

# Characteristics of Customary Law and Its Characteristics

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## ***Abstract***

*In today's sophisticated era, sometimes we forget the background of the birth of laws that are known in the social life environment in Indonesia and other Asian countries such as Japan as countries that are almost the same in their ideological order, namely the existence of sources where unwritten legal regulations grow and develop and are maintained with the existence of customs that are embraced by the community as a reference and guideline in stepping. The purpose of this study is to understand the term and application of customary law and customs in society as a social and familial implementation in society. Especially the Indonesian people, which are still very strong to this day, have even become guidelines that cannot be separated from the applicable law.*

**Keywords;** Customary Law, Its Characteristics, Social

## **A. Introduction**

Customary law is a legal system known in social life in Indonesia and several other Asian countries such as Japan, India, and China. Customary law is the original Indonesian law that is sourced from unwritten legal rules that grow, develop, and are maintained by the community. Because these rules are unwritten and constantly evolving, customary law has the ability to adapt and is flexible. In addition, there are also customary law communities, which are a group of people who are bound by their customary law order as members of a legal alliance, either because of the same place of residence or on the basis of descent. There are two views on the origin of the word "custom". Some state that the word "adat" comes from the Arabic language which means custom. However, according to Amura, the term "adat" comes from the Sanskrit language because this term has been used by the Minangkabau people about 2000 years ago. According to him, "adat" comes from two words, namely "a" which means no and "dato" which means something material. The debate over the term customary law was first raised by Snouck Hurgronje, an Eastern literary scholar from the Netherlands. Before the term customary law developed, the known term was customary recht. In his book "De Atjehers" (Aceh) published in 1893-1894, Snouck Hurgronje stated that the uncoded Indonesian people's law was called de atjehers. This term was later used by Mr. Cornelis van Vollenhoven, a scholar of literature and law who also served as a professor at Leiden University, the Netherlands. He included the term recht in his book "Adat Recht van Nederlandsch Indie" (Dutch East Indies Customary Law) published between 1901 and 1933. In 1929, legislation in the Dutch East Indies officially used this term in the Indische Staatsregeling (Dutch State Law Regulation), a kind of Constitution of the Dutch East Indies, in article 134 paragraph (2).

At first, the Indonesian people were not very familiar with the term adat. According to Hilman Hadikusuma, this term is actually just a technical term developed by legal experts to study the law that applies in Indonesian society and then made into a scientific system. In

English, this term is known as "customary law". However, in Indonesia itself, what is more commonly known is the term "custom" to refer to the legal system which in an academic context is called customary law. Mohammad Koesnoe, in his book, stated that the term customary law had been used by an Acehese scholar named Sheikh Jalaluddin bin Sheikh Muhammad Kamaluddin Tursani in 1630. A. Hasymi added that the book by Sheikh Jalaluddin has a high value in the field of good law<sup>4</sup>.

Customary law is a collection of customary norms and rules that apply in a region. The term "custom" comes from the Dutch "gewoonte," while the term "adat" comes from the Arabic "adah," which also means custom. So, the two terms have the same literal meaning, namely habits. However, in the study of law, customs and customs have differences. This difference can be seen from its use in human behavior or actions as well as from the history of the use of the term in law in Indonesia.

As human behavior, the term "ordinary" refers to what consistently or routinely happens, becoming the norm. Customs, in this context, describe what is considered prevalent in a society. Adat can also be defined as a custom that is accepted and carried out by the community collectively. The history of legislation in Indonesia distinguishes the use of the terms "customs" and "customs", by referring to customs that are outside the law and customs that are recognized by the law. This resulted in the emergence of the term customary/customary law, which refers to unwritten law and written law. In the Netherlands, there is no distinction between the terms "customs" and "customs"; Both are considered part of the law, so they are referred to as customary law (*gewoonterecht*) which is different from legal law (*wettenrecht*).<sup>5</sup>

The term "customary law" itself comes from a combination of the Arabic terms "huk'm" and "adah". The word "huk'm" in its plural form is "ahakam", which refers to an order or order, while the word "adah" means habit. Thus, customary law can be interpreted as a customary rule. In Indonesia, customary law is interpreted as the original Indonesian law that is not written in the form of legislation of the Republic of Indonesia and contains religious elements. The terms "custom" and "customary law" are often equated in providing understanding, even though they are different institutions. Adat is often seen as a tradition that tends to be local, sometimes considered outdated, or not in harmony with religious teachings, and so on. This is understandable because custom is generally a rule that is not enforced by physical sanctions in society, except in the case of customary sins related to taboos or prohibitions to be done (taboo and qualification). Moreover, terms such as "cultural customs" and "customary customs" also complicate the understanding of the concept of customs.

