The Position Of Custom Law In The Principles Of Agraria

Dwi Wisnu Wardana
Master of Notarial Sultan Agung Islamic University
mas_wisnu72@yahoo.co.id

Abstract

The existence of customary law is inseparable from the existing legal system in Indonesia, if a positive law in general or agrarian law in particular contradicts the customary law system, it is necessary to formulate and policy legal institutions in empowering legal settlement that occurs in society. The approach method used in this study uses a normative juridical approach. The position of customary law in statutory legislation in accordance with Law No.10 of 2004 is not formally a source of law. The development of the position of customary law in the national legal system in Indonesia is very important and has a good role in the national legal system in Indonesia. The implementation of the position of customary law in the Application of Law No.5 of 1960 concerning Basic Agrarian Regulations still uses customary law as the drafting guide. Customary law makes it the main and complementary source of written law on land. The formulation of a national land law must not conflict with the customary land system and must be based on existing customary rights.

Keywords: customary law; legal position; Agraria;

1. Introduction

The Indonesian nation as a unitary state places land in an important position, because it is a factor that cannot be separated from the condition of Indonesia's agrarian society. During the Dutch colonial rule, land belonging to the Indonesian people was confiscated and used for the governance of the interests of the colonial government. In order to make legal changes in order to provide agrarian life and justice for the community, the People's Consultative Assembly issued TAP MPR No.IX /MPR/2001 concerning Agrarian Reform and Natural Resource Management as the basis for the National Land Policy, including regulating customary community rights and land use.[1]

Customary law is a value that lives and develops in the community of an area. Although most of the Customary Laws are unwritten, they have a strong binding power in society. There

1. Husen Alting, Penguasaan Tanah Masyarakat Hukum Adat (Suatu Kajian Terhadap Masyarakat Hukum Adat Ternate), *Jurnal Dinamika Hukum*, Vol.11 No.1 Januari 2011, page.87-98

are separate sanctions from the community for violating customary law rules. Customary law that lives in this society for people who are still thick with their original culture will be very pronounced. The application of customary law in everyday life is also often applied by the community.

Customary law is an unwritten rule that lives in the customary community of an area and will remain alive as long as the community still fulfills the customary law that has been passed on to them from their ancestors before them. Several definitions and descriptions for analysis materials in order to describe the meaning of customary law, will be presented below. C. Van Vollenhoven stated that what is called customary law (adatrecht) is dat samenstel van voor inlanders en vreende oosterlingen geldende gedragregels, die eenerzijds sanctie hebben (customary law is the entire code of conduct applicable to native Indonesians who have forced and uncodified attempts).[2]

In Indonesia, this is emphasized in the State Constitution which recognizes the existence of customary law communities, namely in Article 18 B of the 1945 Constitution which states that the State recognizes and respects indigenous peoples and their traditional rights as long as they are still alive and in accordance with the development of the nation, society and the principles of the Unitary State of the Republic of Indonesia which are regulated in law.[3] However, when examined, it can be concluded that there are in fact the formulations contained in it contain noble values and the soul of customary law. The preamble to the 1945 Constitution, which contains a view of life, namely Pancasila, this reflects the national personality, which lives in values, patterns of thought and customary law.

At a practical level, based on the 1945 Constitution, the State introduces a right called the State's Right to Control (HMN), which is derived from Ulayat Rights, Land Rights, which are traditionally recognized in customary law. There are 4 (four) main points of thought in the preamble to the 1945 Constitution, namely:

(1) First Thought, namely: "The state protects the entire Indonesian nation and all Indonesian blood on the basis of unity by realizing social justice for all Indonesian people". This means that the State wants unity by eliminating group ideology, overcoming all individual views. The First Thought is the incarnation of the Third Principle of Pancasila;
(2) Second Principal, namely: "The state wants to create social justice for all Indonesian people". This is the main idea of social justice which is based on the awareness that humans have the same rights and obligations to create social justice in people's lives. Second Principle is the incarnation of the Fifth Precepts of Pancasila;
(3) Third Principle, namely: "The state is sovereignty of the people, based on democracy and deliberation / representation". This shows that the State system formed in the Constitution

2. Mahdi Syahbandir, Kedudukan Hukum Adat Dalam Sistem Hukum, *KANUN* No. 50 Edisi April 2010, page.1-13
3. Hayatul Ismi, Pengakuan dan Perlindungan Hukum Hak Masyarakat Adat Atas Tanah Ulayat Dalam Upaya Pembaharuan Hukum Nasional, *Jurnal Ilmu Hukum*, Vol.3 NO. 1 Tahun 2018, page.1-22

must be based on the sovereignty of the people and based on deliberation / representation. The Third Thought is the incarnation of the Fourth Precepts of Pancasila.

