Asymmetric Decentralization on the Recognition of Customary Law Community Unitsturned Customary Villages in Indonesia

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Abstract
Transformation from a customary law community unit in Indonesia into a customary village (desa adat) indicates a move enacted by the government of Indonesia to promote asymmetric decentralization. The problem that arises therein is the loss of self-governing community autonomy when the autonomy is combined with local self-government functions, especially when the supervision from the central government to local units in each local government becomes too excessive. As such, the study aims to examine how asymmetric decentralization affects the paradigm of recognition of government functions (local self-government) in customary law community units turned customary villages. The focus of this research is on the recognition of the Baduy tribe in Kanekes Village, Leuwidamar District, Lebak Regency, Banten Province as a customary village. The output of this research is to know the consequences of adopting asymmetric decentralization to the paradigm of local self-government in customary law community units that become customary villages.

I. Introduction

With the establishment of the Unitary State of the Republic of Indonesia, Indonesia's regional government system is reconstructed. This reconstruction can be observed from the recognition and/or acknowledgment of political units within the territory of the Unitary State of the Republic of Indonesia which previously existed independently before Indonesia's independence as part of the existing Indonesian regional government system.In this regard, the division and classification of political units in Indonesia must now followthe regional government model as regulated in laws governing regional government and/or regarding villages. Instead of being accommodative, Indonesia's approach to the diversity of political units within its territory tends to be based on integralistic principles, which is often considered

repressive under the pretext of nationalism.[1]

This classification arrangement applies to each region and/or political unit so that each unit is now formally recognized as a regional government unit applicable in Indonesia. The existence of these arrangements also has an impact on the change in basic assumptionsin the recognition of government functions (local self-government). The existing paradigmshift is a consequence of the adoption of the constitution of the Republic of Indonesia, *in casu* the 1945 Constitution of the Republic of Indonesia.

This recognition of the function of government (local self-government) has drawn some debates. Colin, Greenhalgh, and Lister (2010) show that the existence of greater localism can hinder the process of administering the central/national government.[2] In a case issued under the New York Court of Appeals, the establishment of a constitution (*in casu* the United States Constitution) is not considered as an attempt to eliminate political and legal institutions from political units that join a country, but is considered as an effort to adapt these political and legal institutions against all or almost all of the objectives of the government that will be formed through the existing constitution. In particular, this was the *People ex rel. Fernando Woods v. Simeon Draper and others* case which took place in 1857 and,in one part, reads:

> "*...In determining this question we must keep in mind that the constitution was not framed -for a people entering into a political society for the first time, but for a community already organized and furnished with legal and political institutions adapted to all or nearly all the purposes of civil government; and that it was not intended to abolish these institutions, except so far as they were repugnant to the constitution then framed*".[3]

Referring to the quote above, although the context in question is the United States constitution, it can be understood that the formation of a constitution occurred because previously there were a few groups of people who were members of an already establishedsociety agreeing on the existence of a constitution. Associated with the previous function ofgovernment (local self-government), regional government cannot be separated from the consequences of adopting a constitution at the national level. In the case of *State ex rail. Holt, et al. v. Denny, Mayor, et al.* at the Supreme Court of Indiana, one of the views expressed isabout the adoption of a constitution that does not eliminate the power possessed by the people. The people continue to hold all

[1] Gabriele Ferrazzi, "Using the 'F' word: federalism in Indonesia's decentralization discourse", *Publius: The Journal of Federalism, 30, No. 2* (2000): p. 69. <https://www.jstor.org/stable/3331088>
[2] Colin Barrow, Stephen Greenhalgh, and Edward Lister, 2010, *A Magna Carta for Localism: Three practical steps to make localism real*, UK: Centre for Policy Studies, p. 1.
[3] New York Court of Appeals, *People ex rel. Fernando Woods v. Simeon Draper and others*, 15 NY 532 (1857), p. 537.

existing powers, except those that are expressly delegated to government institutions through the adoption of a constitution.[4]

Returning to the Indonesian context, the Indonesian regional government system triggers the recognition and/or the acknowledgment of political units within the territory of the Unitary State of the Republic of Indonesia which previously existed independently before Indonesia's independence as part of the existing Indonesian regional government system. In Indonesia, this acknowledgment is carried out on original structures that have various characteristics, such as villages in Bali and Java, clans and hamlets in Palembang, and *nagari* in West Sumatra.[5] Their existence is recognized by the state and must be guaranteed their survival in the administration of the Unitary State of the Republic of Indonesia.[6] The original structure includes villages and customary villages.

