

The Position of Traditional Law as a Source of Law in the Civil Law System in Indonesia

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Abstract. *Indonesian law essentially comes from four sources of law, namely customary law, Islamic law, ex-colonial law and ratified international treaties. But what makes it sad is that from these four sources of law, customary law is left behind or forgotten, it looks inferior compared to other laws. In scientific forums it is only used as research material and academic studies and is narrated rhetorically. Against this background, the problem studied in this research is how the position of customary law in the national legal system with a civil law pattern in Indonesia is. The research method used is normative juridical sourced from primary, secondary and tertiary legal materials. The results show that traces of customary law are scattered in legislation, as legal principles in positive law in Indonesia and also in jurisprudence. Research findings that customary law fulfills two requirements of reality and ideals as the primary source of law in Indonesian legislation.*

Keywords: Civil; Customs; Sources of Law.

1. INTRODUCTION

Customary law is a legal system that is known in the social life environment in Indonesia and other countries.¹ Regarding Customary Law (Adatrecht) is a legal

¹ Fatahuddin Aziz Siregar, Ciri Hukum Adat Dan Karakteristiknya, *Jurnal Al-Maqasid*, Volume 4 No. 2, December 2018, p. 1-14

system that grows and develops from habits (customs)² in society. The discourse on the existence of customary law in the Indonesian national legal system is always interesting to study. This is because constitutionally, the 1945 Constitution of the Republic of Indonesia expressly recognizes customary law as an integral part of the state legal system. This acknowledgment is clearly seen in paragraph 18B paragraph (2) which reads:

The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated by law.

In the discussion, of the four conditions that are concreted, there is not much discussion and debate, except for the phrase "as long as you are alive".³ Reforms that open up opportunities for constitutional amendments, the dominance of the face of certainty is unavoidable. Article 18B paragraph (2) of the 1945 Constitution as a result of the amendment, stipulates four requirements for the Customary Law Community: still alive, in accordance with the development of society, the principles of the Unitary State of the Republic of Indonesia (NKRI), and regulated by law.⁴ Furthermore, in article 281 paragraph (2) it is implicitly emphasized that cultural identity, which of course includes customary law, must be respected. The meaning of being respected in the article is clearly empirical, not rhetorical. This means that the cultural identity and rights of traditional communities must be maintained and preserved. And, in the legal context, the cultural identity and rights of traditional communities must be used as one of the legal guidelines and references. The following reads article 28I paragraph (2):

Cultural identity and rights of traditional communities are respected in line with the times and civilizations.

The problem is then, in a country that adheres to the Civil Law System tradition such as Indonesia, the main principle is to put the law in the form of written rules or set out in the form of law,⁵ which was inspired by the Continental European tradition built by the Dutch colonial government, customary law is rarely positioned as a formal and primary primary source. The law was originally formed by customs and general beliefs, then by jurisprudence.⁶ Although traces of customary law are often found in jurisprudence, in practice, these traces are rarely seen and referred to. Customary law,

² Abdurrahman Konoras, Eksistensi Hukum Islam Dan Hukum Adat Dalam Sistem Hukum Nasional, *Jurnal Ilmiah Al-Syir'ah* Vol. 14 No. 2, 2016, p. 1-13

³ Warassih, Esmi., & Sulaiman. Recognition of Adat Forest and Plantation Concessions in Indonesia. *Kanun: Jurnal Ilmu Hukum*, Vol.19, (No.2), 2017, p. 249-268

⁴ Sulaiman, dkk, Ketidakteraturan Hukum Pengakuan Dan Perlindungan Masyarakat Hukum Adat di Indonesia, *Law Reform*, Volume 15, No. 1, 2019, p. 12-25

⁵ Zaka Firma Aditya, Romantisme Sistem Hukum Di Indonesia : Kajian Atas Kontribusi Hukum Adat Dan Hukum Islam Terhadap Pembangunan Hukum di Indonesia, *Jurnal Recht Vinding*, Vol 8 No. 1 April 2019, p. 37-55

⁶ Friedmann, W, (1990), *Teori dan Filsafat Hukum (Susunan II)*, Saduran Mohammad Arifin, Rajawali Pers, Jakarta.

which is more like the Anglo Saxon tradition,⁷ seems to have a secondary place in the legal and judicial system in Indonesia. Although its existence has begun to be shifted by the modern legal system, for the Indonesian people, especially for legislators, customary law still has an important meaning for the lives of Indonesian people.⁸

Therefore, almost all traces of customary law traces in Indonesian legal jurisprudence, both criminal and civil, the reference source refers to old decisions that occurred several decades ago. Meanwhile, in the context of modernity, at least since the amendment of the 1945 Constitution of the Republic of Indonesia in 2000, it is difficult to find traces of customary law in the national legal system.

