

THE ROLE OF INDIGENOUS PEOPLES AND CUSTOMARY LAW IN THE DEVELOPMENT OF NATIONAL LAW THE PARADIGM OF PANCASILA

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ABSTRACT

Long before the entry of foreign traditions into Indonesia, Indonesian society was believed to have been regulated by the values of customary law. Adat is basically understood as a binding norm that is preserved by the community to regulate the daily lives of humans, so that adat is by itself a law. The formulation of the problem is how the role of indigenous peoples and customary law in the development of national law that has the Pancasila paradigm. The research method is normative juridical. The result of his research is that customary law is an important source for obtaining materials for the development of national law, which leads to the unification of the making of laws and regulations without neglecting the growth / development and development of customary law, habits in legal development. Pancasila as a source of legal order is very meaningful to customary law because customary law is rooted in folk culture so that it can manifest the real and living legal feelings among the people and reflect the personality of the Indonesian people and nation, especially indigenous peoples. Thus customary law is philosophically a law that applies according to Pancasila as a life view or philosophy of life of the Indonesian people. For example, magical religio, mutual cooperation, consensus and justice. Thus Pancasila is a crystallization of Customary Law. Keywords: Role of Indigenous Peoples, Customary Law, National Development, Pancasila.

A. INTRODUCTION

Indonesia is a maritime country that is connected by a vast ocean. In addition to consisting of thousands of customary laws, the consequences of this maritime country are also a big challenge for us to remain committed to the life of the nation and state. The consequences of our country's customary law diversity and maritime life threaten the extinction of various tribal languages, the loss of customary law, the escape of various cultural identities from the middle of the community and the weakness of the authority of traditional institutions in national and state life.

Long before the entry of foreign traditions into Indonesia, Indonesian society was believed to have been regulated by the values of customary law. Adat is basically understood as a binding norm that is preserved by the community to regulate the daily lives of humans, so that adat is by itself a law. Based on this understanding it can be said that Indonesian people

in fact never understand adat as an entity separate from the law.¹ Customary law is basically a reflection of what someone believes as the right way of life in accordance with their sense of justice and propriety.

Customary law is a legal system known in the social life environment in Indonesia and other Asian countries such as Japan, India and China. Customary law is the original law of the Indonesian people. The source is the unwritten legal regulations that grow and develop and are maintained with the legal awareness of the community. Because these regulations are not written and are growing, customary law has the ability to adjust and elastic. Besides that, it is also known that customary law communities are a group of people who are bound by the customary law as citizens together with a legal alliance because of the similarity of their place of residence or on the basis of inheritance.

Laws that apply in a country can be distinguished into laws that really act as the living law and there are laws that are enforced but do not apply as the living law. As an example of the law that applies by the way it is applied is the written law that is promulgated in the state sheet. Written laws are made that apply as the living law but there are also those that do not apply as the living law because they are not obeyed / carried out by the people.

Written law that is enacted by means of promulgation in the State Gazette is then carried out and obeyed by the people can be said as the living law. Whereas the written law, although it has been enacted by means of promulgation in the State Gazette but is abandoned and not implemented by the people, cannot be said to be the living law. One example is Law Number 2 of 1960 concerning Revenue Sharing.

Customs or habits can be interpreted as a person's behavior which is constantly carried out in a certain way and followed by an outside community for a long time. Customary law contains very traditional properties. Whereas customary law is generally considered by the people to be from a legendary ancestor (only found in the story of parents).

¹ Ratno Lukito, *Hukum Sakral dan Hukum Sekuler Studi Tentang Konflik dan Resolusi Dalam Sistem Hukum Indonesia*, (Jakarta: Pustaka Alvabet, 2008), p. 37

Each rule contains elements of necessity that are determined according to the community and customs (habits). These rules (normative) must be distinguished from the factual order or uniformity that serves as a guideline for human behavior. Law is a means by which humans will be able to adjust their actual actions to ideal principles that allow the continuation of social life (Soekanto, 1984).

