ADAT LAW AS THE SIGN OF IDENTITY OF INDONESIAN STATE LAW: NEOLIBERALISM AND POLICY TREATMENT OVER ADAT LAW

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I. INTRODUCTION

The absorption of the concept of welfare state by the Constitution of the Republic of Indonesia 1945 has affected the position of Indonesian genuine traditional community (desa adat)[1] within the life of the state of Indonesia. The decline of the concept has caused Indonesia experienced the same problem with any other welfare state all over the world. The deterioration has significantly affected the welfare states since 1980s in forms of insufficiency, instability, and uncertainty. Most welfare states in the West have firmly failed to perform their optimistic promises following the war. Hence, the researchers had concluded that welfare state is not the only effective way to develop the more just society.

The decreasing of the state income from fiscal sector as an effect of international economic instability has caused crises and weakned the budgeting capacity of the state. The slow down of economic performance has caused the state fail to perform their duty. The most contradictory fact of the situation was at the time the state has to perform public services the budget was not there. The state has firmly lacked of financial resources for performing responsibilty.[2] In the experience of Indonesia, the lack of budgeting capacity has forced the decision makers to bat their choice to all sectors that certainly will generate income or to lead all state budgets to empower economic potencies and tightening programs and budgenting for non-economic sectors. As adat communities were not an economic asset than this sector, in any critical situation, has easily edged or ignored. From international trade point of view, national identity is fundamental to the global trade competition. National identity is the precondition for winning gloal competition and winning global competition is the first prerequisite of enhancement of the state income from the fical sector. So, the proper policy treatment over adat law as a sign of identity of Indonesian national identity is critical for the time being. It is a fundamental issue which expects immediate curing.

1 The Constitution of the Republic of Indonesia 1945 named it the entity of adat legal community (kesatuan masyarakat hukum adat)(Article 18B).
2 Jim Ife dan Frank Tesoriero, Community Development, Pustaka Pelajar, Yogyakarta, 2008, p. 4-5.

Article 18B of the Constitution of the Republic of Indonesia 1945 clearly states that the State of Indonesia firmly recognizes and respects entities of adat legal community (kesatuan-kesatuan masyarakat hukum adat: hereinafter referred as to: adat community or desa adat) including their traditional rights. In fact, such recognition and respect were firmly instrumental and far from actual or substantial recognition and respect. Practically, the existence of adat community, including their legal system (hereinafter referred as to: hukum adat) has intentionally suffered through legislation and regulation. The government has issued various legislations and regulations which in so naive way have destroyed the cultural identity signs of the adat community, such as: rights to land, water, air, natural landscap, rights to justly participate in the life of state, rights to perform their full ritual procession, and rights to apply their social and legal system within their village. It calls naive, because of in the contex of globalization where national identity considers fundamental in determining existence and power of competition of a nation, and in term of liberal states keep theirself busy in developing and strengthening their nation identity, Indonesia surprisingly busy in amputating their cultural identity, including adat community with their rights and law, as one of the fundamental cultural sign of Indonesia. Article 18B paragraph (2) of the Constitution clearly states that:

> The State recognizes and respects the entities of adat legal community including their traditional rights as long as it still alive and meets the developed situation of the society and the principles of Unitary State of the Republic of Indonesia, which shall be governed in an act[3].

Elucidation of Chapter VI, Article 18, Part II, of the Constitution 1945 (the original version), explains that:

> In the territory of Indonesia there are more or less 250 zelfberturende landschappen and volksgemeenschappen, like the desa in Java and Bali, negeri in Minangkabau, dusun and marga in Palembang etc. Those villages have their own genuine social structure, and therefore it could be treated as a special region.[4]
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> The State of the Republic of Indonesia respects the existence of those special region and all regulations issued by the State affecting those regions shall deem considering their historical background.[5]

The rules, due to its moral content, suppose resulted in an actual maintenance and strengthening of the adat community. In fact, the destiny of the moral power and the spirit of glory of the the founding fathers have to surrender to the moral quality and the dgree of technical skill of each established rezim. Phrase that says "that shall be govern by act" in the clause of Article 18B paragraph (2) and the phrase "all state regulations affecting those regions shall deem considering their historical background" in the clause of the Elucidation of the Constitution have never been proven in the actual life of the community. In contrary, various amputations against the cultural signs of identity of the desa were continuously happen. Law Number 32 of 2004 regarding Local Government, as amended by Law Number 12 of 2008, the basic law for governing the performance of the local government and the main gate for performing the cultural rights of adat community, have exiled and ignored the existence of the desa. Desa which is in Article 1 point 12 of the Law defined as kesatuan masyarakat hukum berdasarkan asal-usul dan adat-istiadat setempat (social legal entity under historical background and local custom) in Article 200-216 of the Law, which suppose to govern the adat community, has cheated the adat community by means of governing the administrative village[6]. This way of stipulation has resulted in, at least, all programs and budgetings provided for the village development will automatically flows to the pocket of administrative village, never to the village based on their historiacal background (*the genuine village*).

The Law Number 5 of 1960, the Agrarian Law, may be seen as respecting the adat community by means of setting rules on the status of the land belong to adat community (tanah adat or adat land) as tanah ulayat and the legal position of the desa community as the legal owner of the land. But, the Law has never break down the rules into a more detail rules which may tenically approve the legal position and rights of the adat community over the land. Article 22 of the Law stipulates the process of development of property rights under adat law, but it totally has no relation with the status of adat land and the position of the adat community over the land as a legal entity having rihts over the land. Regulation Number 38 of 1963 concerning on Approval of Legal Entities Which May Accept Property Right over a Peace of Land (Penunjukan Badan-badan Hukum Yang Dapat Mempunyai Hak Milik Atas Tanah) also ignored the existence of adat community. Regulation of the State Minister of Agrarian/Head of the National Board of Land Number 5 of 1999 regarding Gidence for Settling the Problem of Property Rights of the Adat Community has never provided

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3 Translated from the original text: Negara mengakui dan menghormati kesatuan-kesatuan masyarakat hukum adat beserta hak-hak tradisionalnya sepanjang masih hidup dan sesuai dengan perkembangan masyarakat dan prinsip-prinsip Negara Kesatuan Republik Indonesia, yang diatur dalam undang-undang.

4 Dalam teritoir Negara Indonesia terdapat lebih kurang 250 zelfberturende landschappen dan volksgemeenschappen, seperti desa di Jawa dan Bali, negeri di Minangkabau, dusun dan marga di Palembang dan sebagaimnya. Daerah-daerah itu mempunyai susunan asli, dan oleh karenanya dapat dianggap sebagai daerah yang bersifat istimewa.

5 Translated from the original text: Negara Republik Indonesia menghormati kedudukan daerah-daerah istimewa tersebut dan segala peraturan Negara yang mengenai daerah-daerah itu akan mengingati hak-hak asal-usul daerah tersebut.

6 Desa (village) in Indonesia is a very confusing terminology. It can relay on the genuine desa (called desa asli or desa adat or masyarakat adat or masyarakat hukum adat), it can also relay on the desa as the lowest component of the governmental structure (it called administrative desa or desa dinas/formal desa).

the basic technical rules with regard to the existence of adat community as a subject of property right. Recognition over adat community as a subject having rights to hold property right over a piece of land is a quasi recognition and respect, it has never beneficial to the adat community because they never have actual legal capacity to owe, manage, sell or transfer the land in the same way to any other subject of rights over a land could perform their rights.

The Law Number 7 of 2004 regarding Water Resources, in article 6 paragraph (2) and paragraph (3), has provided basic rules for the rights of the adat community to manage water resources within the territory of their village. But, the phrase states "as long as not contrary to the state interest and any valid law" stipulated in Article 6 paragraph (2) is an empty box which its application depends on the moral and commitment of the governing rezim.

The similar case may be find in any other rules, such as: the regulation of natural resources, management of mining resources (Law Number 30 of 2007), space management (Law Number 26 of 2007), and the law of the forestry management, which totally ignored the cultural and historical rights of the adat community. Professor Nurjaya, from Brawijaya University, pointed out that the use of the concept of the fully control of State over the natural resources has caused exiling over the natural right of the adat community in the natural resources management.[7] Article 19 of the Law of Mining only provides rule on the participation of the people in the development of mining policy, but never break it down into a more detail rules. The right to participate is a facultative rule, not an imperative rule, which set chance not rights to participate. There is no even a single rule provides guarantee that the adat community shall have rights over the natural energy resources which is situated within the adat community's teritory. Right to participate stipulated in the Law Number 26 of 2007 does not related to the rights of the adat community to the natural space which is historically and culturally belonging to them. It is a slight right over information of space management and the right over compensation with regard to misappropriate use of space.

All those facts draw up the map of the problems faced by Indonesia: firstly, the fundamental one. It relates to nation identity which may affect the existence of the nation of Indonesia, especially in the view of global society. The annihilation of identity equal to the extinction of a nation; secondly, having technical and practical in nature. The extinction of identity is parallel to the void of chance for taking position, role, and winning the global economic competition. Annihilation of identity is an annihilation of trademark.

This problem shows two fundamental needs from the law point of view, i.e.: firstly, scientific justification of legal science (philosophically, scientifically, and technically) over the ontology of identity; and secondly, mapping the causes of problem which causing effects on an act of suffering over the adat community, which is an act of contra-productive against the existence of Indonesia recently.

II. ISSUES

1. How would be the ontological justification of identity with regard to the existence a nation in the common world and the existence of a nation in the context of Neoliberalsim?
2. How would be the policy treatment given by the government of the Republic of Indonesia against the adat law as the main sign of identity of Indonesian state law?