This reality seems to show the ambiguous face of Indonesian law. On the one hand, the highest constitution in this country provides clear and unequivocal recognition of the existence of customary law. But on the other hand, the recognition includes conditions that imply the view that customary law is a different entity, which has the potential to conflict with state law, so it must be bound by certain conditions.

This means, if customary law is not in line with state law, then customary law does not apply. And, what applies is state law. In this context, the existence of customary law really looks inferior compared to state law. In fact, almost all legal experts admit that customary law, which is usually unwritten, is the mother of law. Sources of law that inspired the birth of state law that is written and codified in law.⁹

Although customary law has a high position in the history of law formation, this position does not automatically make it honorable so that it is used as a primary reference for justice seekers. This is reflected in the stipulation of a number of conditions by Article 18B paragraph (2), which Marco Manarisip summarizes into 2. Namely the conditions of reality and the conditions of ideality.¹⁰

Meanwhile, Satjipto Rahardjo detailed these conditions in more detail, and divided them into 4 clusters, namely: [1] As long as they are alive. [2] In accordance with the development of society. [3] In accordance with the principles of the Republic of Indonesia. [4] Regulated by law.

⁷ Soetandyo Wignjosoebroto. *Dari Hukum Kolonial Ke Hukum Nasional, Dinamika Sosial Politik dalam Perkembangan Hukum di Indonesia*, Jakarta : Penerbit PT. RajaGrafindo Persada, p. 175.

⁸ Yazid Fathoni, Peran Hukum Adat Sebagai Pondasi Hukum Pertanahan Nasional Dalam Menghadapi Revolusi Industri 4.0, *Refleksi Hukum Jurnal Ilmu Hukum*, Vol 5 No. 2, April 2021, p. 219-237

⁹ Jaja Ahmad Jayus, (2020), *Hukum Ada: Sejarah, Teori, Pengakuan Negara dan Yurisprudensi*. Depok: Rajagrafindo Persada,

¹⁰ *Reality requirements, namely customary law is still alive and in accordance with community development. while the Ideality Requirements, which are in accordance with the principles of the unitary state of the Republic of Indonesia, and their validity is regulated by law*, Marco Manarisip, *Eksistensi Pidana Adat Dalam Hukum Nasional* dalam *Lex Crimen* Vol.I/No.4/Oct-Dec/2012, p. 30

2. RESEARCH METHODS

The method used in this study is normative juridical.¹¹ That is, the researcher uses a statutory approach in the form of document review, namely the 1945 Constitution of the Republic of Indonesia, especially articles relating to customary law and indigenous peoples, the principles of customary law which are used as principles in legislation. laws and jurisprudence issued by the Supreme Court of the Republic of Indonesia.

3. RESULTS AND DISCUSSION

Customary law is the law that applies and is practiced by the community in an area. The term customary law was first proposed by Snouck Hurgronje in 1983 in his work entitled *De Atjehnese*.¹² However, the technical understanding of customary law was only formed and became one of the academic studies, when Cornelis van Vollenhoven published his book entitled *Adatrecht*. In the book, van Vollenhoven defines customary law as a set of rules on behavior for indigenous people and foreigners on the one hand having sanctions (because they are legal), and on the other hand they are in an uncodified state (because of custom).¹³

Meanwhile, according to Basha Muhammad, customary law is the law that regulates the behavior of Indonesian people in relation to one another, whether it is the whole of the customs, habits, and decency that actually live in indigenous peoples because they are embraced and maintained by members of that community, as well as those who is the entire regulation regarding sanctions for violations stipulated in the decisions of the authorities.¹⁴ Customary law is the original law in a particular society, which is usually unwritten.¹⁵ In general, customary law experts share the same view that the customary law system has three elements, namely basic conceptions, principles, and norms.¹⁶

State law has a different perspective from customary law. Typically, revitalization must be carried out by looking at customary law as a source of law.¹⁷

¹¹ Lihat Soerjono Soekanto, (2012), *Pengantar Penelitian Hukum*, Universitas Indonesia, Jakarta, p.51. Bandingkan dengan Khushal Vibhute dan Filipos, *Legal Research Methods Teaching Material*, Justice and legal system Research Institute, tt, 2009, p.

