

The Existence Of Customary Law In The Legal System In Indonesia

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Abstract

Customary law is a law that reflects the character of Indonesia, so it is claimed to be the original Indonesian law. As an unwritten law, the existence of customary law is currently questionable. Customary law is considered a conservative, rigid, and primitive law when compared to the development of modern society. Some people argue that customary law is incapable of solving problems in this era of globalization. In fact, traditional law has become a fundamental principle for legalizing contemporary law. For example, customary law inspired the birth of the law. No. 5 of 1960 concerning basic agrarian regulations and laws. No. 1 of 1974 concerning marriage. The relevance of customary law to current law is supported by the existence of a law. No. 4 of 2004 concerning judicial power, this opens up opportunities for judges to adjudicate and decide a case based on customary law.

Keywords: customary law, custom, agrarian law, and marital property.

INTRODUCTION

Ever since man was born into the world, he has been engaged in interaction with others in a container called society. At first, the relationship was limited to parents, but as time went on, the relationship expanded. With the development of relationships between people, society began to form guidelines or rules that govern life together. The guidelines that govern people's lives vary, encompassing various rules and values. Legal norms are one of the important norms in addition to religious, ethical, and moral norms. The legal norms that exist in society also vary, including written legal norms and unwritten legal norms. Every society around the world has a legal system that applies in its territory. Each nation has its own national legal system. The national legal system of a nation reflects the culture of that nation. Law is the result of the nation's intellect and legal awareness, so it reflects the cultural characteristics of the nation.¹ In Indonesia, customary law is one of the representations of the characteristics of the nation that develops from generation to generation. Each region has its own customs, which, although different, still have similarities in their Indonesianness. This is reflected in the concept of *Bhinneka Tunggal Ika*, which describes the diversity but unity of the nation. Customary law continues to evolve along with the evolution of society and is closely related to folk traditions. Thus, customary law becomes the guardian of moral values in society, which are widely recognized as true by the local community.

Customs have existed since ancient times, before the entry of Hinduism into Indonesia. At that time, the prevailing customs were Malay-Polynesian customs. However, over time, influences from Islamic and Christian cultures also began to influence the original culture. The cultural

¹ Anto Sumarman, *Customary Law Present and Future Perspectives*, (Yogyakarta: Adi Cita Karya Nusa, 2003), p. 1.

influence of the two religions is so great that finally the original culture that has long governed the lives of the Indonesian people has been shifted, and the prevailing customs are the result of acculturation between the original customs and the customs introduced by Hinduism, Islam, and Christianity. Therefore, in the development of customary law in society, the influence of the three religions is very significant.² Customary law is the result of the collective consciousness of the community, which reflects the values and cultural wisdom of a nation. In the process of legal development and formulation, the question often arises as to whether to make use of customary law principles, which are an integral part of the local legal tradition, or to choose to use foreign or foreign laws.

Some scholars question the ability of customary law as the basis or foundation of national law. This view is based on the notion that customary law is considered archaic or even primitive, which may only be relevant for more remote or isolated societies. This argument implies that customary law may no longer be suitable for more civilized societies, especially in the current era of globalization where borders between countries are increasingly blurred.³ In the university environment, both in the faculty of law and in the sharia department, until now customary law remains one of the courses that must be taken. However, there are often views from lecturers and students that customary law is not worthy of being classified as a law, but is only considered as a 'custom'. This phenomenon is supported by a lack of interest in the study of customary law today. Customary law is often considered archaic and irrelevant for further study. This lack of interest is reflected in the lack of research on customary law in Indonesia, as well as the limited number of related literature books that have generally been published for a long time and have only experienced renewal of the year of publication. This situation indicates that the future of customary law development may be increasingly bleak, with the possibility of its declining interest among the academic community. Therefore, it is important to revive interest in customary law and improve understanding of it.

METHOD

Qualitative research methods are suitable approaches to explore and understand complex phenomena such as the existence of customary law in the Indonesian legal system. Here is a brief explanation of the relevant qualitative research methods for your research title: Qualitative research methods focus on an in-depth understanding of the social, cultural, and historical context of a phenomenon. In the context of your research on the existence of customary law, this method will allow you to:

² Factors that affect customary law include: magi and animism, higher powers than alliances, relations with people and foreign powers, and the most influential is religion, especially Islam. The biggest influence is in marriage law, so that Islamic marriage law has become its own marriage law (there has been a legal reception). Even in Java and Madura the reception is unanimous, so that the new marriage is considered valid, if the marriage contract is carried out in accordance with the provisions of Islamic marriage law.