(4) Fourth Principle, namely: "The state is based on the One Godhead according to the basis of just and civilized humanity". This shows a logical consequence that the Basic Law must contain the content that obliges the government and other state administrators to maintain noble human character and uphold the noble moral ideals of the people. The Fourth Principle is the incarnation of the amalgamation of the First and Second Principles of Pancasila;[4]

Thus, the 1945 Constitution as the first Constitution of the State of Indonesia is based on and encompassed by spiritual values: Divinity, Humanity, Unity, People and Justice. The basics of divinity and humanity give the characteristics and characteristics of the first constitution of the Indonesian State based on the religious values of religious values, moral values and human nature.

However, after the amendment of the constitution, customary law is recognized as stated in the 1945 Constitution Article 18B paragraph (2) which states: The state recognizes and respects indigenous peoples 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 in law.

The existence of customary law as the living law of the Indonesian nation is increasingly marginalized. Customary law, which was originally a living law and is able to provide solutions to various social problems in the life of the Indonesian people, is increasingly fading. At present, in its empirical reality, there are sometimes many problems faced by indigenous Indonesians when customary law is faced with positive law.[5]

Customary law has been in effect throughout the Indonesian archipelago since time immemorial. The word Adat comes from Arabic which means habit. Customary law is a part of the law that is not written down, lives and grows in the souls of the people and has been passed down from generation to generation from ancient times to the present. The source of customary law is the people's belief in belief, which is expressed, among other things, in the form of a habit, the decisions of the heads of the people. Indonesian legal politics, which leads to codification and unification of law, has accelerated the disappearance of customary law institutions. In fact, it cannot be denied that currently, in relation to economic activity, positive law is transforming into an Islamic legal system (syariah).[6]

4. Sri Handayani Retna Wardani, Grand Design Politik Ketatanegaraan Indonesia Sesuai Pancasila Dan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, *Jurnal Kajian Hukum,* Vol. 2, No. 1 (2017), page 79-107
5. Lastuti Abubakar, Revitalisasi Hukum Adat Sebagai Sumber Hukum Dalam Membangun Sistem Hukum Indonesia, *Jurnal Dinamika Hukum*, Vol. 13 No. 2 Mei 2013, page.319-331
6. Lastuti Abubakar, Implikasi Aktivitas Ekonomi Syariah Terhadap Perkembangan Hukum Ekonomi di Indonesia, *Jurnal Legal Review*, Vol. I No. 2 Desember 2010, page. 165-168.

Customary law is a value that lives and develops in the community of an area. Although most of the Customary Laws are unwritten, they have a strong binding power in society. There are separate sanctions from the community for violating customary law rules. Customary law that lives in this community for people who are still thick with their original culture will be very much felt, and we will find customary law if we ourselves live in the customary community itself. The application of customary law in everyday life is also often applied by the community.

Customary law also has binding material strength for indigenous peoples, there are several factors that influence the level of material strength of customary law, among others; to what extent customary law is in line with social values, to what extent the regulations applied are in line with the prevailing legal system, how far the customary law is able to bring about changes in the social situation of the community. These things are factors of the high and low of the binding strength of customary law.

From its form, customary law is unwritten and uncodified law, so that the position of customary law cannot be a source of law. In fact, in a constitutional state, a principle applies, namely the principle of legality. The principle of legality states that there is no law other than what is written in the law. This is to ensure legal certainty. Although customary law is not a source of law, customary law has an important role in the formation of positive law. This can be proven if we examine the preamble of the 1945 Constitution, it can be concluded that in fact the formulations contained in it contain noble values and the spirit of customary law. The preamble to the 1945 Constitution, which contains the Pancasila view of life, this reflects the national personality, which lives in values, patterns of thought and customary law.

2. Research Method

The research method is a series of procedures or steps used to manage and collect data and analyze the data using certain techniques and methods.[7] The research method used in this research is library research or library research. The approach used in this study is a normative juridical approach. The normative juridical approach is a research approach that aims to examine legal principles, legal systematics, legal synchronization, legal history and comparative law.[8] Meanwhile, the legal materials used in this study consist of primary, secondary and tertiary legal materials. Primary legal materials consist of statutory regulations, official records or minutes relating to this research. Meanwhile, secondary legal materials relate to legal materials that provide clarification to primary legal materials, such as books, literature, articles, papers and other materials taken from legal experts. The tertiary legal material places more emphasis on data from the internet

7. Bambang Sunggono, *Metodologi Penelitian Hukum,* Cet. Kedua, Jakarta; Raja Grafindo Prasada, 2010, page. 24.
8. Laurensius Arliman S, *Notaris dan Penegakan Hukum oleh Hakim, Yogyakarta;* Deepublish, 2015, page. 12.

which is intended to provide reinforcement for the object under study.