¹²Djuned T, *Asas-asas Hukum Adat*, Aceh: Fakultas Hukum Unsyiah, p.8. lihat juga C. Snouck Hurgonie, (2019), Penerjemah Ruslani, *Orang Aceh Budaya, Masyarakat, dan Politik Kolonial*, IRCiSod, Yogyakarta, p.130.

¹³Dewi C Wulansari, *Hukum Adat Indonesia Suatu Pengantar*, PT Refika Aditama, Bandung, p. 3-4.

¹⁴Bushar Muhammad, *Asas-Asas Hukum Adat Suatu Pengantar*, jakarta: Pradnya Paramita, p. 27

¹⁵ Asliani Harahap, Pembaharuan Hukum Pidana Berbasis Hukum Adat, *Jurnal EduTech* Vol. 4 No.2 September 2018, p. 1-9

¹⁶ Rikardo Simarmata, Pendekatan Positivistik Dalam Studi Hukum Adat, *Mimbar Hukum*, Volume 30, No. 3, October 2018, P. 465-489

¹⁷ Abubakar, Revitalisasi Hukum Adat sebagai Sumber Hukum dalam Membangun Sistem Hukum Indonesia. *Dinamika Hukum*, Vol.13,(No.2), 2013, p.319- 331.

What is interesting in the context of the Indonesian legal system is that although customary law has been recognized by the 1945 Constitution, article 18B paragraph (2), if carefully and thoroughly, in fact, the 1945 Constitution stipulates a number of conditions so that customary law can apply. Here is the important point. It is the reading of these four conditions that must be reconstructed, so that customary law does not seem contradictory to the state. Satjipto Rahardjo tries to offer a perspective in reading these four conditions, so that customary law and state law can run in harmony and in one breath.

First, as long as you are alive. When explaining this first requirement, Satjipto Rahardjo asked law enforcers in Indonesia to be careful. It is not rigid, and only uses a rational quantitative approach. Need instruments of empathy and participation.¹⁸

In other words, customary law should not be viewed with an external approach, without clearly understanding the reality of local wisdom that underlies the birth of the customary law. The reason is, every customary law must be born from the long struggle of social interaction that occurs in the midst of society. Customary law is not born from the spectrum of scientific studies conducted by academics and then decided jointly between the legislature and the executive in the form of law, as is state law. Customary law was born from a long process involving various elements--from anthropological to topographical ones.¹⁹ Therefore, an academic approach alone is sometimes not enough to understand the concepts of justice and truth in customary law. It requires an intense and emotional approach, as well as a deep understanding of the noble values held and believed by indigenous peoples.

Second, in accordance with the development of society. According to Satjipto Rahardjo, this requirement should not be viewed from an economic and political perspective.²⁰ The reason is, using both perspectives in the framework of community development, has the potential to defeat customary law from state law. The development of society in Article 18B of the 1945 Constitution of the Republic of Indonesia must be seen from the perspective of the local indigenous community, not the global community which has undergone many changes due to cultural acculturation and technology penetration.

The dynamics that occur in the midst of indigenous peoples who hold fast to customary law, must be far different from the dynamics of global society which has interacted a lot with other cultures. Just a small example, many indigenous peoples still adhere to the historical system and belief in the ownership system. Meanwhile, modern society uses letters and certificates as proof of asset ownership. So, when a land

¹⁸Satjipto Rahardjo. *Hukum dalam Jagat Ketertiban*, Jakarta: Penerbit UKI Press, p. 120

¹⁹ Suriyaman Mustari Pide in *Hukum Adat: Dahulu, Kini, dan Akan Datang*, writes that customary law is formed through polarized actions and reactions in repeated social interactions. This interaction then has an influence on behavior, thus forming social relationships. When social relations are carried out systematically, a social system will be formed. This system then becomes a custom which then expresses the feelings of the community itself. Furthermore, the community will make the system a norm that must be obeyed by all members of the community. It is at this point that customary law is born which must be obeyed and implemented by the community.