III. OBJECTIVES

1. To darw up ontological justification of position and function of identity in term of existence of a nation in the common world and the existence of a nation in term of neoliberalism.
2. To draw up mapping of policy treatment performed by the government of Indonesia over the adat community, including their law, in term of the recovery of policy treatment over the adat law to fix the policy with the function of adat law as the prime sign of identity of Indonesian state law.

IV. METODE

This analyse is conducted under the functional normative approach.[8] This approach firstly introduce in science of law by Roscoe Pound under his famous theory of law, law as tool of social engineering. This approach than promoted further by Myres S. McDougal, Harold D. Laswell, and W. Michael Reisman under the lable of policy-oriented approach which much more focused on the substance of law and policy. This approach, technically, is a substantive or constructive analyse of law. As a substantive analyses, this analyses is focused on the substance of policy, the substance of law, or the substance of a policy which than transformed into law. The constructive approach is an approach which focused on the reconstruction or deconstruction of the substance of a policy or law. The work of the constructive approach is focused on the exploration of the natural or man-made defects of a policy or law which caused bad or contraproductive work of law or policy in affording its objectives. This approach will use to conduct substantial deconstruction against any political treatment performed by each rezim in Indonesia over the adat law.

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7 I Nyoman Nurjaya, Pengelolaan Sumber Daya Alam, Prestasi Pustaka, Jakarta, 2008, p. 98 and 154.

8 Myres S. McDougal dan Harold D. Laswell, W. Michael Reisman, International Law In Policy-Oriented Perspective, dalam R. St. J. Macdonald Douglas M. Johnston, The Structure and Process of International Law: Essay in Legal Philosophy Doctrine and Theory, Martinus Nijhoff Publishers, The Hague, 1983, p. 103. See also: Lung-chu Chen, An Introduction to Contemporary International Law A Policy-Oriented Perspective, Yale University Press, New York, 1989, p. ix.

Raw materials of law explored in this analyse are law primary resources and law secondary resources, such as: the decisions of the People's Assembly (Ketetapan Majelis Permusyawaratan Rakyat), legislation products providing rules on the policy treatment over the adat law, text-books, international legal instruments, journal, and some state documents.

V. ONTOLOGICAL JUSTIFICATION OVER IDENTITY

A. The Ontology of Identity

God creats the universe and its contents with name, position and function. Each creations, the tangible or intangible, the visible or invisible, with colour or without colour, with breath or breathless, moving or immoving, growing or nongrowing, having temperature or temperaturelss, with voice or voiceless, with substance or substanceless, are all created with name, position, and individual function which than integrated in one giant and complicated process of creation, living, and annihilation within the universe.[9] The ancient literature posed name, position, and function of each entity as the first sign of identity of things, than followed with nature and notion. Book I point 6 of the Veda Smrti descripts:

> Tatah swayambhurbhagawan awyakto'wyanjayannidam, mahabhutadi wrttaujah pradurasitta manudah. (So God the almighty who is self-existed makes all things, all elements, the big and the smallest element, which are not differ from one to the other become able to differentiate).[10]

All existed thing considered to be existed because of it can be differentiate between one to the other, having identity. There is nothing considered existed without identity. Each existed things even though equipped with amazing power and glory if has no identity than will easily ignored. Stone is named stone because of its identity. So, the universe: planet, water, air, fire, wind, plant, animal, human being, nation, state, judge, legislature, broker, television, car, Nokia, Sony, Toyota, Kentucky Fried Chicken are considered existed because of its identity. Identity, for human being, is the qualities of a person or group which them different from others. Hence, person or group who confuses with their identity is called a person or group with identity crisis.[11]

Identity is the first reference of existence of thing. It forms by nature, shape, substance, volume, size, sign, history, position, function, and reason for its existence. Identity is the ontological essence of any existed thing. Hence, all things existed are considered existed because of it owes identity. On the contrary, all existed things will simply be ignored or not existed when it has no identity. Identity of each thing is the inner element of these things. It becomes the first subject of the philosophy of science.[12] Parmenides of Elea, 504 B.C., by reference of the subject of philosophy of Heraclitus (504 B.C),[13] which focused his exploration on correlation between reason and sense, went futher to analyze correlation between change, reason, and sense. Inside his work Parmenides said:

> How, therefore, can we believe in change and yet remain true to reason? This give rise to the argument that change must mean the appearance of something new; but for something new, something that did not exist before, to come to existence, entails that something is created out of nothing, which again unthinkable.

The same thing has been done by Anaximander (611-547): "man originally emerging as a fish-like creature from the sea; Empedocles (445 B.C.): substance of things, each thing is developed by fluids; Heraclitus (504 B.C.) explored reason, sense, mind, wisdom, observation and interpretation as instumrnts for exploring truth. Truth is an identity: everything is in flux and nothing is in rest"; Pythagoras of Creton (571-497 B.C.): ... what the world was made and how reason could discover the answer.[14]

In the context of nation and state, identity is the main sign which difer one nation or state from the other. The signs include: (a) for a nation: history, culture, and language; (b) for a state: certain territory, permanent population, stable government,[15] sovereignty, institutions, governmental system, security system, etc. This context is related to tension between the concept of particularity[16] and universality.[17]

B. The Function of Identity

The function of identity may be divided into two categories, ontological and instrumental. The ontological function of identity is the function that giving a mark of the existence of things. It is a sign that can indicate an existence

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9 See: C. Hooykass, Cosmogony and Creation in Balinese Tradition, The Hague, Martinus Nijhoff, 1974.

10 G. Pudja dan Tjokorda Rai Sudharta, Manawa Dharmacastra, Departemen Agama RI, 1978, p. 31.

11 Cambridge International Dictionary of English, Cambridge University Press, 1995, p. 701.

12 Hector Hawton, Philosophy for Pleasure: An Adventure In Ideas, Fawcett World Library, New York, 1956, p. 20-25.

13 Ibid., p. 21.

14 Ibid., p. 24.

15 Harris, Case and Materials on International Law, Third Edition, Sweet & Maxwell, London, 1983, p. 80.

16 Particularity from nominalist point of view is "... a thing which is not universal, is concrete rather than abstract, is one amongst many particulars, is something which is unique (or individual), and is potentially more real, immediate and familiar. Andrew Vincent, Nationalism and Particularity, Cambridge University Press, Craft Print, Singapore, 2002, p. 8-9.

17 Universality is "...functional abstractions which we apply to aggregation of real particulars. ... infact, envisaged as a distortion or imaginary unity imposed upon the complex particularity of the world", Ibid.

of thing. It likes a name, nature, shape, color, and behavior.

The instrumental function is the axiological function. It relates to the use and the benefit of the using of identity. In political point of view, it is the instrument of political imaging, poer, and strength. In economic perspective, it is an instrument for product imaging, instrument for developing power of competition, and instrument of promotion. In social use, it is a tool for developing, maintaining, and promoting the spirit of social solidarity and relationship.

For the science, it is the equipment for controlling the development and the use of a certain theory and concept within the social life. For the law, it is the tool for controlling the development, change, and voidance of law. Identity in practical view is the base or instrument for determining position, function, and role of thing in a system.

C. Identity of a State in Neoliberalism Era

Neoliberalism indicates the new movement (neo) of liberalisme. This ideology related to the ten economic development policy introduced by John Williamson during the conference of the world economy in Washington, held by Intitute for International Economic in 1989. This conference held for analyzing economic development in Latin America which has been used since 1950s and sudenly has to be replaced with the model commonly used in work of OECD (Organization for Economic Cooperation and Development). In his working paper Williamson introduce 10 points of policy reformation related to economic development problems which commonly faced by all nations all over the world, particularly developing countries. Those 10 points of ideas covers:[18] (1) Fiscal Discipline;[19] (2) Reordering Public Expenditure Priorities;[20] (3) Tax Reform;[21] (4) Liberalizing Interest Rates;[22] (5) A Competitive Exchange Rate;[23] (6) Trade Liberalization;[24] (7) Liberalization of Inward Foreign Direct Investment;[25] (8) Privatization;[26] (9) Deregulation;[27] (10) Property Rights.[28]

Those ten proposal than patented in the lable of Washington Consensus. But, an hororable thing has happened. Those ten proposal have not adopted in the spirit of critic of Williamson to the work of OECD, but in the spirit of the job of OECD. This way of adoption has disposed Williamson into complicated position. Williamson argue that:

> *Audiences the world over seem to believe that this signifies a set of neoloberal policies that have been imposed on hapless countries by Washington-based international financial institutions and have led them to crisis and misery. There are people who cannot utter the term without foaming at the moth.*[29]

In another part of his writing:

> *Some of the most vociferous of today's critics of what they call the Washington Consensus, most prominently Joe Stiglitz... do not object so much to the agenda laid out above as to the neoliberalism that they interpret the term as implying. I of course never intended my term to imply policies like capital account liberalization...monetarism, suplly side economics, or a minimal state (getting the state out of welfare provision and income redistribution), which I think of as the quintessentially neoliberal ideas.*[30]

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18 John Williamson, A Short History of the Washington Consensus, Senior Fellow, Institute for International Economics, Paper commissioned by Fundación CIDOB for a conference "From the Washington Consensus towards a new Global Governance," Barcelona, September 24-25, 2004, p. 3.

19 This was in the context of a region where almost all countries had run large deficits that led to balance of payments crises and high inflation that hit mainly the poor because the rich could park their money abroad. Ibid.

20 This suggested switching expenditure in a progrowth and propoor way, from things like nonmerit subsidies to basic health and education and infrastructure. It did not call for all the burden of achieving fiscal discipline to be placed on expenditure cuts; on the contrary, the intention was to be strictly neutral about the desirable size of the public sector, an issue on which even a hopeless consensus-seeker like me did not imagine that the battle had been resolved with the end of history that was being promulgated at the time. Ibid.