The traditional form of customary law is characterized by its unwritten delivery model in community life. The specificity of customary law lies in its oral tradition. It is through this oral tradition that the traditional character is preserved and through this tradition the relationship between the past, present and future is maintained. Because the information brought into the community is usually delivered orally, the law in adat is rarely codified. Customary law has never been attempted to be systematically enacted or codified, because it is believed to be a direct manifestation of the sense of justice and propriety held by all members of the community. Therefore, both the source and development of customary law are in the hands of the community and do not depend on the technical process of legislation.²

Based on the above, the author is interested in writing this paper with the title *The Role of Indigenous Peoples and Customary Laws in the Development of National Law with the paradigm of Pancasila*.

B. Problem Formulation

What is the role of indigenous peoples (Adat Law) in the development of national law with a Pancasila paradigm?

C. Discussion

1. The Role of Indigenous Peoples (Customary Law)

Within each custom, language, ethnicity and religion, there is a value system and knowledge system that has grown hundreds or even thousands of years ago. Our country is regulated and managed for generations with thousands of customary laws, guided by hundreds of belief and religious systems. Indonesia is a nation built from hundreds or even thousands of sovereign, independent and dignified nations, which in their history have

² Ibid, p.44

experienced ups and downs. Thousands of these customary laws are a consequence of various ethnic groups in various regions in Indonesia.

According to Soepomo, customary law is a synonym of the law not written in the legislative regulations, the law that lives as a convention in state bodies (parliament, provincial council, etc.), the law that lives as a rule of habit that is maintained in social life, both in cities and villages. According to Cornelis van Vollenhoven Customary Law is a set of rules about behavior for indigenous people and the Foreign East on one party has sanctions (because it is legal), and on the other party is in a state not codified (because of custom).³

The veiled tradition is rooted in traditional culture. Customary law is a living law, because it manifests a real legal feeling from the people. In accordance with its own nature, customary law continues to grow and develop like life itself. Customary law regulates all aspects of people's lives that originate from ancestors and applies for generations. Customary law regulates the problem of marriage, children, marital property, inheritance, land and others that are always obeyed by every member of society in order to achieve order in society. This customary law is always upheld by its implementation. Customary law also regulates the adoption of children.

Enrichment of the customary rules of customary law must be in line with the values of the precepts in Pancasila as legal ideals in the national law. As stated by IGN. Sugangga, the principles of Customary Law that are used as the basis for the formation of National Law must fulfill the requirements including: (a) Customary Law must not conflict with National and State interests based on national unity; (b) Customary Law may not conflict with the Indonesian State which has the philosophy of Pancasila; (c) Customary Law may not conflict with the Written Regulations (Law); (d) Customary law that is clean from the characteristics of feudalism, capitalism and the exploitation of humans over humans; (e) Customary Law which does not conflict with the Elements of Religion.

Since the reformation began in 1998 there have been many laws and regulations that were born to recognize the existence and rights of indigenous peoples over land, natural resources and other basic rights. Various legislative products touch all levels from the

³ Dewi C Wulansari, *Hukum Adat Indonesia Suatu Pengantar*, PT Refika Aditama, Bandung, 2010, p. 34

constitution to village regulations. Our constitution before the amendment does not explicitly show us the recognition and use of the term customary law.

Post-New Order recognition of customary law is contained in the Decree of the People's Consultative Assembly Number IX Concerning Agrarian Reform and Management of Natural Resources and MPR Decree Number IV of 2000 concerning the Outlines of the State Policy in 1999-2004. Both of these state policies clearly recognize the existence of indigenous and customary law communities.⁴ At the constitutional level, in 2000, the People's Consultative Assembly (MPR) made amendments (also referred to as the second amendment) Chapter VI Article 18 UUD'45.⁵

After constitutional amendments, customary law is recognized as stated in Article 18B of the 1945 Constitution paragraph (2) which states: "The state recognizes and respects the units of customary law communities and their traditional rights as long as they are alive and in accordance with the development of society and principles Unitary Republic of Indonesia, which is regulated in law. Then a number of laws, especially those related to natural resources, contain recognition of the existence of indigenous peoples' rights. As if a regulation is incomplete if it does not contain recognition of the existence and rights of indigenous peoples. This was greatly influenced by the advocacy carried out by indigenous peoples and their supporters who since its emergence did indeed want to re-regulate the relationship between indigenous peoples and the state.

