differently. For instance, through the Ministry Regulation No 1/2017, the MIA creates uncertainty on the procedure of the establishment of *adat* village and its *adat* government. These drawbacks affect the effectiveness of the legislation.

Conclusion

The discourse of the interrelated relationship between legal pluralism and network governance is fruitful for indigenous peoples to claim their rights and NTA. Legal pluralism sheds light on the significance of cultures and traditions as one of crucial elements of development, not as obstacles. Network governance, on the other hand, strengthens the social cohesion between interested parties and helps legal pluralism feasible. Legal pluralism is the substance; network governance is the procedure. Thus, both are equally important.

Both theories share similar understanding on how to manage diversity by prioritizing non-formal approaches and mechanisms. Nevertheless, in order to make theories work, some modifications are needed. To match with the modern government structures and procedures, legal pluralism needs to absorb state law's elements into its core argument: the idea of state law pluralism has emerged. To adapt with a state-centred paradigm, network governance has forced to accept the influence of formal approaches and mechanisms in its implementation. In modern state setting, hybrid network governance is the most feasible option.

The implementation of decentralization policy in post-authoritarian Indonesia is still a challenging project. On paper the legislation, the 2014 Village Law has acknowledged legal pluralism as an undisputed reality and as the most feasible policy to manage diversity in Indonesia. However, there are no clear and certain provisions on how the inclusive involvement of all interested parties can be exercised. The provisions are too general, thus the local governments can interpret it differently.

The noble aim of decentralization is hijacked by pragmatic motives of the government. The conclusion affirms the hypothesis that the government does not wholeheartedly support the recognition of indigenous peoples and their rights.

Despite of its drawbacks on governance network mechanism, the Village Law has accommodated legal pluralism and indigenous peoples' rights. The central government must interpret this legislation by regulating some Executive Orders or Implementing Regulations to concretize the legislation. The government's interpretation must be in line with the theory of network governance by guarantying autonomous, interdependent and equal relationship among all interest parties.

Additionally, other legislation is needed to accompany the Village Law. Unlike the Village Law that is based on decentralization policy, the new legislation should focus more on human rights, particularly on minorities and indigenous peoples' rights. The legislation is so pivotal to strengthen the state's duty to recognize and to respect indigenous peoples, and to lessen the practice of developmentalism in Indonesia.

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