21 The aim was a tax system that would combine a broad tax base with moderate marginal tax rates. Ibid.

22 In retrospect I wish I had formulated this in a broader way as financial liberalization, stressed that views differed on how fast it should be achieved, and-especially-recognized the importance of accompanying financial liberalization with prudential supervision. Ibid.

23 I fear I indulged in wishful thinking in asserting that there was a consensus in favor of ensuring that the exchange rate would be competitive, which pretty much implies an intermediate regime; in fact Washington was already beginning to edge toward the two-corner doctrine which holds that a country must either fix firmly or else it must float "cleanly". Ibid.

24 I acknowledged that there was a difference of view about how fast trade should be liberalized, but everyone agreed that was the appropriate direction in which to move. Ibid.

25 I specifically did not include comprehensive capital account liberalization, because I did not believe that did or should command a consensus in Washington. Ibid.

26 As noted already, this was the one area in which what originated as a neoliberal idea had won broad acceptance. We have since been made very conscious that it matters a lot how privatization is done: it can be a highly corrupt process that transfers assets to a privileged elite for a fraction of their true value, but the evidence is that it brings benefits (especially in terms of improved service coverage) when done properly, and the privatized enterprise either sells into a competitive market or is properly regulated. Ibid.

27 This focused specifically on easing barriers to entry and exit, not on abolishing regulations designed for safety or environmental reasons, or to govern prices in a non-competitive industry. I have seen it asserted that a competitive exchange rate is the same as an undervalued rate. Not so; a competitive rate is a rate that is not overvalued, i.e. that is either undervalued or correctly valued. My fifth point reflects a conviction that overvalued exchange rates are worse than undervalued rates, but a rate that is neither overvalued nor undervalued is better still. Ibid.

28 This was primarily about providing the informal sector with the ability to gain property rights at acceptable cost. Ibid.

29 Center for International Development at Harvard University, Washington Consensus, Global Trade Negotiation (GTN) Homepage, April 2003, p. 1.

30 Ibid.

So, Washington Consensus is the Williamson's ideas of economic development, but minus the spirit of his critic to the work of OECD and plus the ideology of OECD. This way of replacement may be charged as scientific manipulation where OECD ideology may freely or even fully influence the consensus.

The World Bank has absorped the points of the idea, not the reasons of the idea, in term of their position, vision, mission, and functions for strengthening the idea of neoliberalism which actually drove by the inaugural adress of the US President, Truman, on January 20, 1949.[31] Within his speech, he has introduce at least 20 concepts of universalism which mould in four basic concepts of universalism, according to him, for the better living of human being on earth : (a) universality of human mankind; (b) the people of the world; (c) international responsibility of states over the rights of the society of the world to the development; and (d) international economic development as a common interest of the society of the world.

Those concept lies in the following termss, phrases, and sentences: *the peoples, human dignity, lasting peace, democratic international relation, limitation and control of all armaments, expansion of world trade on a sound and fair basis, the security and welfare of the world, structure of international order and justice, standards of living of all peoples, common defense, the maintenance of peace and security, program of development-based, concepts of democratic fair-dealing, a constructive program for the better use of the world's human and natural resources, the world's human and natural resources, human family, rights of the people, freedom and happiness for all mankind, freedom from fear, of speech, of religion, and to live their own lives useful ends, self-government in term of lies and propaganda by communism, economic security, which mould in the principles of universality of human mankind or the peoples of the world. It yields in the obligation of all states and international entities to bear international responsibility in international development and the right of the peoples of the world, wherever they are, to the development, which in the other side creates right to international entities to enter into any state jurisdiction under the name international obligation to carry out development.*[32]

Those all concepts have strong relation with ideas of libralism which lies in various international instruments, such as: the Magna Charta, 1215,[33] British Bill of Rights (1689),[34] US Bill of Rights (1789) which than inserted in the US Constitution (1791).[35] United Nation Charter (1945),[36] Universal Declaration of Human Rights (1948),[37] General Assembly Resolution on Permanent Sovereignty over Natural Resources (1962),[38] Declaration on Principles of International Law Concerning Friendly Relation and Co-operation among States in Accordance with Charter of the United Nations (1970),[39] Declaration of the United Nations Conference on the Human Environment (1972), Charter of Economic Rights and Duties of States (1974),[40] Declaration on the Establishment of a New International Economic Order (1974),[41] The United Nations General Assembly Resolution on the World Charter for Nature (1982),[42] Declaration on the Right to Development (1986),[43] United Nations Millennium Declaration (2000),[44] and finally the United Nations Milennium Development Goals (MDG's) which adopted by the United Nations in 2001 for achievement of targets set for 2015.

The coverage of the MDG's may be drawn up as follows[45]

MDG's	PROGRAMS	TARGETS 2015
MDG 1	*radicate extreme poverty and hunger*	• *Halve, between 1990 and 2015, the proportion of people living below $1 a day.* • *Halve, between 1990 and 2015, the proportion of people who suffer from hunger.*

31 Harry S. Truman, Inaugural Address, January 20, 1949, Library & Museum, Truman.library@nara.gov., place, time and date of access: Maastricht, Netherlands, 16:00 a.m., May 18, 2009.

32 Ida Bagus Wyasa Putra, Rights to Development of the Peoples of Republic of Indonesia: Constructive legal concept for solving ideological tension, Working Paper on Short Course Program on International Development Law, Master of Law Program, Maastricht University, April to June 2009 (hereinafter referred as to Ida Bagus Wyasa Putra 1), p. 1.

33 Ida Bagus Wyasa Putra, Deklarasi Hak Azasi Manusia, Biro Hukum dan Hak Azasi Manusia, Setda Provinsi Bali, 2009 (hereinafter referred as to Ida Bagus Wyasa Putra 2), p. 1.

34 Ida Bagus Wyasa Putra 2, Ibid.

35 Ida Bagus Wyasa Putra 2, Ibid.

36 Ian Brownlie, Basic Documents in International Law, Third Edition, Clarendon Press, Oxford, 1983, p. 1.

37 Ibid., p. 250.

38 Ibid., p. 230.

39 Ibid., p. 35.

40 Ibid., p. 235.

41 UNGA/RES/S-6/3201, 1974.

42 Expert Group on Environmental Law of the World Commission on Environment and Development, Environmental Protection and Sustainable Development: Legal Principles and Recommendations, Graham & Trotman Nijhoff, Norwell, USA, 1987, p. 155.

43 UNGA Resolution 41/128 of 4 December 1986.

44 UNGA Resolution A/55/L.2, 2000.

45 United Nations, The Millennium Develppment Goals Report, 2008. Lihat juga: Venkates Seshamani, Trade, Development and poverty: a Millennium Development Goals (MDG) Perspective, University of Zambia.

MDG's	PROGRAMS	TARGETS 2015
MDG 2	*Achieve universal primary education*	• *Ensure that, by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling.*
MDG 3	*Promote gender equality*	• *Eliminate gender disparity in primary and secondary education preferably by 2005 and to all levels of education no later than 2015.*
MDG 4	*Reduce child mortality*	• *Reduce by two-thirds, between 1990 and 2015, the under-5 mortality rate.*
MDG 5	*Reduce maternal mortality*	• *Reduce by three quarters, between 1990 and 2015, the maternal mortality ratio.*
MDG 6	*Combat HIV/AIDS, malaria and other diseases*	• *Have halted by 2015, and begun to reverse, the spread of HIV/AIDS.* • *Have halted by 2015, and begun to reverse, the incidence of malaria and other diseases.*
MDG 7	*Ensure environmental sustainability Sustainable development (forest area): North African*	• *Integrate the principles of sustainable development in country policies and programs and reverse the lose of environmental resources.* • *Halve by 2015, the proportion of people without sustainable access to safe drinking water.* • *By 2020, to have achieved a significant improvement in the lives of at least 100 million slum dwellers.*
MDG 8	*Develop a global partnership for development*	• *Develop further an open, rule-based, predictable and non-discriminatory trade and financial system; includes a commitment to good governance, development and poverty reduction – both nationally and internationally.* • *Address the special needs of the Least Developed Countries; includes: tariff and quota free access to LDC exports, enhanced program of debt relief for HIPC and complete cancellation of official bilateral debt, and more generous ODA.* • *for countries committed to poverty reduction.* • *Address the special needs of landlocked countries and small developing island states.* • *Deal comprehensively the debt problems of developing countries through national and international measures in order to make debt sustainable over the long term.* • *In cooperation with developing countries, develop and implement strategies for decent and productive work for youth.* • *In cooperation with pharmaceutical companies, provide access to affordable, essential drugs in developing countries.* • *In cooperation with the private sector, make available the benefits of new technologies, especially information and communication.*

The idea of neoliberalism has been pack in a very perfect way, which finely merges the prinsiples of universalism with various technical aspek bsuiness, such as: capital, labour, production, products, market, and trade for affording the welfare of the people of the World. The new concept lies in the new concept of liberalism is that the placement of capital, production, labour, market, and trade under the construction of liberalism combined with the equal position of society (social groups, society, community) international institution, governmental organization and non-governmental organization, and the government of all states in an equal position of access to the background, content, and target of the world economic develpment. The very critical situation of the concept is that the concept has resulted in: (1) *vagueness* of demarcation the state sovereignty, state jurisdiction with regard to universalism; (2) the equal access of all diferent degree of entities to poverty and other social issues ignors the position and the location of the issues; and (3) the uses of trade as a reason for accessing social problems.

The people from the anti-globalization movement considers the construction as the most sensitive part of MDG which at any time may slip from its ideal spirit and easily drop into the form of intervention or even imperialism to become political instrument of the *clever state* to get into, to control, and to occupy the domestic life of the *innocent states*. This idea could easily turn into a weapon for destorying the economic, political, social, and even cultural sovereignty of the *innocent states*.