Law Number 6 of 2014 concerning Villages ("**Village Law**") prioritizes a change in basic assumptions in the recognition of government functions (local self-government), and to improve internal village governance through the granting of autonomy to villages, thus creating decentralization whose aim is to free villages from the authority of higher levels ofgovernment.[7] According to Eaton (1900), the right to local self-government is contained inthe Magna Charta which is one of the historic documents that contains the principle that everyone is subject to the law and guarantees individual rights, the right to justice, and theright to a fair trial; and is one of the most coveted freedoms.[8] In the Indonesian context, the right to local self-government is still recognized, but it is constructed through the incorporation of the function of the self-governing community (as seen in the original political

[4] This view in full reads as follows: "*It is contended by counsel for appellants that by the constitution of the state all power is vested in the legislative department of the government, except such as is expressly granted to the executive, the judiciary, and retained by the people in the constitution itself. We are not in harmony with counsel's theory of our state government, but we state it this way: At the adoption of the state constitution all power was vested in the people of the state. The people still retain all power except such as they expressly delegated to the several departments of the state government by the adoption of the constitution; that the legislative, executive, and judiciary departments of the state have only such powers as are granted to them by the constitution*". See Supreme Court of Indiana, United States of America, *State ex rel. Holt et al. v. Denny, Mayor, et al.*, 118 Ind. 449 (1888), p. 457.

[5] Indonesia, *Law on Villages*, Law Number 6 of 2014, State Gazette of the Republic of Indonesia Number 7 of 2014, Supplement to the State Gazette of the Republic of Indonesia Number 5495, General Elucidation, Section 1: Rationale.

[6] *Ibid*.

[7] Hans Antlöv, Anna Wetterberg, and Leni Dharmawan, "Village governance, community life, and the 2014 village law in Indonesia," *Bulletin of Indonesian Economic Studies* 52, no. 2 (2016): p.161-162. <https://doi.org/10.1080/00074918.2015.1129047>

[8] Amasa M. Eaton, "The Right to Local Self-Government," *Harvard Law Review Vol. 13, No. 6* (1900): p. 447. <https://doi.org/10.2307/1322832>

units/compositions that existed before Indonesia's independence) with the function of local self-government.[9] Therefore, customary law community units are also encouraged to become part of the village area and be organized into villages and customary villages. The Village Law considers this arrangement as an effort to realize the spirit of implementing the constitution, namely, to regulate customary law communities so that they are regulated in the composition of the Indonesian regional government structure.[10]

II. Problems Identification

The problem arising as observed in this research is the existence of asymmetric decentralization to the incorporation of the function of the self-governing community (as seen in the original political units/compositions that existed before Indonesia's independence) with local self-government in the Indonesian local government system. Tarlton (1965) showed in his study that there is generality and conformity in a unit of a state (*in casu* federation). This theory by Tarlton refutes K. C. Wheare's theory of the federal government which says that there is no higher government at the central or local level.[11] Infact, according to Tarlton, the regions in the federation contain diversity in terms of area, population, natural resources, fiscal, and culture, giving rise to conditions of inequality or asymmetry. This asymmetry occurs between the relations of the federated regions with other regions and with the government system as a whole.[12]

However, Tarlton's view is starting to be abandoned. An asymmetrical unit of state is now considered to be a state in which each subunit has guaranteed constitutional autonomy, but at least one subunit enjoys different and/or better autonomy than the othersubunits.[13] This doctrine also applies to the existence of an asymmetrical unit of state in which there are subunits that enjoy autonomy, but other subunits do not. According to McGarry (2007), if this autonomy is guaranteed constitutionally and cannot be canceled unilaterally by the central authority of a state,

[9] Indonesia, *Law on Villages*, Law Number 6 of 2014, State Gazette of the Republic of Indonesia Number 7 of 2014, Supplement to the State Gazette of the Republic of Indonesia Number 5495, General Elucidation, Section 1: Rationale.
[10] Indonesia, 1945 Constitution of the Republic of Indonesia, *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*/UUD NRI 1945, 4th Amendment, Art. 18 verses (7).
[11] Charles D. Tarlton, "Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation," *The Journal of Politics, Vol. 27, No. 4 (1965): p. 863. <https://doi.org/10.2307/2128123>*
[12] John McGarry, "Asymmetry in Federations, Federacies and Unitary States," *Ethnopolitics, Vol. 6, No. 1* (2007): p. 105. <https://doi.org/10.1080/17449050701232983>
[13] *Ibid*

a federation is then formed. If the central authority of a state is able to revoke this autonomy, then an asymmetrical decentralized unitary state is formed.[14]