According to the Great Dictionary of the Indonesian Language, custom is a rule or act that has been commonly done since ancient times, a way or behavior that has become a habit. The term "custom" is absorbed into the Indonesian language as "custom", so the term "customary law" can be considered equivalent to "customary law". However, according to Van Dijk, it is not appropriate if customary law is interpreted as customary law. For him, customary law is a complex of legal regulations that arise because of the length of time people take a certain action in a certain way, so that a regulation that is accepted and desired by the community emerges. So, according to Van Dijk, customary law and customary law have differences<sup>6</sup>. According to Soejono Soekanto, customary law is essentially customary law, but this custom has legal consequences (*das sein das sollen*). In contrast to conventional customs,

customs that are the application of customary law are actions that are carried out repeatedly in the same format, with the aim of achieving *Rechtsvaardige Ordening Der Samenleving* (just social order). According to Ter Haar, known for his theory of *beslissingenleer* (decision theory), customary law encompasses all regulations that arise from the decisions of legal officials who have authority and influence, and are applied and obeyed wholeheartedly by the parties affected by the decisions. The decision can arise from disputes, but can also be reached through deliberation and agreement. In his work, Ter Haar also stated that customary law can come from the collective decision of community members.<sup>7</sup>

Sheikh Jalaluddin explained that customary law is a link between the past and the present, which is seen from the existence or absence of an action that is carried out repeatedly. According to him, customary law does not lie in the event itself, but in what is not written behind the event, namely the provisions that regulate the necessity behind the facts that connect one event to another. Ter Haar presents two formulations that show a change in his view of what is meant by customary law

*First*, customary law arises and is maintained through community decisions, especially decisions taken by authoritative figures such as the head of the people or the customary head, which helps in the implementation of the law. In the case of a conflict of interest, the decisions of the judges in charge of resolving the dispute are also part of this process. As long as these decisions are not based on arbitrariness and are in line with the legal beliefs of the community, and in accordance with the collective consciousness, then these decisions will be accepted, recognized, or at least tolerated. *Second*, the applicable customary law can only be known and observed through decisions taken by legal functionaries, whose powers are not limited to only two powers, namely the executive and the judiciary. These decisions are not only related to formal dispute resolution, but also include a process of deliberation and harmony beyond that. These decisions are made based on values that live in accordance with the spiritual needs and common life of the members of the community<sup>8</sup>.

Customary Law is a manifestation of cultural ideas consisting of cultural values, norms, laws, and rules that are interrelated to form a system that has very strong real sanctions. According to Mr. B. Terhaar Bzn, customary law includes all regulations that are embodied in the decisions of the customary heads, and are applied spontaneously in society. Terhaar is known for his theory of decision, which means that to determine whether a custom or custom has become part of customary law, it is necessary to look at the attitude of the ruler of the community towards the violator of the customary or customary law. If the ruler gives punishment to the violator, then the custom or custom is considered part of customary law. According to Mr. Cornelis van Vollen Hoven, customary law is the entire code of conduct of society that applies and has sanctions and has not been codified. Then Sukanto mentioned that customary law is a complex of customs that are generally not bookmarked, uncoded and coercive, have sanctions so they have legal consequences.

From the limitations stated above, it can be seen that the elements of customary law are the existence of behavior that is continuously carried out by the community, which is orderly and systematic, has sacral value, there is a decision of the customary head so that there is sanction, and is obeyed in society<sup>9</sup>. This research aims to explain the characteristics of customary law and its characteristics.

## RESEARCH METHODS

This study uses literature studies to present an understanding of the characteristics of customary law and its characteristics. Literature is sourced from books from libraries or digital libraries, academic journals, conferences and proceedings, theses, dissertations, academic websites, social media, blogs and so on. The data obtained will be analyzed and then explained in the discussion section.