Globalisation and neoliberalsim certainly resulted in bluared. Hence, identity is the only strongest weapon for scuring the existence of a state in the global world. Identity is the basic potency, capital, and power for choosing any

proper position, function, and role in the life of the global society. Each entity will be considered existed only when it has an identity. Existence is the main gate for entering global competition. The capacity to pass the gate equals to the chance for taking position, playing role, or even winning the competition. People hunt Nokia, Toyota, and any other famous brands because of those brands strongly mark by its identity. The mark creates image, the image creates markets, and the markets create income.

The power and the work of identity depend on the quality of the identity. The quality of identity depends on the coherency of the marks or sgins of the identity. For a state, it is indepence, sovereignty, political system, legal system, governmental system, economic system, military system, capacity to enforce the sovereignty, the storage of its natural resources and other economic potencies, good performance of the government (good governance), are the attributes of identity of the state. The coherence of those signs determines the quality of the identity of the state.[46] For a nation, it is the degree of signs of its community, such as: ideology,[47] common historical background,[48] nation solidarity, spirit of brotherhood in taking collective action,[49] spirit of belonging over the territory,[50] and common sign of their culture.[51]

d. Indonesian Law : The Crisis of Identity

From *functionalism Functionalim* focuses their philosophy in the utility of things. Its analyse focuses on the *substance* of thing which lead to the utility of those things. point of view, identity of law may insufficient to be proven from sign of its creator, form, performance, and its enforcement process, but its substance. Principles and rules of law applied in Indonesia should be the principles and the rule of law that is grew and developed Indonesia, not the principles and rules that is taken from any other nation.

The crisis of identity of Indonesian law is not only related to the substantial aspect, but the theories, doctrines, and principles. Almost all theories and doctrines of law applied in the development of law in Indonesia are Western law doctrines. Hence, crisis experienced by Western legal system Mark Van Hoecke dan Franqois[52] are also experienced by Indonesia's legal system. Such crisis bring more suffering to Indonesia legal system due to counciousness, knowlegde and technical capacity of Indonesia to recover the crisis. Western countries have worked hard to handle the crisis by means of developing new legal doctrines, concepts, and rules for recovering the crisis, Ibid. while in Indonesia have not. The crisis has moved freely and suffering not only the identity of the law, but also the life of the country. It has naturally rolling without planning for rescueing. Inbalance amount between doctors and professors of law and the Indonesian legal theories and doctrines in Indonesia draws some serious problem of legal education in Indonesia. Most of them are the followers or even the devoties of Western legal theories and doctrines of law and very small of them have develop legal theories and doctrines for handling Indonesian policy of law problem. This problem is getting more dangerous facing the global issues and the rality of legal policy in Indonesia.

It is a fortune for Indonesia that they still have some legal theories and doctrines which may be called the Indonesian legal theory or donctrine.[55] Two of the are the doctrine of the law of development and the development of law br Professor Mochtar Kusumaatmadja[56]. from Padjadjaran University of Bandung, and the theory of identity of Indonesian state law by Professor Djojodigoeno, from Gajah Mada University of Yogyakarta and Professor Koesnoe, from Airlangga University of Surabaya.[57]

(1) Doctrine of Function of Law as a Tool of Social Engineering in the Developing Society (Doctrine of the Law of Development and the Development of Law of Professor Mochtar Kusumaatmadja)

According to Professor Mochtar, the essence of national development is the renewing of the way of thinking and attitude. With no canging on the way of thinking and attitude,

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46 Guntram H. Herb and David H. Kaplan, Nested Identities: Nationalism, Territory, and Scale, Rowman & Littlefield Publishers, INC, Maryland, 1999, p. 1-6.

47 ... is that national communities are constituted by belief: nation exist when their members recognize one another as compatriot. David Miller, On Nationality, Oxford University Press, Oxford, 1999, p. 22.

48 Nationality is that it is an identity that embodies historical continuity. Ibid., p. 23.

49 National identity is that it is an active identity. Nations are communities that di things together, take decisions, achieve results, and so forth. Ibid., p. 24.

50 A national identity is that it connects a group of people to a particular geographical place. Ibid.

51 A national identity requires that the people who share it should have something in common, a set of characteristic that in the past was often referred to as a 'national character', but which I prefer to describe as a common public culture. Ibid., p. 25.

52 Functionalim focuses their philosophy in the utility of things. Its analyse focuses on the substance of thing which lead to the utility of those things.

53 Mark Van Hoecke dan Franqois Ost, Legal doctrine in crisis: toward a European legal Science, in Legal Studies, p. 200-215.

54 Ibid.

55 The Indonesian doctrine of law is the doctrine of law that has developed under the social context of Indonesia which than applied in performance of the Indonesian policy or leaw process. Indonesian doctrine of law may not necessary develop by Indonesian. It could be developed by foreigner, but shall firmly be based on the social context of Indonesia. The doctrine of "the genuine law shall be the first law applicable to genuine society in the context of national law" introduce by Von Vollenhoven in 1920s is one example of this statement. See: Supomo and Djokosutono, op.cit., p. 145.

56 Mochtar Kusumaatmadja, Pembinaan Hukum Dalam Rangka Pembangunan Hukum Nasional, Binacipta, 1986 (hereinafter: Mochtar 1). See also: Mochtar Kusumaatmadja, Fungsi dan Perkembangan Hukum dalam Pembangunan Nasional, Binacipta (hereinafter: Mochtar 2).

57 Sunaryati Hartono, In Search of New Legal Principles, Binacipta, Bandung, 1982, p. 25.

introduction of any new institution would be meaningless. If Indonesian peoples in the same way of thinking with the Professor that for development renewing of attitude, nature and values is necessary, than they have to determine which values of the existing values will be leaved and replaced with new values which is estimated more appropriate to the recent social situation and which values shall be protected. It must firmly clear that Indonesian people may not take over any value which is considered modern because of it is considered modern, and shall not defending on a certain values which is considered original because of it is considered genuine or reflecting the nation identity.[58]

The statement of the Professor reflects the consciousness of the professor that national identity is a must and shall be expressed in the process of adoption of any forein values. The transfer of values shall be performed properly, so it can maxize the benefit and minimize the lose. Tension between the needs of change and the necessity for giving a serious attention to the effect of the change against the national identity shows that the most importance thing for handling such question is the availability of a set of indicator for measuring time, volume, and digree of of the change that can be done. Professor Mochtar introduced three indicators for measuring which law may be or shall be changed safely:

(a) *Urgency needs*, based on urgency of the change due to critical situation fostering the change, for example the change of the investment law;
(b) *Feasibility*, based on the content of values of the law that will be changed. Any change of law which may cause cultural complication, ternsion against religion, and the life of the society shall be suspened. The neutral one shall be forwarded; and
(c) *Fundamental change*, change over the law produced by the colonial government. It shall be changed in accordance to the character of the nation, such as: maining law, labor law, agrarian law, and law that make the government facing difficulty to run the the government in managing their nation.

Those indicators are complete enough to measure time, nature, degree, and volume for determining which law may, can, or shall be changed. However, those indicators have firmly forgotten by most Indonesian legal experts and the legislature. In contrary, some experts refused the theory of Professor Mochtar. Most of them are good in refusing the theory, but have no ability to offer solution. From legislation perspective, the doctrin of Professor Mochtar is widely accepted and predominantly influencing the practice of legislation. In fact, the adoption of the doctrine has limited to one side face of the doctrin (the law of development, law as an instrument of development) and firmly ignoring the other side of the doctrine (the indicator for changing the law). Hence, the adoption has turned the change of law into a "brutal" action, focuses on the use of law as an instrument of development and ignoring impact of the development which suppose absolutely taken into account as an integral aspect of consideration in the law-changing process. The position of the indicators shall firmly be recovered and more it needs to be developed contextualy due to the new development of the life of the world.

The main function of law is to support social change (*law as a tool of social engineering*). In the developing society, the function of law must be fostered from conservative function into progressive function. In conservative function, law is function as a tool for keeping social order or protecting what has been achieved which may develop a contraproductive social order against the process of development. In progressive function, law function as a tool for fostering and promoting social behavior and the way the people to the higher level of social attitude. The change must be carried out in right way, in an orderly process.[59] In accordance to the doctrine, adat law may be change, but it shall be done in conformity with law.

(2) The Theory of Adat Law as the Sign of Identity of Indonesian State Law

In the opposite way with the doctrine of Professor Mochtar, which allowed, if not suggest, the change over the adat law, the *theory of adat law as the sign of identity of the state law of Indonesia* stand on the opposite way of thinking. Professor Djojodigoeno and Professor Koesnoe marked that the change of law shall deem not be performed under the governmental intervention. Law must change naturally, self-gorwing, and all laws not in conformity with adat law shall not be qualified as state law, and shall be declare invalid.

> ... our national law should grow by itself (based on Savigny's theory that " recht wird nicht gemacht, aber ist and wird mit dem Volke). And that all law which is not in accordance with our Adat legal thinking cannot be classified as National Law, and should therefore be deemed invalid.[60]

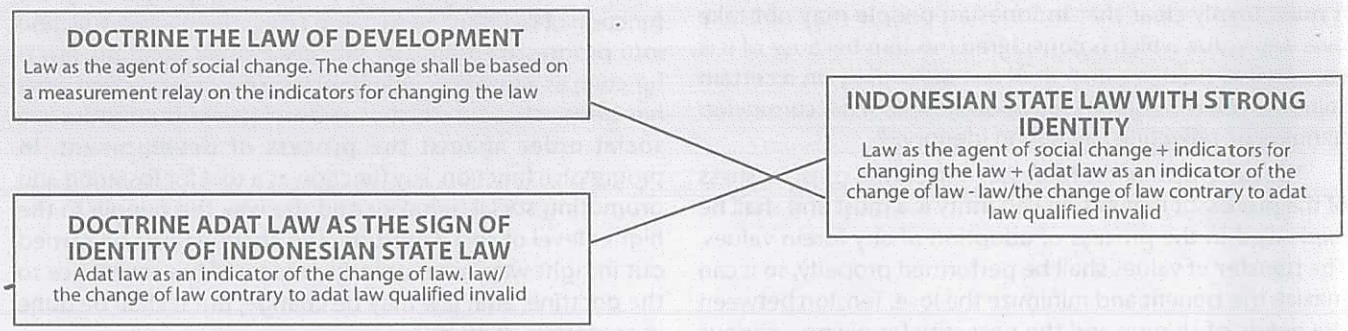
The big problem which may be faced by this theory if it applies totally is the rality of adat law which is not single or unified. Adat law is spread out all over Indonesia, which in accordance to the result of Mr. Van Vollenhoven research in 1920, covers at least 19 ranges of adat law. Each of it has its own principles which in some ways are extremely different one to another. Thin conservative point of view could emerge a contraproductive situation to the development process of Indonesia as the difference of each range of adat law could turn into conflict of law.