Legal construction of Article 18 B paragraph (2), UUDNRI 1945, shows several important things namely; First, the state recognizes the existence of indigenous peoples and their rights in the territorial territories of indigenous peoples. Recognizing the existence of customary law communities, basically also recognizes their customary law. Customary law and customary law communities are inseparable entities. These two entities give each other

⁴ Outlines of the State Policy of 1999-2004, the field of law development number 2 states: arranging a comprehensive and integrated national legal system by recognizing and respecting religious and customary law and renewing the legislation of colonial heritage and discriminatory national law, including injustice gender and its inconsistency with the demands of reform through legislation programs.

⁵ The designation of the 1945 Constitution or the 1945 Constitution is the designation prior to the amendment. After the fourth amendment of the 2004 MPR RI, stipulated the results of the 1945 Constitution amendment as the 1945 Constitution of the Republic of Indonesia or abbreviated as the NRI Constitution

the existence of one another. Customary law is a customary law community and each of them gives its existence to each other. Customary law provides legal grounds for indigenous and tribal peoples, and regulates their social life. Second, the state provides a sociological and political juridical requirement so that indigenous and tribal peoples can be recognized by the state, namely only the unit of customary law, the community along with their traditional rights is still alive and in harmony with the development of society and the principle of an Indonesian state that can be recognized by the state. Third, the state is in a dominant position in assessing and recognizing the existence of a customary law community. It is the country that determines the assessment of whether the customary law community is still alive and in harmony with the development of society and in accordance with the principle of the unitary state of Indonesia. Fourth, the state constitution instructs state administrators, both the DPR and the government, to regulate the issue of state recognition in law. In other words, it must be in the form of a law that regulates the form of recognition of the existence of indigenous and tribal peoples. The fifth recognition of the existence of indigenous and tribal peoples is placed in the regulation of regional government. In such a context, it clearly shows that the possibility of the adoption of customary law as part of the national legal system is closely related to the administration of regional government or in a decentralization policy.

2. National Law Development

Understanding National Law is a rule of law that applies in a country which consists of the principles and regulations that must be obeyed by society in a country. National Law is a legal system that is formed from the process of discovery, development, adjustment of several existing legal systems . Nasional law in Indonesia is a law that consists of a mixture of systems of religious law, European law, and customary law. Religious Law, because the majority of Indonesian people embrace Islam, the Islamic Shari'a is more dominant, especially in the areas of family, marriage and inheritance.

National Law is a law or regulation that is based on an ideological and constitutional basis, namely Pancasila and the 1945 Constitution or a law that is built on creativity or activities based on national taste and engineering. In connection with that, national law is nothing but a legal system that originates from national cultural values that have long existed and developed now, in other words, national law is a legal system that arises as the fruit of

Indonesian people's cultural endeavors that are national in scope, namely law that covers all people as far as the national boundaries of the Indonesian state (Syaukani and Thohari, 2004).

The National Law System which is followed mostly based on continental European law both civil law and criminal law. European law followed specifically from the Netherlands because in the past Indonesia was a Dutch colony. The customary law system is also part of national law, because in Indonesia it is still thick with the local customary rules of the community and culture in the Indonesian territory.

Legal pluralism, substantively legal pluralism is generally defined as a situation in which two or more legal systems work side by side in the same 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 where two or more legal systems interact in one social life or a condition in which more than one legal system or institution works side by side in activities and relationships within a community group.⁶

Bagir Manan stated: Legal development is basically a legal reform. This is because the reform of customary law does not depart from empty space. Indonesia as every society by itself has a legal system as a code of conduct that governs the association of its members. In Indonesia, the legal system has preceded the arrival of colonizers or Western influences in general. An organized legal system is in the midst of Indonesian society that has been organized long before the colonial period. In a certain measure the original Indonesian legal system is very modern (Manan, 1999). The role of law in development to ensure changes occur regularly. Regular changes through legal procedures, both in the form of legislation and decisions of judicial bodies, are better than irregular changes using violence alone. Therefore, both change (and renewal) and order (or order) are the twin goals of a developing society, so the law becomes a tool that cannot be ignored in the development process (Kusumaatmadja, 1976).

The main targets for the development of legislation include: First, Continuing the renewal of laws and regulations from the colonial period. Secondly, renewing the legislation established after independence has lagged or does not reflect the basis and direction of legal politics towards democratic, legal, social justice and a clean government, nation and state life. Third, Creating new laws and regulations that are needed both in order to strengthen the basis

⁶ F. Von Benda Beckman, in H. Abdurrahman, "Customary Law in the Development of Legal Pluralism in Indonesia "Paper presented at a seminar on Legal Pluralism and its Challenges for the Establishment of a National Legal System, the Ministry of Law and Human Rights National Law Development Board in May 1-2, 2007.

and direction of legal politics and fill various legal vacancies due to new developments. Fourth, holding or entering into various international agreements both in order to join in strengthening the international order and in the national interest (Manan, 1999).