Another problem observed in this research is the consequences experienced by the customary law community unit that becomes a customary village (*desa adat*) in Indonesia.[15] The Village Law allows a change in status from a designated customary law community unit to a customary village. Davidson & Henley (2007) saw this as an approach in the context of contemporary *adat* revivalism where *adat* refers to "particular time-honoured practices and institutions, inherited by communities rather than imposed by the state", which is now seen as having continued relevance to current political concerns in Indonesia.[16] Furthermore, the Village Law even obliges the government, provincial regional government, and district/city regional governments to organize customary law community. units and be designated as customary villages.[17] This change requires customary villages to carry out local self-government functions and fulfill absolute requirements, namely:[18]

1. areas with clear boundaries;
2. the existence of a government; and
3. other apparatuses; and
4. other institutions in the life of indigenous peoples (such as shared feelings, assets, and customary government institutions).

Thus, the change into a customary village is an inevitability for the customary law community unit. The problem that arises is the loss of self-governing community autonomy when the autonomy is combined with the local self-government function, especially when the supervision from the central government to local units in each

[14] *Ibid*

[15] Customary Villages (*desa adat*) are in principle a legacy of local community governance organizations that are maintained for generations which are still recognized and fought for by the leaders and communities of Customary Villages so that they can function to develop local welfare and socio-cultural identity. Customary Villages have origin rights that are more dominant than Village origin rights since the Customary Village was born as an original community that exists in the community. Customary Village is a customary law community unit which historically has territorial boundaries and cultural identity formed on a territorial basis which is authorized to regulate and manage the interests of the Village community based on origin rights. This establishment allows *adat* institutions to be integrated into the village governance structure. See Adriaan Bedner and Yance Arizona, "Adat in Indonesian Land Law: A Promise for the Future or a Dead End?" *The Asia Pacific Journal of Anthropology*, Vol. 20, No. 5 (2019): p. 423. <https://doi.org/10.1080/14442213.2019.1670246>

[16] David Henley and Jamie S. Davidson, "Introduction: Radical conservatism – the protean politics of adat," in Jamie S. Davidson and David Henly (eds.), 2007, *The Revival of Tradition in Indonesian Politics: the deployment of adat from colonialism to indigenism*, London: Routledge, p. 3. <https://doi.org/10.4324/9780203965498>

[17] Indonesia, *Law on Villages*, Law Number 6 of 2014, State Gazette of the Republic of Indonesia Number 7 of 2014, Supplement to the State Gazette of the Republic of Indonesia Number 5495, Art. 96.

[18] *Ibid*., General Elucidation, Section 4: Customary Villages and Villages.

local government becomes too excessive.[19]

III. Research Method

This study aims to examine how asymmetric decentralization affects the paradigm of recognition of the function of government (local self-government) in customary law community units that become customary villages in Indonesia. Furthermore, this study uses a type of research that focuses on the searching efforts for problems and issues that are currently happening and discussed related to the issue at hand.

The additional focus of this research in the form of a study case is on the recognition of the Baduy tribe in Kanekes Village, Leuwidamar District, Lebak Regency, Banten Province, Republic of Indonesia as a customary village. This is marked by the stipulation ofBanten Province Regional Regulation Number 2 of 2022 concerning Institutional Structure, Position Filling, and Term of Office of Customary Village Heads ("**Banten Regional Regulation 2/2022**").[20] The Banten Regional Regulation 2/2022 is a new breakthrough in the implementation of the customary law community unit, *in casu* the Baduy Tribe, which is stipulated through a legal product in the form of a provincial regulation. The output of thisresearch is several learned lessons obtained by analysing the consequences of adopting asymmetric decentralization to the paradigm of local self-government in customary law community units that become customary villages, especially the Baduy tribe in Kanekes Village, Leuwidamar District, Lebak Regency, Banten Province.[21]

IV. Discussion

a. Problems of Asymmetric Decentralization of the Customary Law Community Units that are Customary Villages in Indonesia