(3) The Sytheses Doctrine: The Change of Law Resulted in the Changed Law with Strong Identity

The doctrine of *the law of development* may be accepted altogether with the teori of *adat law as the sign of identity of*

[58] Mochtar 2, op.cit., p. 8-9.
[59] Ibid., p. 11-12.
[60] Sunaryati Hartono, op.cit., p. 25.

Indonesia state law with firm consideration over the weakness of the both theories. The doctrin of the law of development shall be adopted in its complete formulation, covering the function of law as an agent of development and the indicators for selecting the proper law to be change in term of development and the social peacefulness. While, the doctrine of adat law as the sign of identity of Indonesian state law may also be accepted in a ceratin way, hence it can eliminate the conservative aspect of the theory in one side and can maximize the keeping of adat law as he sign of Indonesian state law identity. This adoption structure may be drawn up as follows:



Doctrine of the law of development is the synthesis. Theory of adat law as the sign of identity Indonesian state law is the anti-thesis. The theory of the *Indonesian state law with strong identity* is the synthesis. The firm formulation of the synthesis is:

Law as the agent of social change (including indicators for changing the law)

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[*adat* law as an indicator of the change of law – (minus) its conservative aspect (law/the change of law contrary to adat law qualified invalid)]

The actual operation of the synthesis covers:

(1) The adoption of the principles of adat law and to transform it into the state law. Hence, the identity of Indonesian law may not only marked by the process of law, but also the substance of law. The state law shall relay on and shall in conformity with the genuine law of Indonesia.

(2) The adoption of foreign rule of law may be allowed due to the needs of development, but it must not suffering or damaging the identity of the Indonesian state law.

B. Adat Law as the Sign of Identity of the State Law of Indonesia

The identity of a nation is developed by various kind of signs or attributes of identity. The most important sign of identity of a nation is *particularity* of their legal system. Adat law is the genuine legal system of.[61] As easily found in any other legal system, adat law legal system owes particular characters, include its law-creating process, forms, validity, objectives, and enforcement. The national legal system of a state usually transformed from their genuine law. The objective of national legal system is to respon the needs of the spirit of justice of the pople. Hence, the only law having capacity to fulfil that needs is the law which is originally rooted in the society, develop by the society within the society. In the life of Indonesia, that law is the *hukum adat* (adat law).[62] In accordance to Prof. Mochtar, the good law is the law that meets the alive in the society (*the living law*), which reflects the values accepted or belong to the society. [63]

Adat law is consist of various kinds and very characteristic because of the influence of the specific character of the environment where the law is developed. So, the adat law which applied in the national level sould the adat law in its genuine form as a set of principles (*legal principles*). The National Law of Legal Development Agency (*Badan Pembinaan Hukum Nasional*-BPHN) since the beginning of its work has initiated exploration over the adat law principles.[64] This exploration is intended to develop a framework of legal principles for responding the needs of legal development in Indonesia.

F. Absurdity of the Act of the Governement of Indonesia from one Rezim to the other

The spirit and commitment for imaging of the national law of Indonesia has been started in Soekarno's era. Although he was easily to drive Wertern terminologies at each of his speech, but he is not a *Western minded* person. He drived Western theories and mottos only for technical purposes in order to strengthen the *particularities* of Indonesia. He posed Pancasila as the Indonesia legal ideology (*rechtsideologie*) [65] and adat law the base of indonesan law development.

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61 Supomo dan Djokosutono, Sejarah Politik Hukum Adat 1848-1928, Djambatan, 1954, p. 6. See also: Djojodiguno, Azas-azas Hukum Adat, Jajasan Badan Penerbit Gdjah Mada, Jogjakarta, 1964, p. 7-8.

62 Ibid., p. 3.

63 Mochtar 2, ibid., p. 8.

64 Sunaryati Hartono, op.cit., p. 27-28.

65 Soekarno, Filsafat Pancasila Menurut Bung Karno, Media Pressindo, Yogyakarta, 2006, p. 6.

Soeharto has an equal strength of commitment of identity to Soekarno. In the second phase of his governmental period he posed Pancasila and the Constitution of the Republic of Indonesia 1945 as the base of the Indonesian law development. However, in the longterm of his governmental period he has surrendered to the doctrine of economic development he adopted. The exploration of Indonesian genuine legal principles were successfully achieved the target. But, the implementation of the achievement was seriously failed. The doctrine of the law of development, introduced by Professor Mochtar, has understood in wrong direction and partial. The definition of the doctrine has been limited to the meaning of law as the agent of development, law is the agent of change, and the law by means of legislation has been totally slavered to change and development. This way of understanding the doctrine has caused in the desacralization of cultural symbols. The law at any time has been used as an instrument of exploitation over the natural resources for fulfilling the target of economic growth. Many products of legislations have affected the position and function of adat community, or at any situation even ignored or exiled the adat community from its natural and cultural position. The way of Professor Mochtar defining national development, as a change or renewing of the way of thinking and attitude,[66] has driven the life of the nation from its genuine character to the brutalism (exploitation).[67] The change become uncontrollable change and have taken the the people from its genuine chacter to its new unidentified character: from spiritualism to materialism, solidarity to greedy, which tend to change people into anarchism, brutalism, materialism, individualistic, and finally resulted in the exiling of the adat community and the adat law as basic sign of identity of the Indonesian law.

G. Paradox of the Act of suffering over Adat Law : Amputation of Varioud Signs of Identity of the State Law of Indonesia

The vision of the law development in the Soeharto's era is the state law with strong identity. In fact, the practice of legislation has produced several products which causing in mistreatment over the adat law. Act of Foreign Investment 1967, Act of Domestic Investment 1968, the Law of Mining 1967, and the Regulation of the Traditional Property Rights of Adat Community, are some examples which directly damaging the position of the adat community.

In the case of Bali, policy on the transforming of unwritten principles of adat law into written form of adat law (*penyuratan awig-awig*) as a form of insertion of Western legal culture into adat law is a type of soft intervention over adat law. This intervention has followed with series of political actions, such as: the issued of the Local Law (*Peraturan Daerah*) of Bali Number 6 of 1986 concerning on the Position, Function, and the Role of Adat Community which strongly influence the structure of adat society which arising a lot of conflicts in Bali.

IV. POLITICAL TREATMENT OVER ADAT LAW

The life cycle of Indonesian policy treatment over the adat law can be divided into 4 (four) period, such as: (a) the period of the Dutch Colonialism (1848-1928); (b) the period of Soekarno (1961-1966); (c) the periode of Soeharto (1966-1996); and (d) the post-period of Soeharto (1996-recently).

A. Legal Policy of the Government of the Dutch Colonialist (1848-1928)

The year of 1848 is the beginning of legal policy over adat law. The stated year was the firt time the Dutch Colonial Government put attention to adat law as a genuine law of the people of Indonesia. Adat law has been treated under the vision and mission of the colonial government. It was to apply the law to the people of Indonesia [68] not for the people purposes, but for the colonial pruposes. [69] The policy at any time has emphasized to the interest of trade, agriculture, Cristianity, and any other interest which finally ended at the interest of the colonial government. Hence, the policy is a quasi policy.

In the bigining of the twentieth, colonial legal policy influence by the work of the accademicians. Mr. C. van Vollenhoven has introduced science of adat law which than improve the image of adat law with a new scientific labled. However, the policy of the colonial government has never change and even has caused opposite effect with the expectation of the academicians. The colonial government has strugled over new image of adat law. They expressed their refusing through a setting of policy which firmly refusing the application of adat law (*bewuste anti-adatrechtspolitiek*). The legal policy of the colonial government even turned into the interest of the colonial government. The government thinks that giving positive response to the result of the research of adat law conducted by the experts of adat law equal to the creating of new obstacles for performing the governmental duties.[70] For developing respect to the government in order to develop easier situation for performinf the fovernemntal duties and for preventing new obstacles to the government, they decided to simply ignore the existence of adat law or for the better effect of the policy they have intentionally to breach the adat law.

If those policies continuously applied, it can be expected that adat law will certainly destroyed. But, the wind has changed. The continuous struggle of the academicians, law and non-law experts, against the colonial government has caused in the change of attitude of the colonial government. In 1928, the consciousness of the colonial government over the adat law surprisingly change the policy from refusing to

66 Ibid., p. 11.

67 Brutal: cruel, violent and completely without human feelings; unpleasantly truthful. Cambridge Internatinal Dictionary of English, op.cit., p. 170.

68 Article 5 and 6 Koniklijk Besluit, 16 May 1849 No 1, St. 1847 No 23, and St. 1848 No 10 contained new law. Supomo, op.cit., p. 2.