3. Result and Discussion.

1. Customary Law Position in Legislation

In essence, the aim of law enforcement must be based on awareness and moral responsibility to defend justice. Without justice as the main goal, law (positive and customary) will only fall into a tool of justification by the ruling political elite against their political opponents. Customary law is the original law of our nation. Customary law will not be erased by time. Meanwhile, positive law is the law that applies today. In the application of customary law, customary law has always been the source of law for Indonesia's positive law. Basically, a positive legal system will never deviate from the customary law system, because positive law itself cannot conflict with existing community laws, and if it contradicts it, it will definitely be rejected in the community.

Today's customary law is considered to have no binding power and is only implemented by certain communities, even though basically the application of customary law is found in our lives both in society and as a state. Customary law will always exist and have binding power within itself which contains the moral strength of each individual. Customary law will always follow the development of a dynamic society in achieving its goals, so that customary law will not be timeless.

The existence of customary law in the community will be very much felt in the area of the community which is still thick with its original culture, and we will find customary law if we ourselves live in the customary community itself. In connection with the existence of customary law with positive law based on statutory regulations in accordance with Law No.10 of 2004, the order of the statutory regulations is as follows:

1. The 1945 Constitution;
2. Law / Perpu;
3. Government Regulations;
4. Presidential Regulation
5. Regional Regulations;

This does not give a formal place for customary law as a source of statutory law, except for customary law in the form of customary law which is formally recognized in legislation, customs, judges' decisions or or the opinions of scholars. The development of the position of customary law in the national legal system in Indonesia is very important and has a good role in the National legal system in Indonesia, in legislation, and in judges' decisions.

Thus this constitution guarantees the recognition and respect of customary law if it meets the requirements:

1. Requirements for Reality, namely customary law is still alive and in accordance with the development of society;
2. Requirements for Ideality, namely in accordance with the principles of the Unitary State of the Republic of Indonesia, and its enforceability is regulated in law;

Article 28 I paragraph (3) of the 1945 Constitution affirms that "The cultural identity and rights of traditional communities are respected in line with the times and civilizations". Between Article 18 B paragraph (2) and Article 28 I paragraph (3) in principle contains a difference where Article 18 B paragraph (2) is included in Chapter VI concerning Regional Government while 28 I paragraph (3) is in Chapter XA concerning Human Rights. More clearly, Article 18 B paragraph (2) respects cultural identity and the rights of traditional communities (indigeneous people). Strengthened in the provisions of Law no. 39 of 1999 concerning Human Rights in Article 6 paragraph 1 and paragraph 2 which reads:

1. In the context of upholding human rights, differences and needs in the legal community must be considered and protected by law, society and the government.
2. The cultural identity of customary law communities, including protected customary land rights, is in line with the times.

As explained in Law no. 39 of 1999 (TLN No. 3886) Article 6 paragraph (1) states that customary rights which in fact still apply and are upheld in the community of customary law must be respected and protected in the framework of protecting and enforcing human rights in the community concerned with due observance of laws and regulations. Furthermore, the explanation of Article 6 paragraph (2) states that in the context of upholding human rights, the national cultural identity of the customary law community which is still firmly adhered to by the local customary law community, remains respected and protected as long as it does not contradict the principles of the rule of law which is based on justice. and community welfare. In this provision, that customary rights include rights to customary land in the sense that they must be respected and protected in accordance with the times, and it is emphasized that such recognition is made of customary rights which are firmly held by the local customary law community.

2. Implementation of Customary Law Position in the Application of Basic Agrarian Regulations

As an independent social being, everyone has various rights to guarantee and defend life in the midst of their society. The rights that a person has in his life, we can basically distinguish between two main types when viewed according to their nature, namely: 1) rights that are human in nature, namely rights that must exist for everyone to be able to live naturally as an individual who is also a member. society is in line with their dignity as an honorable person, 2) rights that are not human in nature, namely rights that can reasonably be owned by a person

or a party due to their special relationship with other people or parties at a certain place and time as well as situations and conditions which is deemed appropriate.

Basically, positive law is a law that binds in general or binds society as a whole. So that in its implementation positive law must not conflict with the norms that live in society. The norms that live in society in general can be summed up as a law that lives in society or customary law.