According to Booth (2011)[22], the process of decentralization and the formationof

[19] Herbert Feith, 1962, *The decline of constitutional democracy in Indonesia*, Ithaca, New York: Cornell University Press, p. 487-488. <https://www.jstor.org/stable/20067520>

[20] Gabriel Lele, "Asymmetric decentralization, accommodation and separatist conflict: lessons from Aceh and Papua, Indonesia," *Territory, Politics, Governance* (2021): p. 5. <https://doi.org/10.1080/21622671.2021.1875036>

[21] Terry Hutchinson and Nigel Duncan. "Defining and describing what we do: Doctrinal legal research." *Deakin Law Review 17* (2012): 83. <https://doi.org/10.21153/dlr2012vol17no1art70>

[22] *Robert C. Berring, "Legal research and legal concepts: where form molds substance," California Law Review 75, no. 1*

several new political units in Indonesia is a reaction to inequality and injustice.[23]This reaction follows the dynamics of the living conditions of the nation and state, and can change at any time according to the existing context. Referring to Tarlton's theory of asymmetric decentralization (1965), the ideal asymmetric system is a system consisting of political units that correspond to the different interests, characters, and structures that exist in the whole society. An asymmetrical system would be one in which diversity within the larger society finds political expression through local governments that have varying degrees of autonomy and power.[24]

In an asymmetric system model, each component unit will have a unique feature or set of features that will separate its importance from the interests of other states or the system as a whole. Clear dividing lines will be required and strictly maintained as far as these unique interests are concerned. In an asymmetric system,it will be difficult (if not impossible) to distinguish interests that can clearly be considered as common interests or in the national scope (except those related tonational existence itself).[25]

This problem arises due to the provisions in the Village Law which give authority to the government, provincial government, and regency/municipal government to be able to conduct village arrangements. This provision is clarified by the Village Law as an effort to "stipulate the existing customary law community unit and Customary Village for the first time by the Regency/City to become a Customary Village with Regency/City Regional Regulations".[26]

This means that customary law community units have experienced significant erosion of its autonomy and/or traditional/right of origin with the establishment of the Unitary State of the Republic of Indonesia. In fact, the Unitary State of the Republic of Indonesia was formed while still recognizing and respecting customary law community units and their traditional rights as long as they are still alive and in accordance with community development and the principles of the Unitary State of the Republic of Indonesia.[27] According to Ter Haar (1948) as quoted by Buana (2016), there are four requirements that need to be met by customary law community units, including:

[23] Anne Booth, "Splitting, splitting, and splitting again: A brief history of the development of regional government in Indonesia since independence," *Bijdragen tot de Taal-, Land- en Volkenkunde*, Vol. 167, No. 1 (2011): p. 53. <https://www.jstor.org/stable/i40053944>

[24] Charles D. Tarlton, "Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation," *The Journal of Politics*, *Vol. 27, No. 4* (1965): p. 869. <https://doi.org/10.2307/2128123>

[25] *Ibid*

[26] Indonesia, *Law on Villages*, Law Number 6 of 2014, State Gazette of the Republic of Indonesia Number 7 of 2014, Supplement to the State Gazette of the Republic of Indonesia Number 5495, Art. 96.

[27] Indonesia, 1945 Constitution of the Republic of Indonesia, *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*/UUD NRI 1945, 4th Amendment, Art. 18B paragraph (2).

1. The customary law community units have an organized group;
2. The customary law community units have territory;
3. The customary law community units have customary institutions (especially customary courts); and
4. The customary law community units have material and immaterial assets.[28]

b. Ideal Model of Asymmetric Decentralization on Customary Law CommunityUnits turned Customary Villages

The trend of the last three decades indicates the emergence of recognition given by many entities to ancestral traditions (or as what Utama calls "return to tradition").[29] This tradition refers to the existence of indigenous peoples (indigenous groups), including their leaders, institutions, and the customs that govern them. The existence of this unit isin a sovereign country. As such, this triggers overlapping authority.[30] Nevertheless, the phenomenon of the coexistence between several legal structures within one country is basically related to legal pluralism. Legal pluralism itself implies the existence of severallegal institutions that are not integrated into one coherent system, but can support, complement, ignore, or undermine one legal institution with another.[31] Against this, several theories later emerged relating to the right of origin.