69 Ibid., p. 3.

70 Ibid., p. 5.

acceting. Professor Supomo called the situation as a changing direction of the legal policy of the colonial government over the adat law. The government intended to develop their legal policy under the spirit of "legal policy based on the existence of situation which is developed by history" and they interprete that "the existence of situation which is developed by history is actual situation within the society of Indonesia, that is the adat law as a law which naturally grow in life of the society of Indonesia". [71] The government plan to develop legal policy in its natural meaning. The legal policy in its natural meaning is an effort of the government to perform the people's interest by means of setting rules of law. Legal policy is not an independent aim, but truly a *tool* for achieving the targets. Therefore it shall meet the direction of the target. Legal policy means to perform the interest of the people by means of fulfilling their legal needs. For that reason, adat law shall be the suitable way to fulfil the interest of the people.[72]

LEGAL POLICY TREATMENT OVER ADAT LAW BY THE DUTCH COLONIAL GOVERNMENT

NO	PERIOD	TREATMENT
1	Pre-1848	Adat law ignored, the law applied to the people is the Dutch law
2	1848	(1) The initial consciousness of legal policy for enforcing adat law to the people of Indonesia (2) The interest of the colonial government remains predominant in considering legal policy over adat law (3) Policy treatment over adat law is a quasi (4) The Ducth law remains enforced
3	Beginning of the Twentieth	(1) The image of adat law getting better due to the struggle of the academicians and experts of adat law or non-adat law. (2) Adat law promoted as science by Mr. C. Van Vollenhoven. (3) Adat law grows as science (4) The government of the Ducth behave harder against adat law (5) The government of the Dutch colonial refuses adat law (6) The government of the Dutch colonial promotes the interest of the Dutch as the basic consideration of their legal policy against adat law (7) Policy treatment against adat law: a. Adat law refused; b. The enforcement of adat law intentionally refused; c. The performance of adat law intentionally breached to enable the easier performance of the government of Ducth
4	1928	The direction of the legal policy of the Dutch is changing. The Dutch legal policy is based on the actual situation that grows in accordance to history, that is adat law as an actual law that rooted in and grows within the people of Indonesia Adat law obtains legal policy treatment in its pure meaning, to perform the interest of the people by means of fulfilling their needs over the law

B. The Legal Policy by the Government of Soekarno (1961-1966)

Legal policy treatment against adat law within the period of Soekarno may be traced back to the Temporary People's Assembly (Majelis Permusyawaratan Rakyat Sementara-MPRS) Decision Number II/MPRS/1960 concerning on the First State Development Policy Guidelines 1961-1969, Part III Annex A (Laws, Jail and Police) covers:

(1) The legal policy which may direct homogenenity of law shall firmly put attention to the reality of the actual situation of the society;

(2) The principles of national law development shall firmly meet the State Guidelines Development Policy and shall be based on adat law which meet the needs of the development of welfare of the society;

(3) The improvement of the law of family and heritance shall deem put attention to the factor of religion, adat tradition, etc.

Annex B, Part III (Government and Security/Militerary matter), point 22, determines that:

> The maintaining of national law shall be based on the law that meet the progress of the consciousness of the people of Indonesia and shall not hamper the delopment of just and welfare of the people.

The coverage of the policy treatment over adat law may be drawn as follows:

RANGE AND FORM OF LEGAL POLICY TREATMENT OVER ADAT LAW

NO	COVERAGE OF FORMS	LEGAL POLICY TREATMENT
1	Policy on unification of law	Adat law shall be take into account as part of the fact of reality of the life of the people of Indonesia
2	The development of national law	Adat law shall be pose as the base of the development of national law The consciousness of the people, including the adat community with regard to law shall be given an actual attention
3	Improvement of the family law and heritance	Adat law shall be well treated.

c. The Legal Policy Treatment of the Government of Soeharto (1966-1998)

Policy treatment over the adat law during the Soeharto's era can be divided into several phase, i.e.: (1) THE FIRST PHASE: the Decision of the People Assembly Number IV/MPR/1973 (State General Policy Guidelines - GBHN); (2) THE SECOND PHASE: the Decision of the People Assembly Number II/MPR/1983 (GBHN); (3) THE THIRD PHASE: the Decision of the People Assembly Number II/MPR/1988 (GBHN); and (4) THE FOURT PHASE: the People Assembly Number X/MPR/1998 (Guidelines for Reformation of Development).

Legal policy in the First Phase covers: (a) codification and unification in order to develop legal certainty and the social order; (b) to develop consciousness of the people with regard to law in term of the function of law as tool of social engineering.

Legal policy in the Second Phase covers: (a) the development and maintenance of law based on Pancasila and the Constituion of 1945; (b) the development and the maintenance of the national law directed to the function of law to develop social order and legal certainty, to provide support and security over the effort of development; (c) the development of law through codification and unification; and (d) the development of consciousness of the people as a citizen.

The legal policy in the Third Phase.[73] set a very similar model of policy to the policy in First Phase. The national legal policy in this Phase directed to the following treatment: (a) the function of law is directed to strengthening and securing the achievement of the development by means of the creation of legal certainty and the public order; (b) the development of law is directed to the codification and unification especially with regard to areas which can serve the needs of development and consciousness and the dynamic that developed in the life of the society; (c) the development legal consciousness in order to understand better the function of law in the process of development.

The legal policy in the Fourth Phase, eventhough exposed in the lable of reformation, containts the very close content with the previous policy. There is indication that the government will provide an equal policy treatment over adat law in its position as the sign of identity of the state law of Indonesia. Legal policy wthin this Phase cover: (a) law as a tool of public order, peace and secure of the people; (b) the strict division of functions of judicial and executive; (c) the development of national legal system based on integrated legislation model; (d) Supremacy of law; (e) people behavior and government official shall firmly respect law.

The development of legal policy within the phases of the period of Soeharto may be drawn up as follows:

PHASE OF LEGAL POLICY IN THE PERIOD OF THE REZIM OF SOEHARTO

NO	PHASES IN THE PERIOD	LEGAL POLICY
1	**FIRST PHASE** People Assembly Decision Number IV/MPR/1973 (State General Policy Guidelines)	Reformation of law in term of modernization Codification and unification of law due to the needs of the development of legal certainty and social order Consciousness of the people to the existence, function, and the use of law in term of development. the function of law as a tool of social engineering
2	**SECOND PHASE** People Assembly Decision Number II/MPR/1983 (State General Policy Guidelines)	The development and the maintenance of law based on Pancasila and the Constitution of 1945 The development and the maintenance of national law directed to the function for creating of social order and certainty of law, for supporting and securing the effort of development Reformation of law through codification and unification The development of consciousness of the people with regard to the function of law

NO	PHASES IN THE PERIOD	LEGAL POLICY
3	**THIRD PHASE** People Assembly Decision Number II/MPR/1988 (State General Policy Guidelines)	The fuction of law is directed to keep and to protect the result of development The reformation of law directed to codification and unification especially for the areas of law that enable to fulfil the needs of development and consciousness and the dynamic of the society The development of consciousness with regard to law in term of the better understanding to the function of law in the process of development
4	**FOURTH PHASE** People Assembly Decision Number X/MPR/1998 (Guidelines for Reformation of Development)	Law as a tool of social order, peace, and security of the society Strict division between the judiciary function and the executive function The development of national legal system based on integrated legislation model Supremacy of law The attitude and behavior of the society and the public servants which shall highly appreciate the law

Legal policies within the period of Soeharto totally ignored the adat law. the orientation of legal policies fully directed to the development of social order and legal certainty which most cases causing breached and damaged the adat community rights and laws. Adat society has been suffered by a lot of legislation products which slavered to the name of development, change, modernization, social order, and legal certainty. Many legislation products totally ignored the cultural rights of the adat society.

D. Legal Policy Post-Soeharto Era (1999-Recently)

Legal policy following the Soeharto's era is firstly based on the Peoples Assembly Decision Number IV/MPR/1999 regarding State General Guidelines Policy (GBHN) 1999-2004. The structure of the substance of this policy differs from the late model used in all GBHN. In the previous policies, policy on law commonly placed at the end of the content. But, in this policy, policy on law is placed in the beginning of the policy. The way the People Assembly placing the policy shows the apresiation of the Assembly to the legal matter. This policy is the first policy giving a special attention to adat law. The policy set policy treatment in point 2 and point 9. Point 2 of the Policy Direction says:

> To develop the system of national law comprehensively and integratedly by means of recognizing and respecting the region and adat law.

Policy Direction point 9 sets:

> ... to promote protection, respect, and enforcement of allaspets of life.

Policy direction in point 2, eventhough has not strictly recognize and treat adat law as the sign of identity of Indonesian national law, but the treatment has contained promise with regard to the position of adat law as the signt of identity of the national law. This expectation strengthen by the direction of legal policy in point 9 which provides special position to the human rights, including the adat community and its law. The policy, in the same degree and range, has reframed in the Law Number 25 of 2000 concerning on National Development Program (abbreviated in Propernas) 2000-2004. However, this policy still contain possibility to exile the adat law in the way that the policy set the national law as an instrument of development for fulfilling the needs of development and economic activities in term of international liberal trade. This policy may easily the national law into the same position and role similar to the position in Soeharto's era.

The policy than certainly actualized in legislation action, such as the issuing of Law Number 39 of 1999 regarding Human Rights and Law Number 32 of 2004 regarding Local Government, and Law Ratified the Declaration of the Rights of Traditional Community. Insertion of the function of law as an agent of development and economic competition has naturaly caused worse policy treatment against adat law. The Law Number 32 of 2004 "brutally" manipulates the position of adat community and replaces them with the desa (administrative). This manipulation has caused in exiling of adat community, including its law, from the national system of development.