## DISCUSSION

### A. Ciri-ciri Hukum Adat

Customary law sometimes has religious-mystical nuances, in accordance with traditional Indonesian beliefs, as each community is considered to be surrounded by supernatural forces that must be guarded to ensure peace and security. There are no clear boundaries between the real world and the supernatural world, and there is no firm separation between various aspects of life, including human life, nature, ancestral spirits, and other creatures. Special adoration for the spirits of ancestors is considered to be the guardian of traditions that are important for the welfare of the community. Every joint activity, such as clearing land, building houses, planting, and other important events, is always accompanied by religious ceremonies aimed at obtaining blessings and success and to avoid obstacles that may arise.

There is also an element of customary law that highlights the communal or community aspect, which means that human life is always viewed in the context of the group as a whole unit. Individuals cannot live alone, because humans are naturally social creatures who always interact with their fellow humans. In this view, the common interest takes precedence over the interests of individuals. There is also an element of customary law that prioritizes democratic values, where all decisions are always taken through deliberation to reach a mutual agreement. Collective interests take precedence over individual interests, in accordance with the principles of deliberation and representation as a system of government. This is reflected in the practice of deliberation at the village hall, where every step taken by the village leader is based on the results of deliberation with the community.

In addition, there are also elements of customary law that have concrete and consistent characteristics. Concrete ones, in which the transfer or transfer of rights and obligations must be carried out simultaneously, as in the event of handover and acceptance, which must occur simultaneously. This aims to maintain a balance in social interactions. Meanwhile, what is consistent requires clear evidence in every legal transaction, where every act or desire in a certain legal relationship must be realized in the form of tangible objects. This is done so that there is no uncertainty or doubt among the parties involved in the transaction, and to avoid mutual suspicion.<sup>10 reviews</sup>

### B. Teori *Reception In Complexu* (Hukum Adat Agama)

This theory was put forward by Mr. LCW Van Der Berg.

1. Menurut teori *Reception in Complexu* :

If a society embraces a certain adama, then the customary law of the community concerned is the religious law that it embraces. If there are things that deviate from the religious law concerned, then those things are considered exceptions.

## 2. Snouck Hurgronje

Snouck Hurgronje strongly opposes this theory, saying that not all Religious Law is accepted in customary law. Religious law only influences human life which is very personal in nature which is closely related to beliefs and inner life, those parts are family law, marriage law, and inheritance law.

## 3. Terhaar is of the opinion

Refuting Snouck Hurgronje's opinion, according to Terhaar, inheritance law does not come from religious law, but is an original customary law that is not influenced by Islamic law, while inheritance law is adjusted to the structure and structure of society.

The theory of Reception in Comlexu is actually contrary to reality in society, because customary law consists of indigenous law (Malay Polynesian) with the addition of provisions of religious law, as said by Van Vollen Hoven.

It is admitted that it is difficult to describe the fields of customary law that are influenced by religious law, this is due to:

1. The fields that are influenced by religious law are very varied and not the same for a society.
2. The thickness and thinness of the fields influenced by religious law also vary.
3. This customary law is local.
4. In a society, it consists of citizens of different religions.
5. Social control system<sup>11</sup>.

## C. Customary Law Territory

Prof. Mr. Cornelis van Vollenhoven grouped Indonesia into 19 customary law environments (rechtsringen). An area that has a uniform outline, pattern, and nature of customary law is called a rechtskring. Each of these customary law environments is then subdivided into several parts called Kukuban Hukum (Rechtsgouw). The following is a list of customary law environments mentioned: Aceh (Aceh Besar, West Coast, Singkel, Semeuleu)

1. Land of Gayo, Alas and Batak
  - a. Tanah Gayo (Gayo lueus)
  - b. Tanah Alas
  - c. Tana Batak (Tapanuli)
    - 1) Tapanuli Utara; Batak Pakpak (Barus), Batak karo, Batak Simelungun, Batak Toba (Samosir, Balige, Laguboti, Lumbun Julu)
    - 2) South Tapanuli; Padang Lawas (Tano Sepanjang), Angkola, Mandailing (Sayurmatinggi)
2. Nias (South Nias)
3. Minangkabau Land (Padang, Agam, Tanah Datar, Limapuluh Kota, Kampar Land, Kerinci)
4. Mentawai (Pagai people)