²⁰Satjipto Rahardjo. *Hukum dalam Jagat Ketertiban*, Op. cit, p. 120

dispute arises between indigenous peoples and modern corporations in an area, the two parties to the dispute must present two different pieces of evidence. Indigenous peoples submit anthropological-historical evidence in the form of the fact that they have inhabited and managed the land for generations (ifso facto)²¹ Meanwhile, the corporation will submit a certificate and deed of sale as the basis (ifso jure).²²

There are many examples of disputes like this that have occurred in remote parts of the country, and their resolution rarely fulfills a sense of justice for all parties. The problem is, if a judge only uses documents as a legal source of ownership, and this is a common thing in the Civil Law System tradition, then it is certain that indigenous peoples will be the defeated party. This is where the judge needs to understand the phrase "according to the development of society" in a broader perspective.

Third, in accordance with the principles of the Unitary State of the Republic of Indonesia. Against this third condition, Satjipto Rahardjo emphasized that all law enforcers and the instruments they use must not view indigenous peoples in a dichotomous perspective with the Unitary State of the Republic of Indonesia. But on the contrary, indigenous peoples are an inseparable part of the Unitary State of the Republic of Indonesia. Indigenous peoples and the customary law they practice are the flesh and blood of the Republic of Indonesia which must be treated equally and equally before the law.

A holistic paradigm is needed in seeing Indonesian society as a whole and comprehensively. That the Indonesian people are a pluralistic society consisting of various ethnic groups and religions, where each ethnic group has different customs and traditions. It is these differences that knit the country so that Indonesia becomes a large and heterogeneous nation. Rich in culture and local wisdom and customary law that must be preserved. Don't be diametrically opposed to state law, and be seen as not part of the nation.

Fourth, it is regulated by law. Regarding the fourth and last condition, Satjipto Rahardjo argues that, although Indonesia is a state of law, it does not mean that all problems must be submitted to the law and resolved through legal channels. The reason is, such a conception is too narrow, so it can actually make life unproductive.²³

Satjipto then gave an example of the socio-political upheaval that occurred in America in the 1960s, which apparently could not be resolved by law. This reality proves that the law should not only rely on Rukes and logic (rules and logic), then ignore social reasonableness (social wisdom). Karl Renner, as quoted by Satjipto, stated that "The development of the law gradually works out what is socially reasonable", which emphasized that the law contained in the codification of the law will only be effective

²¹In the field of legislation, ipso facto is an expression that can be translated as 'based on facts' . Thus, it is used to refer to legal consequences that have occurred based on facts or actions, see <https://ms.encyclopedia-titanica.com/significado-de-ipso-facto>.

²²ipso jure is as opposed to ipso facto , which we can translate as 'under the law', and which is used to refer to legal consequences that occur without the need for an event to occur, but by the same legal norm. See <https://ms.encyclopedia-titanica.com/significado-de-ipso-facto>

²³ *Ibid*

as a problem solver in the community. if in every process it adopts local wisdom that develops in the midst of society.

Satjipto also in one analysis is almost in line with Karl Renner who said that the law is rooted in a certain community of human life. The community begins by establishing an order that is more natural than law, such as tradition and custom. In the world there are nations that differ in these traditions and values. Satjipto called it the ways of the Nation to Rule. Therefore, when these nations used modern laws that were developed in and from certain communities that were different from their own, problems arose.²⁴ This confirms the suggestion of Werner Menski who writes that because law is culturally specific in all corners of the world it should allow for a deeper investigation into the ways and forms in which global hybrid legal phenomena develop and are reproduced as a result of and interplay between local and global legal inputs. and different elements in the phenomenon of plural law.²⁵

Such a conception is very reasonable, because in fact, every society already has and practices certain values, for example justice. These values have existed long before the codification of laws was passed and enforced by the state to its citizens. Therefore, every law enforcer must realize that every community has and adheres to customary law which is used as a guide in managing life. This customary law must be respected and not positioned against state law. just as Eugen Ehrlich, a legal expert on sociological jurisprudence said. According to him, a good and effective positive law is a law that is in accordance with living law, which reflects the values that live in society.²⁶ In a slightly different narrative, it can be said that customary law reflects the view of life held by the Indonesian people as a whole and comprehensively, especially in creating order and justice. In every customary law there is always a very prominent feature, namely the nature of religion and kinship (mutual cooperation).²⁷

Soerjono Soekanto also emphasized that customary law is the law that applies to the majority of Indonesian people. This is evidenced by the fact that the majority of Indonesian people are still subject to customary law, even in certain areas of customary law.²⁸ Even Mahadi introduced the term Customary Law, namely Pancasila Law which is distinguished in written law and unwritten law.²⁹

Mahadi research that elements of customary law have been adopted into national law, principles and also in jurisprudence.