All policy treatments over adat law provided by all state legal policies, except at the period of Soekarno, have not showed the existence of consciousness of the government with regard to the position of adat law as the sign of identity of the Indonesian national law. Hence, the appreciation of the Dutch Colonial Government over the adat law as the Indonesian genuine law become interesting in term og this mapping: *firstly*, because of the consciousness has own by non-Indonesian people; *secondly*, the reason adat law accepted as the genuine law of Indonesia by the Ducth Collonial Government was because of the active and consistent role of the legal scientist in struggling for the recovery of the values, identity, status, and image of adat law before the Dutch Collonial Government; *thirdly*, the Government of Dutch Collonial has performed an actual policy treatment over adat las as the genuine law of

Indonesia; *fourth*, legal policy in the period of Soeharto even ignored the position of adat law as the basic sign of identity of the national law of Indonesia; and *fifth*, the recovery of legal policy at the post-Soeharto's era is limited to the give of attention and respect, but has not touched the hart of the problem, the consciousness and the actual policy treatment to the adat law as the sign of identity of the national law of Indonesia.

E. The Map of Legal Policy Treatment Against Adat Law

The above path of the development of Indonesia legal policy over the adat law as the sign of identity of the law of the state of Indonesia may be drawn up as follows:

MAP OF THE DEVELOPMENT OF LEGAL POLICY TREATMENT OVER ADAT LAW IN TERM OF ADAT LAW AS THE SIGN OF IDENTITY OF THE NATIONAL LAW OF INDONESIA

NO	PERIODS	PHASES IN THE PERIOD	AREAS OF LAW	POLICY TREATMENT
1	THE DUTCH COLLONIAL GOVERNMENT (1848-1928)	Pre-1848		Adat law has been ignored. The law has enforced in the life of state is the law of the Ducth.
		1848		The consciousness of the policy of law for enforcing adat law to the Indonesian has rise up. The interest of the Duct Colonial Government remains predominant consideration of policy treatment over adat law. Policy treatment over adat law is a quasi policy treatment.
		The beginning of the twentieth century		The level of adat law has increased adat law got new respectable status: adat law as a science of law. Adat law grows as a scince. The Dutch Colonial Government refused the enforcement of adat law. The Dutch Colonial Government treated the interest of the Dutch Colonial Governement as the predominant consideration for enforcing legal policy over the adat law.
				Legal policy over adat law: a. Adat law was refused; b. The enforcement of adat law was refused; c. The adat law was intentionally breached in order to make the performance of the government easier and to strengthen the authority of the government.
		1920		Legal policy of the Dutch Colonial Government was based on the social situation developed in accordance to the history. Adat law as a law that is in reality grows from the nation of Indonesia. Adat law has got legal policy treatment in its pure and natural sense: to perform the people's interest by means of fulfilling their legal needs.

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NO	PERIODS	PHASES IN THE PERIOD	AREAS OF LAW	POLICY TREATMENT
2	THE PERIOD OF SOEKARNO (1961-1966)		Law unification policy	Adat law has given attention as a part of the reality of life of the society.
			National law restoration	Adat law as the base of the development of national law. The peoples' legal consciousness, including adat community, shall be taken into account in the legal policy of the state.
			Improvement of legislation products law, especially family law and law of heritance	Adat law has to be respected and given attention.
3	THE PERIOD OF SOEHARTO (1966-1998)	GBHN 1973 GBHN 1983 GBHN 1988 GBHN 1998		The policies have not provided legal policy treatment at all over the adat law.
4	POST-PERIOD OF SOEHARTO (1999-NOW)	GBHN 1999-2004		Religion and Adat Law has to be respected and given attention
		PROPERNAS 2000-2004		Religion and Adat Law has to be respected and given attention

The development of legal policy treatment over the adat law as the sign of identity of the Indonesianal law may be marked as follows:

(1) Policy treatment over adat law as the sign of identity of Indonesian national law has been initiated by the Dutch Colonial Government in 1920. The policy may be devided into two kind of policy treatments: (a) legal policy treatment at the beginning of the period that treat adat law more like a law of community, it is the community of adat society, and not a law of a nation of Indonesia; and (b) legal policy treatment over adat law at the second part of the period which treats adat law under the pure concept of legal policy, to perform the interest of the people by means of fulfilling the needs of the people over the law.

(2) Legal policy treatment over the adat law as a sign of identity of Indonesian national law has been initiated in the period of Soekarno. Adat law treated as the identity of Indonesian national law. Hence, adat law posed as the base of the development of Indonesian national law.

(3) The period of 1973 – 1988 (30 years), the period of Soeharto, the state legal policy treatment has firmly ignored the position of adat law as the sign of identity of the national law of Indonesia. The worst situation of this period was that adat law has not only ignored, but suffered seriously. This period has marked by various signs of policy, sych as: ignoring, suffering, and damaging adat law; emeptiness of the legal policy over adat law; and the partial approach in legal policy.

(4) Legal policy treatment over adat law in the period of the post-Soeharto Era mark by unclear legal policy over adat law. The policy has not defined clearly and accurately the position of adat law. Adat law may be treated as the base of national legal development. In fact, was not really so.

It can be generally concluded that legal policy treatment over adat law as the sign of identity of the national law of Indonesia has been in *lag* since the end of the period of 1961-1966. The lag includes: (a) more or less 50 yeas emptiness of legal policy treatment over adat law which equal to emptiness of sign of identity over the national law of Indonesia; (b) the 50 years uncontrollable development of the identity of the national law of Indonesia; (c) the 50 years experience of suffering of adat law performed by the legal policy treatment of the state policy of Indonesia; (d) the 50 years unidentified identity of the law of Indonesia.

VII. DECONSTRUCTION OF LEGAL POLICY: ADAT LAW AS THE SIGN OF IDENTITY OF THE STATE LAW OF INDONESIA

A. Political Commitment for Recovering Identity

National law which losees its particularity in the neoliberalsime world is the source of national fundamental problems of all post-modern states. Identitiless would lead a nation into the following problem: *first*, lose of ideological power of prevention for preventing bad intrusion of bad effect of the work of neoliberalism (neoimperialism); *second*, lose of technical power of trade competition or economic competition in general. Lose of identity means lose of existence, lose of image, lose of trust, lose of position, lose of chance for competing, lose of market, lose of source of life, and finally lose of life. In the welfare state point of view, lose of economic or trade competition colud easily turn into lose of income, which is source in the import tax and income tax of the people, and lose of income would certainly means lose of capacity to perform public services. Lacks of public services performance may trun into social conflict and social conflict is the seed of social destruction.

Those problems need the following way outs:

(1) Deconstruction of *identity conciousness*: the importance of national identity in term of neoliberalism;

(2) Deconstruction of *political commitment of the nation of Indonesia, particularly the governing rezim*: recovering national identity by menas of developing national law with particular attention to its identity;

(3) Deconstruction of *national legal policy*: recovering nation identity through recovey of identity of the national law which shall be performed through a well plan and sustainable law development programs. It shall include deconstruction of vision national development policy of law, from unidentified and unclear vision of identity of the national law to a ceratin, firm, and strong sign of adat law as the main sign of Indonesian national identity;

(4) Deconstruction of national education of law: deconstruction of curriculum, national law and legal policy with strong identity as the base of the curriculum setting and method of transfer of knowledge, recovering the position and the function of the faculty of law as the *center of excellent* for the development of national law, including theories, doctrines, concepts, principles, legislation models with strong particular marks from identity perpective; and

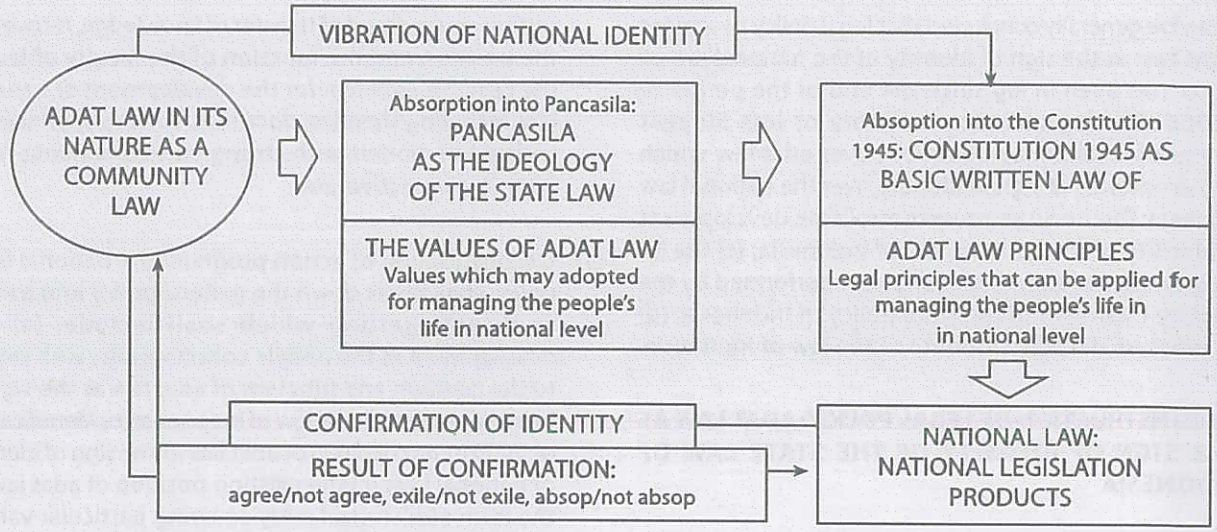
(5) Deconstruction of action program: the national legal policy shall break down the general policy into a more applicable setting which shall include: (a) the development of the people consciousness with regard to the position and function of adat law as the sign of identity of the national law of Indonesia; (b) identification of *the existing condition* of adat law as the sign of identity of national law; (c) the existing position of adat law as the form of historical rality covering particular values, ideas, concepts, and principles of law which may or even shall firmly transfer into national level of regulation; (d) mapping the degree of absorption of adat law into the national legislation products, cetral and local government level; (e) the change of the existing legislation products which has not expressed adat law as the genuine character of Indonesian law, especially of that which might injure (ignore, exile, replace) the the position of adat law as the genuine mark of identity of national law. It shall be started from the recovery of the identity of the Constitution 1945 as the base of the law development recovery. The shape of law will certainly depend on the base and structure of its legal system.