First, there is an opinion of Holzinger *et al* who proposed the existence of RationalTheory of Constitutional-Making. Holzinger's *et al* elaborated that basically the constitution was drawn up based on a perspective that saw it as a contract which was negotiated through elite negotiations and then introduced to the public or society.[32] According to Holzinger *et al*, this Rational Theory of Constitutional-Making can be applied to the context of indigenous communities. Further, he argued that the members of these indigenous peoples submitted a request that traditional political institutions and customary law (read: *adat* law in Indonesia, in which *adat* means local

[28] Mirza Satria Buana, "Living adat Law, Indigenous Peoples and the State Law: A Complex Map of Legal Pluralism in Indonesia," *International Journal of Indonesian Studies 1, no. 3* (2016): p. 104-119.
[29] Tody Sasmitha Jiwa Utama, "Impediments to Establishing Adat Villages: A Socio-Legal Examination of the Indonesian Village Law,"*Asia Pacific Journal of Anthropology*, Vol. 21, No. 1 (2020): p. 17. <https://doi.org/10.1080/14442213.2019.1670240>
[30] Katharina Holzinger *et al*., "The Constitutionalization of Indigenous Group Rights, Traditional Political Institutions, and Customary Law," *Comparative Political Studies*, Vol. 52(12) (2019): p. 1778. <https://doi.org/10.1177/0010414018774347>
[31] John Griffiths, "What is legal pluralism?" *The Journal of Legal Pluralism and Unofficial Law* 18 (1986): p. 39. <https://doi.org/10.1080/07329113.1986.10756387>

[32] Katharina Holzinger *et al*., "The Constitutionalization of Indigenous Group Rights, Traditional Political Institutions, and Customary Law," *Comparative Political Studies*, Vol. 52(12) (2019): p. 1777. <https://doi.org/10.1177/0010414018774347>

customs) that apply to them can be supplied into the constitutional model that will be prepared by constitutional political actors. Lev (1962) even stressed that, echoing this customary lawincorporation to the constitution, such customary (*adat*) law is in fact susceptible to the"changing ideals and imagination of the country's elite than the written codes".[33] Insteadof seeing it as an idealistic approach that emphasizes the constitution as values, this theory sees constitution-making as a rational process and a political power game.[34]

Holzinger *et al* further shows that, basically, this theory also shows the existence of a 'silent state' or a silent presence. This silence refers to the results of the Rational Theory of Constitutional-Making which shows that there is a situation where the community's demand for customary provisions as seen from the condition where existence of multiethnicity and modernization is in fact not enough to make the constitutional elite actors to accommodate the rights of indigenous peoples.[35] The solution offered based on this theoretical perspective is to trigger the realm of recognition and regulation of theseindigenous communities and their coexistence within a country, and not in the form of explicit recognition of rights at the constitutional level.[36]

Hirschl in Goderis and Versteeg also explains that, in principle, the strategic attitude as shown by politicians, elites, and courts actually plays an important role in explaining the diversity in the scope, conditions, and period of a constitutional reform.[37] With respect to this expression, the Rational Theory of Constitutional-Making becomes asuitable theory to reveal the problem of applying the right of origin in a village community. In the context of this theoretical perspective which sees constitution-makingas a contract in the eyes of the political elite, the community *in casu* the village is not seen as constitutional actors or active bidders in the 'negotiation game' in constitution- making.[38] Thus, the request of the village community for

[33] Daniel S. Lev, "The Supreme Court and Adat Inheritance Law in Indonesia," *The American Journal of Comparative Law*, Vol. 11, No. 2 (1962): p. 205. <https://doi.org/10.2307/838708>

[34] Tom Ginsburg, 2003, *Judicial review in new democracies: Constitutional courts in Asian cases,* Cambridge: Cambridge University Press, p. 127. <https://doi.org/10.1017/CBO9780511511189>

[35] Katharina Holzinger *et al*., "The Constitutionalization of Indigenous Group Rights, Traditional Political Institutions, and Customary Law," *Comparative Political Studies*, Vol. 52(12) (2019): p. 1800. <https://doi.org/10.1177/0010414018774347>

[36] *Ibid.*

[37] R. Hirschl, "The strategic foundations of constitutions," in Benedikt Goderis and Mila Versteeg (Eds.), 2013, *Social and political foundations of constitutions*, New York: Cambridge University Press, p. 157. <ISBN: 9781107032880>

[38] Katharina Holzinger *et al*., "The Constitutionalization of Indigenous Group Rights, Traditional Political Institutions, and Customary Law," *Comparative Political Studies*, Vol. 52(12) (2019): p. 1782. <https://doi.org/10.1177/0010414018774347>

their rights of origin to be included in the constitution is seen by the state (as the perpetrators of the constitutionalelite) as a request that needs to be faced rationally.