5. South Sumatra
  - a. Bengkulu (Renjang)
  - b. Lampung (Abung, Paminggir, Pubian, Rebang, Gedingtataan, Tulang Bawang)
  - c. Palembang (Boys, Jelma Daya, Kubu, Pasemah, Semendo)
  - d. Jambi (Orang Rimba, Batin, and Penghulu)
  - e. Enggano
6. Malaya (Lingga-Riau, Indragiri, East Sumatra, Orang Banjar)
7. Bangka and Belitung
8. Kalimantan (Dayak West Kalimantan, Kapuas, Hulu, Pasir, Dayak, Kenya, Dayak Klemanten, Dayak Porcupine, Dayak Tayan, Dayak Lawangan, Lepo Alim, Lepo Timei, Long Glatt, Dayat Maanyan, Dayak Maanyan Siung, Dayak Ngaju, Dayak Ot Danum, Dayak Penyambung Punan)
9. Gorontalo (Mongondow Ball, Boalemo)
10. Land of Toraja (Central Sulawesi, Toraja, Toraja Baree, West Toraja, Sigi, Kaili, Tawali, Toraja Sadan, To Mori, To Lainang, Kep.
11. South Sulawesi (Bugis, Bone, Goa, Laikang, Ponre, Mandar, Makassar, Selayar, Muna)
12. Ternate Islands (Ternate, Tidore, Halmahera, Tobelo, Kep. Sula)
13. Maluku Ambon (Ambon, Hitu, Banda, Uliasar District, Saparua, Buru, Seram, Kei District, Cape. Arow, Kisser)
14. Irian
15. Timor Islands (Timor Islands, Timor, Central Timor, Mollo, Sumba, Central Sumba, Sumba Timur, Kodi, Flores, Ngada, Roti, Sayu Bima)
16. Bali dan Lombok (Bali Tenganan-Pagrisingan, Kastala, Karrang Asem, Buleleng, Jembrana, Lombok, Sumbawa)
17. Central Java, East Java and Madura (Central Java, Kedu, Purworejo, Tulungagung, East Java, Surabaya, Madura)
18. Royal Districts (Surakarta, Yogyakarta)
19. West Java (Priangan, Sundanese, Jakarta, Banten)<sup>12</sup>

#### **D. Customary Law in Society**

Law has a very important role in people's lives. This can be observed from the creation of order, tranquility, and conflict prevention in society. The law plays a role in establishing individual rights and obligations and protecting social interests. According to J.F. Glastra Van Loon, the role of law in society:

1. Ordering the community and regulating the association of life.
2. Resolve disputes.
3. Maintain and maintain order and rules if necessary by force.
4. Maintain and defend these rights.
5. Changing rules and regulations in order to adjust to the needs of the community.
6. Fulfilling the demands of justice and legal certainty by realizing the above functions.

Customary law society refers to a certain group of people or communities that live together in a certain area or region and are bound by a certain legal system. They obey,

implement, and maintain the law, which contains sanctions as a tool of coercion. Therefore, a society cannot be called a customary law society if it does not have or is bound by a certain legal system. This legal system is cumulative, meaning that it regulates, enforces, implements, obeys, and is maintained on an ongoing basis<sup>13</sup>. In this legal nature, customary law communities claim the area of validity for their members and name it as a juridical customary right. These customary rights are not only recognized de jure according to their customary law, but also de facto recognized by neighboring customary law communities in their interactions. This is the juridical basis why the State must recognize the existence of customary rights. From the point of view of ideal norms in the historical framework of the Indonesian constitution, there is recognition of the social institutions of customary law communities. In this position, the State must constitutionally recognize its existence. The institutional implementation of customary law is structured by the recognition of the existence of a certain community, customary law with its cumulative nature, customary institutions that can be ceremonially clearly seen when traditional ceremonies take place, customary heads or tribes as among others who have the authority to punish and customary rights. The state has a constitutional obligation to recognize the existence of customary law communities. The implementation of this customary law institution involves structuring community institutions by acknowledging the existence of certain communities, customary law and its cumulative nature, as well as customary institutions that are ceremonially clearly visible during the implementation of customary ceremonies. Traditional chiefs or tribal leaders are among those who have the authority to punish and regulate customary rights<sup>14</sup>.