1. **Collecting Descriptive Data:** By conducting in-depth interviews with customary law stakeholders, community leaders, and legal experts, you can uncover their views on how customary law interacts with national legal systems.
2. **Qualitative Analysis:** Using analytical techniques such as content analysis, narrative analysis, or grounded theory analysis to identify patterns, themes, and meanings in customary law-related statements and practices.
3. **Cultural and Social Context:** Understanding how customary law is applied in local contexts and how it interacts with national and international legal norms.
4. **Comprehensive Understanding:** Gain an in-depth understanding of how the existence of customary law affects the lives of local communities as well as its implications for national legal policies.

RESULTS AND DISCUSSION

The Concept of Customary Law according to Scholars

As with other laws, customary law initially also recognizes the field, namely: customary state law, customary criminal law (customary delik adat), law between indigenous peoples and customary civil law. The laws of customary states and laws between indigenous peoples have ceased to apply, namely since the Indonesian nation experienced colonialism and moreover, since the Indonesian state became independent, with the concept of one nation and one state. Meanwhile, in the field of customary crimes, most of them are displaced by the enactment of the Criminal Code (KUHP) with the principle of legality, which states that there is no crime, if there is no written regulation that regulates it first. Meanwhile, the customary material civil law that exists to this day includes in the fields of inheritance, marriage, and kinship. Customary law is a term that was used by legal scholars to refer to a set of guidelines, norms, and realities that govern the lives of Indonesian people. At that time, scientists saw that Indonesian people, especially those living in remote areas, lived in an orderly and disciplined manner by following their own rules.⁴ The term "customary law" comes from the Dutch language, namely "Adat Recht". Initially, this term was found in the book "De Atjehers (Acehnese People)" written by Snouck Hurgronje in 1893. Later, the term was adopted by Van Vollenhoven, a researcher who was very active in the field of customary law at that time. Until now, the term "customary law" is still used as a technical term in the field of law. Currently, customary law is still developing, and it is undeniable that there are various different opinions in understanding and defining customary law, both from the perspective of Western and Indonesian scholars.

According to Van Vollenhoven, customary law is a law that does not originate from regulations issued by the Dutch East Indies government or other instruments of power established by the government, and applies to indigenous peoples and foreign Orientals. Furthermore, he stated that the difference between customary law and customary law lies in the existence of sanction elements. Therefore, not all customs can be categorized as customary law. Only customary laws that have sanctions can be considered as customary law. Van Vollenhoven's opinion received responses from other scholars of customary law, especially related to the use of sanctions as a

⁴ M. Koesnoe, *Notes on Customary Law Today* (Surabaya: Airlangga University Press, 1979), p. 122.

distinguishing criterion between customary and customary law. In the Western legal system, sanctions are considered the main feature of the law, so if sanctions are used as the only feature to distinguish between customary terms and customary law, it seems appropriate. However, the question arises whether the sanctions criteria are appropriate to understand the essence of customary law as a whole¹¹

Sanctions or punishments are not considered an urgent priority. In customary law, punishment aims to restore the balance that is disturbed due to a violation committed by a person in society. If the correction of the violation of the law has restored the balance to the original, then the problem is considered to have been resolved. Corrective action against law violators is not always given by law officers, because the community can also carry out corrections themselves, as in the example of running away girls in the Dayak tribe. Such an act is considered an insult to the sanctity of the community concerned and violates the honor of the family. Therefore, to restore the balance of the law, two actions are needed, namely the payment of fines to the family and the handing over of a sacrificial animal to the head of the fellowship to be used as a traditional banquet, so that the community is clean and holy again.

Ter Haar argued that customary law includes all regulations that are applied in decisions that have authority and are considered binding in the process of their birth. This view is known as decision theory (*beslissingenleer*). Thus, customary law is born and maintained by decisions taken by members of the legal community. This includes decisions from legal functionaries, not only from judges, but also from customary heads, village meetings, land guardians, and other village officials. These decisions include not only official disputes, but also decisions based on the prevailing values of life in the community.⁵ Ter Haar emphasized the importance of decisions in customary law because according to him, "law" is the result of decisions taken by community officials who are authorized to establish them. Thus, Ter Haar seeks to provide a theoretical basis for when and how customary law emerges. His opinion was influenced by John Chipman Gray's theory that "all laws are laws made by judges." However, Logemann disagrees with Ter Haar. According to Logemann, the law does not always depend on decisions, and he does not agree that customary will become customary law simply because it is decided by a judge.⁶

The decision-oriented approach as a measure for identifying customary law, as explained by Ter Haar, has certain consequences in the effort to understand customary law. According to this theory, to understand customary law, it is necessary to collect decisions from legal officials that have been determined. This step is important to draw general conclusions from the decision, so that the legal issues implied in it can be understood.