The development of national law to create positive law is essentially an effort to modernize the law, so that our law can be in tune with the development and progress of the times. In order to create positive law must be rooted in the noble values that live on the Indonesian earth. In this case customary law as a reflection of the noble values is very relevant as the basic foundation, sources and materials of national law that will come and become the main capital in the process of law modernization.

Indeed, a national law development that is fundamental to customary law seems to be a strange and impossible thing to do because it will hamper the development of the law itself. This assumption itself is not true at all because a formation of national law will live in society if it is based on adat (Imam Sudiyat, 1981: 93).

In essence, the development of customary law cannot be separated from the development of the supporting community. In the development of national law, the role of customary law is very important. Because the national law that will be formed is based on the customary law that applies. Customary law is an unwritten and dynamic law that can always adapt to the development of human civilization itself. If customary law governing a field of life is deemed no longer appropriate to the needs of its citizens, the citizens themselves will change the customary law so that it can provide benefits to regulate their lives. This can be seen from the decisions made by traditional elders. Customary law experiences development due to social, cultural, economic interactions and others. The contact resulted in a dynamic change in customary law. In addition to not being codified, customary law has a pattern.

These distinctive features include:⁷

1. The first pattern is religious magic. This means that customary law norms are always related to a supernatural or metaphysical belief.

2. The second pattern is communalistic, namely that in customary law there are two basic principles. First, customary law always positions the interests of alliances above all other interests in society. Second, customary law always views an individual in close connection with his alliance which is overwhelmed by a strong family spirit.

⁷ Hilman Hadikusuma, 1992, "Pengantar Ilmu Hukum Adat," Bandung, Mandar Maju, p. 33-36.

3. The third pattern is factual, namely that customary law always resolves a problem based on its context, so that similar problems will not always be solved equally.

4. The fourth pattern is visual, namely that according to customary law, a legal act can only be said to be legitimate if witnessed by another party.

5. The fifth pattern is flexible and dynamic, namely that customary law is not a rigid law, but always changes with the development of culture.

6. The sixth pattern, and at the same time the most important, is traditional, namely that customary law is a law that has been passed on from generation to generation.

Some Indonesian scholars then tried to explain and develop the concept of customary law further, which of the many concepts can be summarized more or less in the following points:⁸

1. Customary law is a law that is (mostly) formed from customs or habits;
2. Customary law comes from the values of the indigenous Indonesian people;
3. Customary law (mostly) is not written;
4. Customary law is custom that has sanctions;
5. Customary law has a distinctive style that distinguishes it from other legal systems.

Conception of customary law or customary institution is one of the means of community renewal and development. now it has been accepted and has even become an official government establishment. A legal conception that is closely related to legal reform efforts, namely "the law as a means of renewal of society" or "law as a means of renewal of society" (Kusumaatmadja, 1976). statement of political will from the highest completeness body in our country according to the 1945 Constitution and therefore binding, both the government and the DPR. The GBHN stipulates what must be done, namely codification and legislation and how to do it, namely by paying attention to the legal awareness of the community. Definition of legal guidance other than: 1) Legal reform through legislation (elements of norms or norms) in a broad sense including 2) law enforcement tools (institutions or institutions), and 3) how to achieve that goal (processes). (4) Development of national law is carried out based on the conception of national unity and unity as outlined in the understanding of the archipelago. (5) Although the legislation is the main technique for

⁸ Surojo Wignjodipuro 1979, "Pengantar dan Azas-Azas Hukum Adat," Bandung, Alumni, p.5.

carrying out legal reform, renewing rules and principles and finding direction or material for renewal of such rules also uses other legal sources, namely the decision of judicial bodies (jurisprudence), while undergraduate writing leading law is also called an additional source.

The failure of the law and legal experts to play a role in the development process and the people's disappointment with the law and legal experts that later arose because legal experts who received traditional education were not actually prepared to face a much more difficult task in developing countries than with the task of legal experts in developed countries. This task is even more severe in countries that have a pluralistic legal system.