In its implementation, positive law and customary law have an intervention or a very close relationship and must not be contradicting one another, so that it will complement each other. Customary law must be dynamic so that it can adjust between the needs of life in society and positive law, on the other hand, every positive law must not conflict with the customary law that lives in the community.[9]

From the above, it can be concluded that the existence of customary law in Indonesian positive law will always exist and will never die. Customary law and positive law are complementary to one another. Customary law will always move elastically and dynamically adjusting life in society and positive law will always not conflict with the laws that live in the community or customary law. If the customary law conflicts with the community, the customary law will not be able to exist, so if it is felt that it does not provide or is not in accordance with the life of the community, the customary law will automatically change according to the complex life of the community. Besides that, the existence of customary law in positive law will never die.

The current positive laws, especially the national agrarian law, have a lot of sources and make customary law a guideline for the formulation of these positive laws. If a positive law in general or agrarian law in particular contradicts the customary law system, it is contrary to the prevailing law in society. The existence of customary law in positive law will never die, because the customary law system is elastic and dynamic. The emergence of the term customary land cannot be separated from the legal history that has existed, which means that the two legal systems that have been in force in Indonesia have become the basis for land law prior to the formation of the UUPA, namely customary law and Western law.[10]

The enactment of Law No.5 of 1960 concerning Basic Agrarian Regulations (UUPA) is a fundamental change in land law in Indonesia (Agrarian Law). The enactment of the UUPA is a very important milestone in the history of land law in Indonesia in general and the reform of land law in particular. Prior to the enactment of the UUPA, Agrarian Law was dualistic, which was based on Customary Law and Western Agrarian Law. Since the UUPA came into effect, the Western Agrarian Law was declared invalid, and the dualistic nature was also removed, what applies is the UUPA as positive law that applies unification in Indonesia.

9. Verlia Kristiani, Hukum Yang Berkeadilan Bagi Hak Ulayat Masyarakat Hukum Adat (Kajian dan Implementasi), *ADIL: Jurnal Hukum* Vol.11 No.1 Tahun 2017, page.143-163
10. I Made Suwitra, Dampak Konversi Dalam UUPA Terhadap Status Tanah Adat di Bali. *Jurnal Fakultas Hukum UII*, Vol 17No (1) Tahun 2010, page.103-118.

National agrarian law according to Law No.5 of 1960 is a group of various fields of law, each of which regulates control rights over natural resources which include land law, water law, mining law, fisheries law, and power control law. and the elements in space, but in this paper I limit it to the land law system only. The definition of land law is all written and unwritten legal provisions all of which have the same regulatory object, namely land tenure rights as a legal institution and as a concrete legal relationship, with a civil aspect that can be systematically compiled and studied so that they become a whole which is a system.

In Article 3 UUPA states that in the National agrarian law originates and recognizes the existence of customary law or customary rights. Hak ulayat is the right of customary law communities to the environment of their territorial land which gives certain authority to the customary rulers to regulate and lead the use of the land. In the UUPA and Regulation of the Minister of Home Affairs for Agrarian Affairs, Ka. BPN No. 5 of 1999 customary rights are recognized on condition that they still exist and are implemented in accordance with the state and do not conflict with higher regulations. Furthermore, the criteria for the existence of customary law are the existence of ulayat rights, ulayat land, and are valid and obeyed by the community. In this case, it is clear that the LoGA still recognizes the existence of customary rights and customary law. The UUPA also explains that the role of customary law in the field of national land law development is as the main source in the development of the national land law and as a complement to the written national land law. Customary law is the original law of indigenous groups in the form of an unwritten form and contains original national elements and social and family characteristics which are based on balance and include a religious atmosphere.[11]

Pengertian hukum adat didalam UUPA meliputi lima aspek yaitu, written conceptions, principles, legal institutions, systems and norms. The conception of customary law includes a communalistic, religious system that allows individual land control with private land rights, as well as an element of togetherness, because in essence the customary system uses a communal principle or prioritizes public interests over private interests. The conception of customary law is accommodated in Article 1 paragraph (2), Article 6, Article 3, and Article 16 UUPA no. 5 of 1960. Whereas the principles of customary land law include the principle of religiosity (Article 1 UUPA), the principle of nationality (Article 1, 2, 5 paragraph (1) UUPA), the principle of democracy (Article 9 paragraph (2) UUPA), the principle of society. equity and social justice (Articles 6, 7, 10, 11, 13 UUPA), the principle of planned use and maintenance (Articles 14, 15 of the UUPA), the principle of horizontal separation of land from buildings and the land above it. Meanwhile, customary law institutions in the National land law are improved

11. Boedi Harsono, 2014, *Hukum Agraria Indonesia, Sejarah Pembentukan Undang-Undang Pokok Agraria, Isi dan Pelaksanannya, Jilid I Hukum Tanah Nasional*, Djambatan, Jakarta, page 12.

and adjusted such as HGU, HGB, land registration, etc.[12]

Land rights based on customary law are recognized, as long as they are still alive and do not conflict with development. Here we see the absolute power of the State, because based on its interpretation, customary rights which have long been owned by indigenous peoples can be abolished. Regarding the issue of enforcing customary law in Indonesia, this is indeed very principle because adat is a mirror for the nation, adat is an identity for the nation, and an identity for each region.