Indonesian scholars in defining customary law have undergone developments, especially with the awareness of the existence of independent customary law, encouraging them to conduct research to formulate a new definition of customary law. One of the views put forward by Supomo is that customary law is an unwritten law in a legislative regulation (unstatutory law), encompassing rules of life that, although not established by the authorities, are respected and supported by the community with the belief that these rules have legal force. This opinion is reinforced by Sukanto,

⁵ Surojo Wignjodipuro, *Introduction*, p.19.

⁶ Hadikusuma, *Introduction to Customary Law*, p. 15 ¹⁵ Wignjodipuro, *Introduction*, p.14.

who states that customary law is a collection of customary rules that are mostly unwritten, uncodified, binding, witnessed, and have legal consequences. From these two views, it can be concluded that customary law is a law that is not documented in social life and the field of state law.

Another opinion was conveyed by Hazairin, who showed that there is a connection between law and morality. For him, in a perfect legal system, there is no place for things that are not in line with or contrary to morality. Hazairin argued that the term "customary law" is not necessary for the general public who understands that "custom" refers to manners or as a form of law. For Hazairin, adat is the embodiment of morality in society, namely that moral norms are widely recognized in society. Hazairin sees customary law as a law, both in the context of manners and as a formal law. Thus, Hazairin does not distinguish between customary and customary law, nor does he separate the law (written) from morality (customs, customs).

Legal Basis for the Enforcement of Customary Law in Indonesia

To explain why customary law applies in Indonesia, it is important to understand its juridical foundations from colonial times to the present day. During the Dutch colonial period, the first relevant legal basis was article 75 of the new Regerings Reglement (new R.R.), which came into force on January 1, 1920. The article stipulates that European Law shall apply to European groups and Customary Law to Native Indonesians, who are recognized voluntarily to be subject to European Law. In civil affairs for other groups, such as Indonesians, Customary Law applies on the condition that it does not conflict with the principles of justice that are generally recognized. However, if the Customary Law does not cover a problem or is contrary to the principles of justice, then the judge is obliged to use the general principles of European Civil Law as a guideline. Article 75 of the RR is reinforced by article 130 of the IS which gives freedom to regions to adhere to their own laws.⁷

After Indonesia became independent on August 17, 1945, the 1945 Constitution was stipulated the next day, August 18, 1945. The legal basis for the enactment of customary law after Indonesia's independence is regulated in Article II of the Transitional Rules of the 1945 Constitution. The article states that all existing state institutions and regulations will remain in force, unless a new one has been declared in accordance with the provisions of the new Constitution.

In the early days of independence, the idea of realizing national law emerged by appointing customary law, or people's law, as national law.⁸ The majority of the pioneers of the idea were the elders, reflecting the view voiced by the nationalists of previous generations that customary law should be adopted as a modern national law.⁹ In the 1945 Constitution, it does not expressly state the applicability of customary law in Indonesia. However, the difference can be seen when compared to the Constitution of the Republic of Indonesia, where there are articles that are constitutionally the basis for the application of customary law. For example, Article 146 paragraph (1) of the RIS Constitution emphasizes that court decisions must contain reasons, and in criminal

⁷ Ibid., p.55.

⁸ Soetandyo Wignjosebroto, *From Colonial Law to National Law* (Jakarta: RajaGrafindo Persada, 1995), p. 240.

⁹ R. Soepomo, *Chapters on Customary Law* (Jakarta: Pradya Paramita, 2000), p. 3.

cases, must refer to the rules of law and customary law on which the punishment is based. This provision was then repeated in Article 104 (1) of the Provisional Constitution of 1950. Nowadays the legal configuration has changed and customary law is an organic part of the law of the state.¹⁰ Law Number 4 of 2004 concerning Judicial Power stipulates in article 25 paragraph (1) that every court decision must include its reasons and legal basis, and must include certain articles of relevant laws and regulations or unwritten legal sources that are the basis in the court. This article is reinforced by Article 28, which affirms that judges have the obligation to research, follow, and understand the values of law and the sense of justice that live in society.

