

# Development of Customary Law System in the National Legal System

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Abstract: The concept of recognition of the existence of indigenous peoples is a concept of limited recognition that the indigenous peoples are acknowledged to exist along with their rights as long as they are not against the interests countries and statutory provisions. The consequence of such a concept of recognition, as a direct derivative of the concept of a State of Law, is that if there is any existence of indigenous peoples and their rights and interests that are contrary to the interests of the state (national interest), or if there is a rule of customary law that is contrary to the rule the positive law of the state in the legislation, the existence of indigenous peoples and their traditional interests and rights can be ignored. The contradiction of interests between the parties, each of which based itself on the normative order of the legal system completely different from each other, namely between customary law used as a basis for thinking and acting of indigenous peoples and positive law used as the basis for thinking and acting for society.

## 1 INTRODUCTION

Indonesia is a maritime nation connected by a vast ocean. Besides comprising thousands of customary laws, the maritime consequences of this country are also a great challenge for us to remain committed in our nation and state life. The consequences of the diversity of customary law and our country's marriages threaten the extinction of various tribal languages, the disappearance of customary law, the blurring of cultural identities from the middle of society and the weakness of the authority of customary institutions in the life of nationality and statehood.

In each of these customs, languages, tribes and religions, contained value systems and knowledge systems that had grown hundreds or even thousands of years ago. Our country is organized and handed down through generations with thousands of customary laws, guided by hundreds of beliefs and religious systems. Indonesia is a nation built from hundreds or even thousands of sovereign, independent and dignified nations, who in their history have experienced ups and downs. These thousands of customary laws are a consequence of various ethnic groups in various regions of Indonesia.

Since reformation in 1998, many laws and regulations have been established to recognize the

existence and rights of indigenous peoples on land, natural resources and other basic rights. These legislative products touch all levels from the constitution to the village regulations. Our constitution before the amendment does not expressly indicate to us the recognition and use of the term customary law. Following the amendment of the constitution, customary law is recognized as stated in the 1945 Constitution of Article 18B paragraph (2) which states: "The State recognizes and respects the unity of indigenous and tribal peoples as long as they are alive and in accordance with the development of society and principles state of the Unitary State of the Republic of Indonesia, as governed by law. Then a number of laws specifically related to natural resources contain recognition of the rights of indigenous peoples. As if it were not complete a rule if it did not contain recognition of the existence and rights of indigenous peoples. This is strongly influenced by advocacy by indigenous peoples and their supporters who, since its inception, are indeed going to reorganize relations between indigenous peoples and the state.

## 2 RESEARCH METHODOLOGY

The type of research used in this study is normative legal research. Normative legal research deals with

the legal norms contained in the legislation and norms that exist in society. Descriptive analytical method is used to describe a condition or situation that is happening or lasting that aims to provide data as much as possible about the object of research so that it can explore things that are ideal, then analysed based on legal theory or applicable legislation.

### 3 RESULT AND DISCUSSION

#### 3.1 Customary Law in the Judicial System

Customary Law is a law that prevails and develops in a community environment in an area. There are several notions of customary law. According to Hardjito Notopuro Customary Law is an unwritten law, customary law with a characteristic that is the guideline of people's life in organizing the justice and welfare of the community and are familial. Soepomo, Customary Law is a synonym of the unwritten law in legislative law, a law that lives as a convention in state bodies (parliament, provincial council, etc.), living law as a custom rule maintained in the association of life, both in the city as well as in the villages. According to Cornelis van Vollenhoven Customary Law is a set of rules concerning behavior for indigenous people and the Foreign East on the one hand has sanctions (because it is legal), and on the other hand is not codified (due to adat).

Legal pluralism, substantively legal pluralism is generally defined as a situation in which two or more legal systems work side by side in a similar field of social life, or to explain the existence of two or more social control systems in one area of social life or explain a situation in which two or more legal systems interact in one social life or a condition in which more than one legal or institutional system works side by side in activities and relationships within a community.

As a country that embraces the tradition of Civil Law System, then in reading the positive legal system of Indonesia must depart from the hierarchy of the most powerful legislation that is the constitution embodied in the 1945 Constitution. Similarly, in elaborating the regulation of the existence of indigenous peoples and customary law in the positive legal system Indonesia, the easiest thing is to first examine its regulation in the 1945 Constitution. In the Constitution (the 1945

Constitution, which is re-enacted according to the Presidential Decree dated July 5, 1959) there is not a single article which contains the basis (legislation) customary law. According to Article 11 of the Transitional Rules of the Constitution, "All State bodies and existing regulations are still valid as long as there is no new one according to this Constitution". Prior to the re-enactment of this Constitution, the provisional Constitution of 1950 applies. In the provisional Constitution Article 104 paragraph 1 says that "All court decisions must contain the reasons and in the case of punishment referring to the rules of the law and the rules "But this provision, which if we interpret the" customary law "to the extent, contains a *grondwettelijke grondslag* (constitutional basis) of the enactment of customary law, until now has not been given the legal basis of its operation. The basis of the legislation of the coming into force of customary law, which dates back to the colonial period and which today still prevails, is Article 131 paragraph 2 sub-IS. According to these provisions, then for the indigenous legal group and the foreign legal class apply their customary law.