## **E. Social Control System**

### **1. Social Control**

If all members of the community are willing to obey the rules that apply in daily life, then it can be expected that community life will run smoothly and in an orderly manner. However, hoping that all individuals will always be obedient is hard to be sure. In reality, not everyone will always be willing or able to comply with all existing provisions or rules. In fact, sometimes there are individuals who deliberately violate the applicable rules for the sake of their personal or group interests.

In detail, some of the factors that cause community members to behave deviate from the applicable norms are as follows:

- a. Because the existing rules are not satisfactory for certain parties or because they do not meet their basic needs.
- b. Because the existing rules are not clear in their formulation, it gives rise to various interpretations and applications.
- c. Because in society there is a conflict between the roles held by the community, and
- d. Because it is impossible to regulate all the interests of citizens equally.

In a situation where a person thinks that by violating or deviating from a norm, they can get a greater reward or benefit, the enforcement of the norm is forced to be carried out using external force. Norms are no longer able to be enforced automatically (self-enforcing), and must be maintained by social control officers who provide threats or sanctions to those who are proven to violate or deviate from those norms.<sup>15</sup> reviews

If it turns out that norms are no longer able to be enforced automatically and the socialization process is not effective enough in giving a positive impact, then society, based on the power of its authority, begins to exercise social control. According to Soerjono Soekanto, social control is a process, whether planned or unplanned, which aims to invite, guide or even force citizens to comply with applicable values and rules.

The object or target of social supervision is the behavior of the community itself. The purpose of this supervision is so that people's lives can run in accordance with the patterns and principles that have been mutually agreed. Thus, social control involves a social process that can be planned or spontaneous to direct individual behavior. In principle, social control is a system and process that aims to educate, invite, and even force citizens to behave in accordance with social norms. The educational system is intended so that in a person there is a change in attitude and behavior to act in accordance with norms.

- a. The inviting system aims to direct a person's actions based on norms, and not according to the will of individuals.
- b. The coercive system aims to influence decisively so that a person acts according to the norms. If he does not want to obey the rules or norms, then he will be sanctioned.<sup>16</sup>

reviews

In social control, we can see that social control processes in three patterns, namely:

- a. Group control of the group
- b. Group control of its members
- c. Personal control over other individuals.

## 2. Types of Social Control

Social control is intended to ensure that members of the community comply with social norms so that harmony is created in social life. To achieve this goal, there are several known types of controls, which are classified according to the point of view from which one views the controls. Preventive control is social control that is carried out before the violation occurs or in the version of "threatening sanctions" or efforts to prevent deviations from norms and values. So, preventive social control efforts are carried out before deviations occur.

- a. Repressive control is a form of social control that is applied after a violation occurs with the aim of returning the situation to its original state. This control is carried out by imposing or imposing sanctions on violators. Its function is to restore balance that is disturbed due to violation of norms or deviant behavior. To restore the situation to normal, restoration efforts are needed. Therefore, this control aims to make the perpetrators aware of the consequences of their actions, as well as encourage them to comply with social norms
- b. Joint social control is an effort that aims to prevent the occurrence of deviations preventively, as well as overcome deviations that have occurred with a repressive approach. This approach combines preventive and repressive elements with the aim that behavior does not deviate from social norms, and if deviations occur, the impact does not harm the individual or others. Official (formal) control is supervision based on assignments by official bodies, such as the state or religion.



- c. Informal supervision is carried out to maintain the sustainability of unofficial regulations belonging to the community. The term "unofficial" refers to the fact that these regulations are not explicitly formulated, are not contained in written law, but are only reminded by members of the public.<sup>17 reviews</sup>
- d. Institutional control is an influence that comes from the cultural pattern owned by a certain institution (institution). The patterns of behavior and principles of the institution not only control its members, but also influence citizens who are outside the scope of the institution.
- e. Personal control refers to the good or bad influence that comes from a particular individual. This means that the influence of a figure who has an identifiable existence, sometimes even clearly known his background and life history.<sup>18 reviews</sup>

## CONCLUSION

Many people think that customary law is an outdated form of law, but in reality, customary law has been able to explore people's habits from the past which then affects the current legal system. Customary law is considered a central point in the formation of all types of laws, because it comes from the habits of individuals and groups that are part of inherited and obeyed traditions. Its implementation can be seen in the form of written law that we know today, and customary law can also play a role as knowledge about people's behavior in the future.

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