From these two articles, it can be implicitly concluded that customary law can be used as a basis by judges in adjudicating and deciding cases in court. Article 25 paragraph (1) which mentions the source of unwritten law can be interpreted as the inclusion of customary law. Likewise, Article 28 emphasizes the understanding of legal values and a sense of justice in society, one of which is customary law, considering that customary law is a product that grows and develops in society. The two articles give the authority to judges to decide cases by referring to customary law.

Customary Law and Agrarian Law

One of the implementations of the idea of using customary law as the basis of National Law is reflected in Law Number 5 of 1960 concerning the Basic Law on Agrarian Affairs, or often referred to as the UUPA. In article 5 of the Law, it is explained that the agrarian law that applies to the earth, water, and space, recognizes the application of customary law as long as it does not conflict with the national and state interests, which is based on the unity of the nation, with Indonesian socialism, as well as with the regulations contained in this Law and other laws and regulations. All of this must take into account the elements that rely on religious law. In the context of the concept or definition of customary law, the drafters of the UUPA describe customary law as "original law" that is in accordance with the legal awareness of the wider community. However, the UUPA does not provide a specific explanation regarding the type of customary law that will be used as a basis, considering that each region in Indonesia has its own customs. Based on Article 5 of the UUPA, agrarian law regarding land is based on customary law. This means that all legal problems related to land must be resolved in accordance with the provisions of customary law. However, not all aspects of customary land law are directly used as a basis, only those that are in accordance with national and state interests are accepted. Before being used as the basis for the UUPA, the customary law of land must be adjusted to the needs of modern countries and international standards. Therefore, the customary law that is the basis of the national agrarian law has gone through a process of improvement (*sanering*), which includes cleaning and adjustment so that it can apply throughout Indonesia.¹¹

The drafting of national agrarian law based on customary law faces challenges due to the plurality of customary law, where each indigenous community has different customary laws, which of course have differences between them. To overcome this, efforts are made to identify similarities by formulating the basic principles or concepts of the legal institution or its legal system. These

¹⁰ Satjipto Raharjo, Customary Law in the Unitary State of the Republic of Indonesia, in *Inventory and Protection of the Rights of Indigenous Peoples* (Jakarta: National Commission on Human Rights, 2005), p. 47.

¹¹ Urip Santoso, *Agrarian Law and Land Rights* (Jakarta: Prenada Media, 2006), p. 69

principles are then taken from customary law to become the main foundation in the formation of national agrarian law, so that national agrarian law can have a simpler structure and provide legal certainty.

Customary Law and Marital Property Law

Article 1 in Law Number 1 of 1974 concerning Marriage states that marriage is a bond between a man and a woman as husband and wife with the intention of forming a happy and lasting family based on religious teachings. One of the important factors for achieving such happiness is having enough worldly wealth to meet the needs of living together, which is often referred to as "marital property". This shows the importance of the financial aspect in maintaining family stability and harmony.

One of the elements of the original customary law regulated in the Marriage Law is the regulation of marital property. In the tradition of customary law, marital property is often divided into two main categories, namely the original property and joint property.¹² The regulation of marital property according to customary law is described in Article 35 of the Marriage Law, which states that all property obtained during marriage is considered joint property. This affirmation is reinforced by Article 37, which explains that if the marriage ends due to divorce, the division of joint property will be regulated in accordance with the legal provisions applicable to each party. Therefore, in practice, the determination of the division of property refers to customary law on marital property.

According to customary law in Indonesia, in the event of a divorce, the joint property is generally divided between husband and wife, who generally each receive half of the share. However, in some regions there are different customs, for example in the Central Java area it is known as *the principle of sagendong sapikul*, which means that the husband gets two-thirds and the wife gets one-third. On the island of Bali, it is known as the principle *of sasuhun sarembat*, which divides common property as applied in the Central Java area.¹³ After the Second World War, developments showed that the above custom of *sagendong sapikul* and *sasuhun sarembat* gradually became unenforceable, with the growing awareness of equal rights between women and men, as the Supreme Court decision No. 387 K/Sip./1958, dated February 25, 1959, which stated that in Central Java, a widow received half of the gono-gini property.¹⁴ This change is proof that customary law is dynamic, so that when the state of a society changes, there will also be changes to its customary law.