For individuals who hold land rights, including legal entities, this affirmation provides assurance that the rights to land they own are attached to restrictions that arise from the existence of control rights by the State. For other parties who are not holders of land rights, certainty is also obtained that they cannot immediately ask the state to take action of control over land where certain rights have been attached to the land.[13]

In the framework of implementing the National Land Law and due to the demands of the customary community, on June 24, 1999, a Regulation of the State Minister for Agrarian Affairs / Head of the National Land Agency Number 5 of 1999 concerning Guidelines for Resolving Customary Rights Issues of Indigenous Peoples was issued. This regulation is intended to provide guidance in regulating and adopting operational policies in the land sector as well as steps for resolving problems concerning customary land.

This regulation contains policies that clarify the principle of recognition of "customary rights and similar rights from customary law communities" as meant in Article 3 of the UUPA. The wisdom includes:

1. Equation of perceptions regarding "ulayat rights" (Article 1)
2. Criteria and determination of the existence of customary rights and similar rights of customary law communities (Articles 2 and 5).
3. Authority of customary law communities over their ulayat lands (Articles 3 and 4) Indonesia is a country that adheres to plurality in the field of law, where western law, religious law and customary law are recognized. In practice (descriptive) some people still use customary law to manage order in their environment.

Taking into account the provisions of Article 1 and 2, the implementation of customary rights and similar rights of customary law communities, as long as they still exist, must be adjusted to the interests of the National and the State, which are based on national unity and must not conflict with the law. and higher regulations. From the two articles, it can be seen that in the national agrarian law it comes from the customary law system and still grasps the

12. Sihombing, B. F. 2014. *Evolusi Kebijakan Pertahanan dalam Hukum Tanah Indonesia*, Gunung Agung, Jakarta, page.12.
13. Yance Arizona, Perkembangan Konstitusionalitas Penguasaan Negara Atas Sumber Daya Alam dalam Putusan Mahkamah Konstitusi, *Jurnal Konstitusi*, Vol. 8, No. 3, Juni 2011, page. 308.

existence of customary law in the national agrarian law.

Hak Ulayat can be formulated as the authority that according to customary law is owned by certain customary law communities over a certain area which is the environment for its citizens to benefit from natural resources, including land, in that area, for their survival and life, arising from a relationship physically and mentally from generation to generation and there is no disconnection between the customary law community and the area concerned.[14]

National agrarian law is derived from customary law and customary law in the National agrarian law system which is used as a complement to written sources of law because the system in customary law that we know is a communal system or prioritizes public interests rather than individual interests. The system is believed to have a positive legal impact on national agrarian law. Another thing is that the customary law system is perceived as a legal system that is suitable for the personality of the National law.

Descriptive reviewed (where customary law is used as the basis for establishing decisions or laws and regulations), officially, it is recognized but limited in its role. Some related examples are Law No.5 of 1960 concerning Basic Agrarian Regulations which recognizes the existence of customary law in land ownership

6. Conclusion.

The position of customary law in statutory legislation in accordance with Law No.10 of 2004 is not formally a source of law. The development of the position of customary law in the national legal system in Indonesia is very important and has a good role in the national legal system in Indonesia. The implementation of the position of customary law in the Application of Law No.5 of 1960 concerning Basic Agrarian Regulations still uses customary law as the drafting guide. Customary law makes it the main and complementary source of written law on land. The formulation of a national land law must not conflict with the customary land system and must be based on existing customary rights. The requirement for recognition of customary rights in the Basic Agrarian Regulations is that they still exist and are implemented in accordance with national and state interests and do not conflict with higher laws and regulations. Based on articles 1, 2, 4, 9, 16 of the Agrarian Regulations, it can be concluded and known that customary land law concerns the systematics of human relations with land.

14. I Made Suwitra, Eksistensi Tanah Adat Dan Masalahnya Terhadap Penguatan Desa Adat di Bali, *WICAKSANA, Jurnal Lingkungan & Pembangunan*, Vol. 4 No. 1 Maret 2020, page. 31-44

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