Customary law grew out of the ideals and minds of the people of Indonesia. Then customary law can be traced chronologically since Indonesia consists of kingdoms, spread throughout the archipelago. The socio-cultural reality is constructed by one poet constructed by another, and reconstructed by the next poet. The period of Sriwijaya, ancient Mataram, Majapahit period some inscriptions (inscriptions) describe the development of applicable law (original law), which has set some fields.

Religious, economic and mining rules are contained in the 732rd Sanjaya Inscription in Kedu, Central Java; Arranging religion and wealth, contained in the inscription of King Dewasimha in 760; Land and Agricultural Law is found in the inscription of King Tulodong, in Kediri, 784 and an inscription in 919 that contains government posts, king rights over land, and compensation; The law regulates civil justice, contained in an inscription Bulai Rakai Garung, year 860; The King's order to formulate customary rules, in the Darmawangsa inscription of 991;

Then in the Airlangga period, the establishment of the symbol of the royal seal of the head of the Garuda bird, the construction of the fief with his privileges, the determination of income tax to be collected by the central government; Majapahit period, visible in the governance and governance of the Majapahit kingdom, the division of institutions and government agencies. After the fall of

Majapahit, the kingdom of Mataram is highly influenced by the influence of Islam, it is known qhisos judiciary, which gives consideration for the Sultan to decide the case. In the interior, the settlement of disputes between individuals by village courts is done in a peaceful manner. At the same time, in Cirebon it is known: the Religious Courts decide cases that endanger the general public, the Digrama Judiciary who breaks adat violations, and other matters that do not belong to religious courts; and Cilaga Court is a court in the field of economy, trade, sale and purchase, accounts payable.

Some of the examples mentioned above show that the original legal order that has prevailed in various regions, now known as Indonesia, shows that the law is based on indigenous people, both in the form of ruling decisions and laws applicable within the local community. Within the 1945 Constitution, there are no regulations specifically regulating customary law, but only the rules on the existence of indigenous and tribal peoples, namely article 18B paragraph 2 and article 28I verse 3. Which reads: "The state recognizes and respects the unity of indigenous and tribal peoples as well as their traditional rights as long as they are alive and in accordance with the development of society and the principle of the Unitary State of the Republic of Indonesia, regulated in the law. "While Article 28I paragraph 3 reads:" The cultural identity and rights of traditional communities are respected in harmony with the times and civilization."

Our constitution before the amendment does not expressly indicate to us the recognition and use of the term customary law. However, when examined, it can be concluded there are actually formulations contained in it contain the noble value and the soul of customary law. The preamble of the 1945 Constitution, which contains the life view of Pancasila, reflects the personality of the nation, which lives in the values, mindset and customary law. Article 29 paragraph (1) State based on the One Supreme God, Article 33 paragraph (1) The economy is organized as a joint effort based on the principle of kinship. At the practical level, the 1945 Constitution of the State introduces a right called the State Controlling Rights (HMN), it is derived from the Ulayat Right, the Right to Pertuanan, which is traditionally recognized in customary law. In the Constitution of RIS Article 146 paragraph 1 stated that all judicial decisions should contain the reasons and in the case must mention the rules of law and the rules of customary law as the basis of the law Furthermore in the Provisional Constitution, article 146 paragraph 1 is reloaded. Thus the judge must

explore and follow the growing sense of law and justice of the people. In Article 102 and taking into account the provisions of Article 25 of the 1950 UUDS there is an order for the authorities to make codification of the law. This then includes customary law. This codification order also applies also to customary law, and this codification command is the first time mentioned in the Laws and Regulations of the Republic of Indonesia which govern the provisions of codification of customary law, although in reality it has not been implemented. The law of a nation is actually a reflection of the social life of the nation concerned, then in fact the formation of the law of a country must be free from the influence and interests of other countries. If later loud voice is voiced, we need the formation of a democratic law, but the establishment of a democratic law does not necessarily mean that the established law will be effective. In this context, for example, the mission of a law lies not in how democratic the formation of a legislation is formed, but it lies in the extent to which what it seeks to achieve from the formation of a law can be achieved or achieved. That is, the advantages of participatory law-making are more of an effort to improve the democratic character and legitimacy of the law of the established law. If the law of a nation is a reflection of the social life of the nation concerned, it becomes a paradox with the globalization of the law. Although in certain respects the globalization of law is understood also the globalization of law will continue in different legal systems. Regardless of the globalization of the law, it is difficult to avoid, but the nation state will not simply surrender their sovereign function, and in a global system will not be free-controlled from the nation state because globalization is not a toll road without mechanisms. The mechanism of how the public relations traffic of a nation state is built on an agreement or contract, a convention, so that the difference that was originally a limitation is a national law, then the restriction is an agreement between the nation state.