Second, in understanding the position of the right of origin in the state, there is a theory put forward by Isra and Tegnan in the form of the theory of legal syncretism. Thetheory of legal syncretism is different from the theory of legal pluralism and colonial legacy of law. According to Isra and Tegnan, the theory of legal syncretism refers to the selection and harmonious fusion of various norms, values and formal-informal rules that are spread in a society so that it becomes a uniform legal system.[39] This legal syncretismtheory rejects the understanding of legal pluralism which tends to be inconsistent and unpredictable.[40] In strengthening this argument, Isra and Tegnan cite Rousseau's opinion that says that the diversity of laws can only cause conflict and confusion among the people.[41] More fully, Isra and Tegnan assert that:

> "*Syncretism, as explained above, means the combination of different systems of philosophical, cultural, and religious practices. Syncretism refers to the borrowing orthe integration of one or many systems into another by a process of selection and unification. So, therefore, legal syncretism refers to the harmonious selection and fusion of different norms, values and formal and informal rules disseminated within agiven society into a uniform system of law. Legal syncretism is the working together of distinct systems of law within a holistic legal scheme so that the result is greater than the sum of their individual effects or capabilities. Legal syncretism is a concept that allows for every voice to be heard and every concern to be taken care of within a single and harmonious yet eclectic legal system. Legal syncretism is opposed to two concepts: legal pluralism and colonial legacy of law. The former is opposed to for its lack of a clear definition of what the law is, which makes it evasive: lacking honesty orstraightforwardness. It requires people to be cleverly skillful and cunning seeking justice. The theory itself does not give a clear definition of the law. In fact, most proponents of legal pluralism claim that the law is what the people think is law, that all social control mechanisms are laws, thus the law is everywhere*".[42]

Hence, legal syncretism is a concept that allows every voice to be heard and every concern addressed within a single and harmonious yet eclectic legal system. Legal

[39] Saldi Isra and Hilaire Tegnan, "Legal syncretism or the theory of unity in diversity as an alternative to legal pluralism in Indonesia," *International Journal of Law and Management* (2021): p. 558. <https://doi.org/10.1108/IJLMA-04-2018-0082>
[40] *Ibid*., p. 559.
[41] Jean Jacques Rousseau, 1895, *The Social Contract*, London: Swan Sonnenschein and Co., p. 82.
[42] Saldi Isra and Hilaire Tegnan, "Legal syncretism or the theory of unity in diversity as an alternative to legal pluralism in Indonesia," *International Journal of Law and Management* (2021): p. 558. <https://doi.org/10.1108/IJLMA-04-2018-0082>

syncretism opposes two concepts: legal pluralism and colonial legacy of law. The former is opposed for the lack of a clear definition of what the law is, which makes it evasive: a lack of honesty or candor. It requires people to be cleverly skilled and cunning to seek justice. The theory itself does not provide a clear definition of law. In fact, most proponents of legal pluralism claim that law is what people perceive as law: that all social control mechanisms are law, so law is everywhere.[43] As for the latter, that is the colonial legacy of law, the legal theory of syncretism rejects it on the grounds that law is not a commodity so that it cannot be inherited or transferred from one place to another. The legal inheritance from a few people whose life values are far different from the few people of today's generation who receive the legal inheritance is a form of denial of their own identity.[44]

Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia strictly stipulates that: "The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with community development and the principles of the Unitary State of the Republic of Indonesia, which are regulated in a law".[45] That is, the provisions and traditional rights of indigenous peoples need to comply with community development and the principles of the Unitary State of the Republic of Indonesia in order to be recognized and respected by the state. In this regard, an explanation of the aspects of the conformity requirements of customary law communities can be seen in the description as contained in Table 1 below.

TABLE I.