²⁴Satjipto Rahardjo, (2006), *Ilmu Hukum*, Citra Aditya Bakti, Bandung, p.253.

²⁵ Werner Menski, (2015), *Perbandingan Hukum Dalam Konteks Global: Sistem Eropa, Asia dan Afrika*, Nusa Media, Bandung, p.viii.

²⁶Mochtar Kusumaatmadja, *Konsep-Konsep Hukum dalam Pembangunan*, Bandung: Pusat studi Wawasan Nusantara, p. 13.

²⁷Abdul Bari Azed, (1989), *Aliran Sociolegal Jurisprudence dan Cita-cita Pancasila di Bidang Hukum*, dalam Lilik Rasjidi dan Arief B. Sidharta, *Filsafat Hukum Mazhab dan Refleksinya*, Remadja Karya, Bandung, p.95.

²⁸Soejono Soekanto, *Kedudukan dan Peranan Hukum Adat di Indonesia*, Jakarta: Kurnia Esa, p.13.

²⁹Basrah Amersyah, (1987), *Capita Selecta Filsafat Hukum*, Fakultas Hukum Universitas Sumatera Utara, Medan, p.96.

- Hukum Positive Law, for example Act No.1 of 1974 concerning Marriage in article 78 which reads:
 "Parents are not allowed to transfer their rights or pledge their children's permanent property...etc." The term "mortgaging fixed assets" only exists in customary law. Customary law does not distinguish between movable and immovable property. While the Western Civil Law stipulates that what can be pawned is movable property and that which can be mortgaged is immovable property.³⁰
- In the Principles, among them are³¹ :
 - Kabau tagak, kubang tingga (Minang language), meaning the buffalo stands, the beetle stays. The positive legal norms relate to customary rights. "If a resident has left the ulayat land. So that there is no longer a sign, he will return to the power of the fellowship.
 - Tugu urat na Tobu, toguan urat ni padam (Batak language), which means strong veins of sugar cane; the stronger the promise given. Norman . "Promises must be kept". (see article 1338 of the Civil Code).
 - Heureta jak habeh, hareut en tendong (Acehnese), meaning that the treasures sought by themselves can be exhausted, the treasures in the village are not. Norman: Search treasure is up to the owner's power, the village property (family family) returns to its origin. In the Positive Law, property is searched during marriage, its use is determined by the will of the husband/wife.
- In Jurisprudence, among them are:
 - Supreme Court Decision October 25, 1958 No.54-K/Sip/1958
 - According to Batak Customary Law (which is patrilineal) all assets that arise in marriage belong to the husband, but the wife has the right to use her husband's property for life, as long as the property is needed for her livelihood.
 - Supreme Court Decision January 17 1959 No.320-K/Sip.1958:
 - Minor children are cared for and are in the care of their mother,
 - Supreme Court Decision January 13, 1960 No.438-K/Sip.1959:
 - According to the Batak Christian tradition, divorce is allowed because there is no longer harmony in the household.
 - Supreme Court Decision 19 November 1992 No.3898 K.Pdt/1989 dated 19 November 1993 and Supreme Court Decision dated 19 June 1992 No.772 K/Pdt/1992 dated 17 June 1993.

In dealing with a civil lawsuit case where the fundamentals of the petition and the petitum are based on violations of customary law and the enforcement of customary sanctions, if in the trial the Plaintiff can prove his argument, the judge must apply customary law regarding the matter which is still valid in the area concerned after hearing the local traditional elders.³²

³⁰Ibid, p.98

³¹Mahadi, *Suatu Perbandingan antara Penelitian Masa Lampau dengan Sistem Metode Penelitian Dewasa ini dalam Menemukan Asas-asas Hukum*, Fakultas Hukum USU,1980, p.5. see Syamsul Arifin, *Falsafah Hukum*, Kelompok Studi Hukum dan Masyarakat, Fakultas Hukum, Universitas Sumatera Utara, 1992, p.131.

³² <http://bahasan.id/hukum-adat>, accessed on 18 September 2021

4. CONCLUSION

Customary law is a living law adopted and practiced by the people of Indonesia, long before this country was founded, and long before state law in the form of law was born and enforced. Therefore, as a form of respect for local wisdom, customary law must be respected and accommodated in the national legal system. Moreover, in the traces of positive law and jurisprudence, there is a lot of evidence of the existence of customary law in legal decisions in Indonesia.

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