B. Strengthening of Identity : The Proper Legal Policy Treatment Over the Adat Law

The fluctuative path of law policy treatment over adat law causes unclear position and function of adat law as the sign of identity of the national law. It indicates needs of a new legal policy treatment over adat law, the proper and the proportional legal policy, in order to recover the identity of the Indonesian national law. Adat law shall bring back to its natural position as *the fundamental of*) the state law, as the base of the development of the state law. National law, as a base, shall deem recognize and accept adat law as his natural mother, as the rality of ideology of Indonesia state which have been respected, accepted, and kept for centuries as the landmark of law of the life of Indonesian societies. The landmark is now absopted into the five elemen of philosophy of law which totally expressed in the formulation of Pancasila, the Indonesian ideology of law (*rechtsidee*), and the Constitution 1945 (the original version) as the *written basic law* of the state.

All legislation products, both the cetral and local government level, supposed relay on and in conformity with the values and the basic law.

The transformation process and form of the adat law into Pancasila and the Constituion 1945 (genuine version) may be expressed as follows:



The construction covers, at least, 6 components: ADAT LAW AS COMMUNITY LAW (component 1) which than transform and absorp into the PANCASILA (component 2) and the CONSTITUTION 0F 1945 (component 3) and tansformed further to the NATIONAL LEGISLATION PRODUCTS (component 4). The national legislation products shall relay on and in conformity with ADAT LAW INFORM OF VALUES AND PRINCIPLES (component 5). The result of the confirmation will affect the VIBRATION OF NATIONAL IDENTITY (component 6) which may trace back in the legislation products.

The construction expressed that there are at least three main problems existed with regard to the national legal policy of Indonesia in line with the position of adat law as the sign of identity of Indonesian national law:

(1) The emptiness of identification of the values of adat law which may adopted as technical or ideological instrumental for governing the life of the nation and state in the national level;
(2) The emptiness of identification of adat law legal principles which may adopted as a set of base for governing the life of the nation and state in national level;
(3) The unavilabelity of set of values and principles as an indicator for examining the level of confirmation of each legislation product (agree or not agree, absorop or not absorp, exile or not exile) to adat law as a sign of identity of Indonesian national law.

Those problems set needs and solutions in the form of:

(1) Needs and program of identification of values of adat law which may adopted as source of law applicable for governing the life of the people in the national level;
(2) Needs and programs od identification of legal principles of adat law which may adoped as base for governing the life of the people in the national level;
(3) Needs and programs for setting legal values and principles adopted from the reality of adat law which may be used as a set of indicator for examining the confirmation of legislation products with adat law.

VIII. CONCLUSION

(1) Legal policy treatment can be qualified into 4 groups: the period of Dutch Government (1848-1928), the period of Soekarno (1961-1966), the period of Soeharto (1966-1996), and the post-period of Pasca-Soeharto (1996-recently).
(2) Legal policy treatment over adat law as the sign of identity of Indonesian national law initiated in 1920 by the Dutch Colonial Government. Adat law in this period treated a law of community, not the sign of identity of Indonesian national law.
(3) Legal policy treatment over adat law as the sign of identity of Indonesian national law started in the priod of Soekarno. In this period adat law has treated as the BASE of national legal development.
(4) Legal policy in the period of Soeharto firmly ignored the position of adat law. Adat law in this period even more than ignored. It has suffered by the legislation policy which truned legislation products into instrument of social change. This situation runs for 30 years (1973 – 1988).
(5) Legal policy treatment since 1999 unclearly defines the position of adat law.
(6) Legal policy treatment with regard to adat law over the whole period, from functionalism and ontologism point of view, has emerged crisis of identity over the national law of Indonesia. This crisis is a fundamental problem in term of neoliberalism as neoliberalism work through the scheme of universality which has caused blard in the life of the World.
(7) *The existing* problem of the national legal policy over adat law covers: (a) the emptiness of identification of the values of adat law which may adopted as technical or ideological instrumental for governing the life of the nation and state in the national level; (b) the emptiness of identification of adat law legal principles which may

adopted as a set of base for governing the life of the nation and state in national level; (c) the unavilabelity of set of values and principles as an indicator for examining the level of confirmation of each legislation product (agree or not agree, absorop or not absorp, exile or not exile) to adat law as a sign of identity of Indonesian national law.

(8) The existing problem of national legal policy over adat law emerges needs and programs for solving the problems. It covers: (a) needs and program of identification of values of adat law which may adopted as source of law applicable for governing the life of the people in the national level; (b) needs and programs od identification of legal principles of adat law which may adoped as base for governing the life of the people in the national level; (c) needs and programs for setting legal values and principles adopted from the reality of adat law which may be used as a set of indicator for examining the confirmation of legislation products with adat law.

REFERENCE

BOOK, JOURNAL, INTERNET

Brownlie, Ian, *Basic Documents in International Law*, Third Edition, Clarendon Press, Oxford, 1983.

Cambridge International Dictionary of English, Cambridge University Press, 1995.

Center for International Development at Harvard University, *Washington Consensus*, Global Trade Negotiation (GTN) Homepage, April 2003.

Chen, Lung-chu An *Introduction to Contemporary International Law A Policy-Oriented Perspective*, Yale University Press, New York, 1989.

Djojodiguno, *Azas-azas Hukum Adat*, Jajasan Badan Penerbit Gdjah Mada, Jogjakarta, 1964.

Expert Group on Environmental Law of the World Commission on Environment and Development, *Environmental Protection and Sustainable Development: Legal Principles and Recommendations*, Graham & Trotman Nijhoff, Norwell, USA, 1987.

Harris, *Case and Materials on International Law*, Third Edition, Sweet & Maxwell, London, 1983.

Hartono, Sunaryati, *In Search of New Legal Principles*, Binacipta, Bandung, 1982.

Hawton, Hector *Philosophy for Pleasure: An Adventure In Ideas*, Fawcett World Library, New York, 1956.

Herb, Guntram H. and David H. Kaplan, *Nested Identities: Nationalism, Territory*, and Scale, Rowman & Littlefield Publishers, INC, Maryland, 1999.

Hoecke, Mark Van dan Franqois Ost, *Legal doctrine in crisis: toward a European legal Science*, in Legal Studies.

Hooykass, C., *Cosmogony and Creation in Balinese Tradition*, The Hague, Martinus Nijhoff, 1974.

Ife, Jim dan Frank Tesoriero, *Community Development*, Pustaka Pelajar, Yogyakarta, 2008.

Kusumaatmadja, Mochtar, *Pembinaan Hukum Dalam Rangka Pembangunan Hukum Nasional*, Binacipta, 1986.

Kusumaatmadja, Mochtar, *Fungsi dan Perkembangan Hukum dalam Pembangunan Nasional*, Binacipta, 1986.

Miller, David, *On Nationality*, Oxford University Press, Oxford, 1999.

Myres S, McDougal and W. Muchael Reisman, *International Law In Policy-Oriented Perspective*, dalam R. St. J. Macdonald Douglas M. Johnston, *The Structure and Process of International Law: Essay in Legal Philosophy Doctrine and Theory*, Martinus Nijhoff Publishers, The Hague, 1983.

Nurjaya, I Nyoman, *Pengelolaan Sumber Daya Alam*, Prestasi Pustaka, Jakarta, 2008.

Pudja, G dan Tjokorda Rai Sudharta, *Manawa Dharmacastra*, Departemen Agama RI, 1978.

Putra, Ida Bagus Wyasa, *Rights to Development of the Peoples of Republic of Indonesia: Constructive legal concept for solving ideological tension*, Working Paper on Short Course Program on International Development Law, Master of Law Program, Maastricht University, April to June 2009.

Putra, Ida Bagus Wyasa, *Deklarasi Hak Azasi Manusia*, Biro Hukum dan Hak Azasi Manusia, Setda Provinsi Bali, 2009.

Seshamani, Venkates, *Trade, Development and poverty: a Millennium Development Goals (MDG) Perspective*, University of Zambia.

Soekarno, *Filsafat Pancasila Menurut Bung Karno*, Media Pressindo, Yogyakarta, 2006.

Supomo dan Djokosutono, *Sejarah Politik Hukum Adat 1848-1928*, Djambatan, 1954.

Truman, Harry S., *Inaugural Address*, January 20, 1949, Library & Museum, ., place, time and date of access: Maastricht, Netherlands, 16:00 a.m., May 18, 2009.

United Nations, *The Millennium Develppment Goals Report*, 2008.

Vincent, Andrew *Nationalism and Particularity*, Cambridge University Press, Craft Print, Singapore, 2002.

Williamson, John, *A Short History of the Washington Consensus*, Senior Fellow, Institute for International Economics, Paper commissioned by Fundación CIDOB for a conference "From the Washington Consensus towards a new Global Governance," Barcelona, September 24–25, 2004.

LEGAL MATERIALS

Ketetapan MPR RI Nomor: IV/MPR/1973, Garis-Garis Besar Haluan Negara.

Ketetapan MPR Nomor II/MPR/1983, Garis-Garis Besar Haluan Negara.

Ketetapan MPR Nomor II/MPR/1988, Garis-Garis Besar Haluan Negara.

Ketetapan MPR RI Nomor X/MPR/1998 (Pokok-Pokok Reformasi Pembangunan Dalam Rangka Penyelamatan dan Normalisasi Kehidupan Nasional Sebagai Haluan Negara).

UNGA/RES/S-6/3201, 1974.

UNGA Resolution 41/128 of 4 December 1986.

UNGA Resolution A/55/L.2, 2000.