DESCRIPTION OF THE LIMITATION OF COMPATIBILITY OF CUSTOMARY LAW COMMUNITIES AND THEIRTRADITIONAL RIGHTS WITH COMMUNITY DEVELOPMENT AND THE PRINCIPLES OF THE UNITARY STATE OF THE REPUBLIC OF INDONESIA

[43] *Ibid.*
[44] *Ibid.*, p. 559.
[45] Indonesia, 1945 Constitution of the Republic of Indonesia, *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*/UUD NRI 1945, 4th Amendment, Art. 18B paragraph (2).

No.	Aspects of Requirements Conformity	Limits of Conformity
1	Aspects of Community Development[48]	Customary law community units and their traditionalrights are considered in accordance with communitydevelopment if: a) their existence has been recognized based on applicable laws as a reflection of the development of values that are considered ideal in today's society, both general laws as well as sectoral; and b) concerned and the wider community and does not conflict with human rights
2	Aspects of the principles of the Unitary State of the Republic ofIndonesia[49]	A customary law community unit and its traditional rights with the principles of the Unitary State of the Republic of Indonesia if the customary law community unit does not interfere with the existence of the Unitary State of the Republic of Indonesia as a political and legal entity which: a) does not threaten the sovereignty and integrity of the Unitary State of the Republic of Indonesia; and b) specifies that the substance of customary lawnorms is in accordance with and does not conflict with the provisions of laws and regulations.

Referring to the legal syncretism theory in Table 1 above, it can be said that the selection model for traditional rights as an integral part of the Unitary State of the Republic of Indonesia principle is the accurate model to be feasibly implemented. It also serves as a formalization[46] to provide symbolic legitimacy for the local government system, *in casu* village government. Thus, basically the absorption model of the legal system through the theory of legal syncretism is more in line with the characteristics of the values of the right of origin in a community which tend not always to be recognized and respected by the wider community outside the indigenous peoples concerned. At the positivistic level, the value of indigenous peoples in the form of traditional rights whose

[46] Janine M. Ubink, 2008, *In the Land of the Chiefs: Customary Law, Land Conflicts, and the Role of the State in Peri-Urban Ghana*, Leiden: Leiden University Press, p. 17. <ISBN:90-485-0220-9>

substance is not recognized and respected by the wider community outside the indigenous peoples concerned has consequences in the form of those values being not recognized and not respected by the state.[47]

a. Case Study of the Baduy Tribe as a Customary Law Community Unit in Kanekes Village, Leuwidamar District, Lebak Regency, Banten Province which became a Customary Village

The Banten Regional Regulation 2/2022 is a new breakthrough to recognize the Baduy Tribe as part of the customary village government. With the adoption of this customary village, the Baduy Tribe can implement customary law for the provisions of filling the position of the customary village head, the term of office of the customary village head, and the implementation of the position.[48] However, the adoption of BantenRegional Regulation 2/2022 still carries a threat to the existence of the Baduy Tribe as aunit of customary law community. This is due to the obligation of the Regency/City Regional Governments in the Banten Province to establish customary villages accordingto the laws and regulations after the promulgation of Banten Regional Regulation 2/2022.[49] This means that every unit of customary law community, including the BaduyTribe, will become part of the territory of the Banten Province administratively and is indanger of losing its right of origin because it is now limited by the authority of the customary village which is the lowest sub-unit of regional government under the regency/city.

The existence of such a condition is also the impact of the implementation of the legal pluralism model which tends to advocate plurality without prioritizing coherenceand harmonization.[50] This is clearly reflected by the model of the adoption of customarylaw communities in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. In fact, the principle of recognition of indigenous peoples is that there are communities that maintain social, economic, cultural, political, social, and legal institutions. This situation also becomes a reference in the application of the Indigenousand Tribal Peoples Convention, 1989 (No. 169) ("**ITPC 1989**"). ITPC 1989

[47] Indonesia, *Law on Villages*, Law Number 6 of 2014, State Gazette of the Republic of Indonesia Number 7 of 2014, Supplement to the State Gazette of the Republic of Indonesia Number 5495, Art. 97 paragraph (3) letter
[48] Indonesia, *Banten Province Regional Regulation on Institutional Structure, Position Filling, and Term of Office of Customary Village Heads*, Banten Province Regional Regulation Number 2 of 2022, Banten Province Regional Gazette Year 2022 Number 2, Supplement to the Banten Province Regional Gazette Number 96, Art. 4-5.
[49] *Ibid*., Art. 6.
[50] Saldi Isra and Hilaire Tegnan, "Legal syncretism or the theory of unity in diversity as an alternative to legal pluralism in Indonesia,"*International Journal of Law and Management*(2021): p. 560. <https://doi.org/10.1108/IJLMA-04-2018-0082>

applies the provisions in it to those who are categorized as indigenous and tribal people, namely those who have the following characteristics:

> "*(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community. , and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status,retain some or all of their own social, economic, cultural and political institutions*".[51]

Thus, the basic principle of recognizing indigenous and tribal peoples is that the state is obliged to continue to recognize and respect the existence of those who are considered natives because of their descent from the population that inhabits the country, or the geographical area in which the country is located. This recognition also includes the obligation to implement ITPC 1989 while maintaining the values held in the community. ITPC 1989 stipulates that:

> "*the social, cultural, religious and spiritual values and practices of these people shall be recognized and protected, and due accounts shall be taken of the nature of theproblems which face them both as groups and as individuals*".[52]

To promote a decentralized administration model that does not eliminate the existence of adat from the customary law community unit of the Baduy Tribe when it becomes a customary village, the social, cultural, religious, and spiritual values, and practices of the indigenous peoples of the Baduy Tribe must be recognized and protected institutionally.[53] The nature of the problems they face both as a group and as individuals must be carefully considered. Through the legal syncretism model, the adoption of indigenous values can be integrated with the state legal system in a coherent manner. This is done, of course, in the hands of knowledgeable parties, namely the local traditional leaders.[54]

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[51] International Labor Organization, *Indigenous and Tribal Peoples Convention 1989*, 27 June 1989, Art. 1 number 1.
[52] *Ibid*., Art. 5 letter a.
[53] Jacqueline A. C. Vel and Adriaan W. Bedner, "Decentralisation and village governance in Indonesia: the return to the nagari and the 2014 Village Law," *The Journal of Legal Pluralism and Unofficial Law 47*, no. 3 (2015). <https://doi.org/10.1080/07329113.2015.1109379>
[54] Saldi Isra and Hilaire Tegnan, "Legal syncretism or the theory of unity in diversity as an alternative to legal

Concluding this study, it can be inferred that lawmakers never actually make laws; they simply wrote in the book what had become the rule of action by custom or opinion,or at least what they thought had become the law. Law, with the model of legal pluralism, is only a codification of a habit or custom that has always been part of the life of a society,[55] and in fact it becomes incoherent to include a harmonization process in the form of the state's obligation to respect the identity of indigenous peoples[56], including the Baduy Tribe. As such, this study concludes as follows.

V. Conclusion

Syncretism differs from legal pluralism in that it advocates the rule of law rather than the rule of law. Legal syncretism theory distinguishes law from norms and values, and orders. The selection of these scattered regulations must rest on the state. Therefore, the theory of legal syncretism can be related to the discourse on the application of the rightof origin in the frame of village government in Indonesia through the recognition that the Baduy Tribe is now a customary village in Banten Province. This study appreciates the enactment of Banten Regional Regulation 2/2022, which in its general explanation emphasizes that the regulation does not homogenize the existing local government system in Lebak Regency, but instead accommodates the diversity of existing local government systems. The use of syncretism theory can avoid the frame of legal pluralism in applying the right of origin. Therefore, both the interests of the state and the customary law community units are accommodated, as no entity is left behind constitutionally.

VI. Suggestion

This study recommends that the Baduy Tribe as a coherent entity/unit is inherently separated from the customary village administrative model. Further, instead of turning the whole tribe as a customary village, one regency/city government can appoint the local customary leaders of the Baduy Tribe in the formation

pluralism in Indonesia,"*International Journal of Law and Management*(2021): p. 563. <https://doi.org/10.1108/IJLMA-04-2018-0082>

[55] Clarence Darrow, "Crime: Its Cause and Treatment," *Pennsylvania State University Electronic Classics Series* (2004): p. 9. <ISBN-13:978-1502361974>

[56] International Labor Organization, *Indigenous and Tribal Peoples Convention 1989*, 27 June 1989, Art. 2 paragraph (2) letter b.

of a contemporary customary village whose inhabitants include the Baduy Tribe. This research believes that this syncretism model is the most practical as of now. Nonetheless, this research encouragesfuture studies to explore how better alternatives may be proposed in order to protect the interests of customary law community units in Indonesia while still maintaining their existence to be institutionally, legally, and constitutionally recognized by the Indonesianauthorities.

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