### **3.2 Comparison of Customary Law Systems and National Legal Systems**

The first thing to understand in examining the customary law system is that this legal system is a legal system totally different from the western legal system and all its follow-up concept, including the concept of the existence of the state. In view of the diversity of customs in the history of French law over the centuries, the country has a wide variety of

customs, since it consists of 60 separate geographical regions, each of which has its own ruler. When Gaul became part of the Roman Empire, Roman law prevailed in this region, but over time, local customs still persisted. In France there is clearly no Common Law in the early Roman period, whether it is related to the private law in a comprehensive way, nor is it managed by legitimate sovereignty. In the 14th century AD, the source of French law was the Codes of Georgius and Hermogenius, the institutes written by Gaius and the words of Paul. In the 5th century AD, this French legal source was compiled but nowadays some of Gaul's territory has been mastered by France.

If the state legal system and the concept of the State of the Law are based on the existence of a state with historical roots in ancient Greece, the customary law system stands on the historical roots of indigenous peoples itself that existed long before the concepts of state law and the State of Law were transplanted by Europeans colonialism in eastern and southern countries, including in the archipelago. Factors that trigger the occurrence of legal innovation a particular community. We can also study whether a law imported elsewhere retains its original features. Through Comparative Law, we can also find out the factors that hinder and trigger the development of law in certain areas including the formal law enforcement process that occurs. In addition, Comparative Law has practical uses. Through Comparative Law, law reform activists can better understand their roles, duties and responsibilities. They become competent in choosing and deciding which foreign law is eligible to be imported in full or through local modification.

This would be in line with the basic concept of customary law as proposed by Van Vollenhoven which states that customary law is a law (for indigenous Indonesians) which is not derived from the regulations made by the Dutch East Indies government. According to Koesnoe, associated with flexible and dynamic styles, the traditional pattern of customary law also brings with it the meaning that what is the rule of today in customary law will not abandon what was in the past.

Based on the description of the basic concept of customary law above, it is clear that customary law is a distinctive legal system and therefore different from other legal systems, including the western legal system as part of the concept of the State of Law. Thus, it can be said that customary law is a legal system that is not concurrent with the concept of the State of Law. This lack of awareness can, among others, be seen from some quite contrasting

differences between the characteristics of customary law and the common elements in the concept of the State of Law. These differences include the following:

First, that in the concept of the State of Law, the supremacy is the law of the state, whereas customary law is not an artificial law of the state but a law born from the daily habits of society.

Second, that in the concept of the State of Law the principle of legality that the law must be clear, definite, and measurable and unchangeable is the absolute prerequisite, whereas in the customary law it is not written and flexible and dynamic, and every problem that emerges precisely settled according to existing circumstances (tends to be arbitrary).

Third, in its substantive category, one of the elements of the vital Law State concept is the protection of individual rights and freedoms. This indicates that in the concept of the State of Law, the rights of individuals are fundamental rights, as a consequence of liberalism in European culture as the womb of the birth of this concept, and simultaneously as the realization of the purpose of the State of Law itself that is to protect (salvation and private property) of every citizen of an arbitrary act by either the state or by a fellow citizen. This is in contrast to customary law in which the ultimate right is not the right of the individual, but the right of fellowship. Under customary law, an individual's rights may be disregarded if he or she is in conflict with the right of fellowship.

Hart explains that there must always be primary rules in every society, because otherwise there will be total turmoil and such a society can't survive, for the law to exist, the need for complex legal regulation, the secondary rules in its terminology whose primary purpose is to regulate legal processes and to give the rule of law. Thus there are two necessary conditions and sufficient conditions to the existence of a law. On the one hand, rules concerning valid behaviour according to the criteria of validity in the system shall be generally adhered to, and on the other hand, rules that define the legal criteria of validity and the units whose adjudication shall be effectively accepted as official standards of public behaviour by officers

## 4 CONCLUSIONS

In Indonesia there has not been established a law that specifically regulates the existence of customary law community as mandated by Article 18B paragraph 2 of the 1945 Constitution, In fact there

are many other laws and derivative technical regulations governing the existence of indigenous peoples, but of the many legislation there is one similarity that is the concept of recognition of the existence of indigenous peoples is the concept of limited recognition that the indigenous peoples recognized existence (along with their rights) as long as it is not contrary to the interests of the state and not contrary to the provisions of the legislation.

In the concept of the State of Law, the supremacy is the law of the state, whereas customary law is not an artificial law of the state but a law born from the daily habits of society. In the concept of the State of Law the principle of legality that the law must be clear, definite and measurable and unchangeable is the absolute prerequisite, whereas in law custom law it is not written and flexible and dynamic, and every problem that emerges is solved according to the circumstances (which tends to be arbitrary). In its substantive category, one of the elements of the vital Law State concept is the protection of individual rights and freedoms. This indicates that in the concept of the State of Law, the rights of individuals are fundamental rights, as a consequence of liberalism in European culture as the womb of the birth of this concept, and simultaneously as the realization of the purpose of the State of Law itself that is to protect (salvation and private property) of every citizen of an arbitrary act by either the state or by a fellow citizen. This is in contrast to customary law in which the ultimate right is not the right of the individual, but the right of fellowship. Under customary law, an individual's rights may be disregarded if he or she is in conflict with the right of fellowship..

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