The Concept of Customary Law towards the Development of National Law

Customary law, as an integral part of Indonesia's original law, has always been rooted in the cultural essence of the Indonesian society in which it applies, as it grows and develops together with the local culture. Customary law is a reflection of the character, soul, and social structure of the community or nation. This thinking is in line with Von Savigny's view that the evolution of

¹² Joint property is property obtained during marriage, regardless of who obtains the property, while what is referred to as origin/inherited property is property obtained before marriage, which later both husband and wife can act fully to carry out legal acts regarding their property.

¹³ Wignjodipuro, *Introduction*, p.158.

¹⁴ Ibid.

customs is part of the substance of law, and the substance of law is influenced by the course of the history of the society in which the law applies.

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Since Indonesia's independence on August 17, 1945, the Indonesian nation has become an independent and autonomous entity in the political, economic, social, and cultural fields. With the passage of the 1945 Constitution, Indonesia has a new legal foundation that reflects the characteristics of the nation. This is reflected in the Decree of the People's Consultative Assembly No. II/MPRS/1960, which emphasizes that the development of national law must pay attention to legal uniformity by taking into account the social reality that exists in society, and must be in line with the direction of the state and based on customary law that does not hinder the progress of society.

In a seminar on National Customary Law held on January 15-17, 1975 by Gadjah Mada University and the National Law Advisory Board, customary law was explained as "the original Indonesian law that is not regulated in the form of legislation of the Republic of Indonesia, but contains religious elements in several places." In the seminar, the concept of customary law in the context of legal development in Indonesia was formulated, including: First, the use of customary law principles and principles to formulate legal norms that meet the needs of the community; second, modernization and adjustment of customary law institutions to the conditions of the times; Third, the integration of the concept and principles of customary law into new legal institutions.

Some argue that customary law has undergone a need for its enforcement in this modern era, and this view has a strong basis. This is supported by the fact that Indonesia applies the Continental European legal system. In this system, written law or legislation has a more dominant role in the administration of the state and the regulation of society compared to unwritten law. In this context, customary law is considered as a complement only. As a result, if there is a conflict between the provisions stipulated in the legislation and customary law, then officially, the written law prevails. This Continental European system prioritizes formally written laws.

Keep in mind that in practice, written law does not always reflect developments that occur in society. Sometimes, the rules listed in written law are not able to deal with the problems that arise and do not fully accommodate the needs of justice in society. In a situation like this, there is a gap between written law and practice that lives in society. In this kind of case, unwritten law or customary law becomes relevant to solve the problem. The mandate contained in Law Number 4 of 2004 provides flexibility to judges to understand, explore, and follow the legal values that exist in society. This shows that customary law still has an important role in resolving problems that cannot be overcome by written law.

Therefore, the role of customary law is still very important today, especially in the process of forming national laws in the future, especially in the field of family law. Customary law will be one of the main sources in the formation of written law, so that the written regulations automatically reflect the values and legal practices that exist in society. It is hoped that when these written rules

¹⁵ Von Savigny taught that the law follows *the volksgeist* (soul/spirit of the people) of the society in which the law applies. Because the *volksgeists* of each society are different, so are the laws of society. This legal teaching recognizes the existence of laws arising from society, when compared to written laws. The main reason underlying this is because written law does not always reflect the law that lives in society. Von Savigny's teachings are a reflection of the enactment of customary law in Indonesia.

are implemented, there will be no gap between the written law and the practice that occurs in society, known as law in action.

CONCLUSION

Customary law, as part of non-statutory law, will naturally continue to develop and take root in society. As a traditional and original heritage of Indonesia, customary law is often considered a primitive form of law, so there are doubts about its relevance and use in the modern era as it is now. Doubters often point out that customary law is unwritten, so it is considered less able to provide legal certainty when compared to written law. In addition, during the period of legal unification, it was difficult to match or choose customary law as a guideline, because each region in Indonesia had different variations of customary law.

Meanwhile, other parties still recognize the crucial existence of customary law in today's modern context. The public realizes that written laws in the form of laws are not always able to follow the evolution of society perfectly. When such a gap occurs, the role of customary law becomes very important, given its dynamic and adaptive nature. In addition, customary law, as a form of law that grows and develops from the community itself, is the main source in the preparation and formulation of rules in legislation.

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