Developing country communities with a pluralistic system where customary law systems and institutions apply side by side with Western legal systems and institutions and perhaps other foreign legal systems and institutions face a particular problem. The problem is that the law cannot be separated from the value system adopted by a society. For example, it cannot just be imposed on a monogamous system in a Muslim society (Kusumaatmadja, 1976).

One of the efforts in doing legal guidance is to determine which areas of law can be renewed and which fields should be left first. In general, perhaps it can be said that the fields of law that are closely related to the cultural and spiritual life of the community must be temporarily left or can only be worked on after all aspects of a change and consequently are taken into account and carefully considered. The fields of family, marriage and divorce law and inheritance are included in it. Whereas other fields such as contract law, company and commercial law are generally legal fields that are more appropriate for renewal businesses. There are other legal fields that are even more neutral from a cultural point of view, here the use of foreign models will not cause difficulties. Can be included in this category presumably legal norms relating to transportation, for example traffic regulations on land, sea, air, postal and telecommunications relations (Kusumaatmadja, 1976).

3. Customary Law with the Paradigm of Pancasila

Political policy lines regarding legal coaching with cultural approaches. The dimensions of "culture" as a sub-system of legal development include: (1) Development and development of legal culture is directed to shape attitudes and behavior of community members including state administrators in accordance with the values and norms of Pancasila so that legal culture is more internalized in society, so awareness , legal compliance and

compliance are increasing and human rights are increasingly respected and upheld. (2) The awareness to respect and uphold human rights as a practice of Pancasila and the 1945 Constitution is directed at the enlightenment of human dignity and to promote the general welfare and intellectual life of the nation. (3) The development and development of customary law is aimed at creating peace and order and upholding laws that are based on honesty, truth and justice to realize legal certainty in order to foster national discipline. (4) Legal awareness of state and community organizers needs to be continuously improved and developed through education, counseling, socialization, exemplary and law enforcement to respect, obey and obey the law in an effort to create a nation with a legal culture.

In the national scope, the ideal pattern of the Indonesian people is Pancasila, so the outlook on life, the ideals of law, legal norms, behavior and the purpose of national life are to realize the Pancasila society and for that the legal system is the Pancasila legal system. The idealistic concept of "customary law culture" in the 1998 National Guidelines, on paper is enough to give promises and political messages but the continuation that should be through the making of laws and law enforcement has not been able to prove the consistency of law enforcement in an intrinsic sense, and this is evident from legal products especially in the efforts of law enforcement that are still fresh away from the idealism of a cultural approach through those legal channels (Lubis, 2000).

The real problem is the cultural attitude of legal actors in our country. On the one hand we always place law as part of the ideal values of our society. This attitude is of course not an attitude that is not commendable, we unconsciously put the law in an ivory tower. Far from the reality of everyday life. Even though the law, as a social phenomenon actually must be realistic, grounded, solve the social problems it faces (Setiawan, 1998).

The development of customary law is an effort to build national legal structures by consciously and directed planning by referring to the future based on observed trends. The direction of legal development is not something that stands alone, but is integrated with the direction of development in other fields that require harmonization.

However the direction of legal development starts from the outlines of ideas in the 1945 Constitution, it is necessary to harmonize with the level of community development that is dreamed of will be created in the future. According to van Vollenhoven, customary law is a law that does not originate from the regulations made by the Dutch government of the

Netherlands or other instruments of power which are joint and carried out by the Dutch themselves.

Habit or custom is a reflection of the personality of a nation and the embodiment of the nation's soul. Therefore, every nation has its own customs and habits that are different from each other, in which the differences are important elements in the identity of a nation. Thus Indonesia, habits or customs that are owned by regions differ from each other, although the basis or nature is one, namely Indonesia. Indonesian customs or customs can be referred to as *Bhinneka Tunggal Ika*.

Basic Applicability of Customary Law in terms of philosophical Customary Law that lives, grows and develops in Indonesia in accordance with the development of a flexible, flexible era in accordance with the values of Pancasila as well as stated in the opening of the 1945 Constitution only creates thoughts that include the atmosphere *kebatinan* of the 1945 Constitution of the Republic of Indonesia.

As for what is meant by the philosophical basis of Customary Law is actually the values and nature of Customary Law are very identical and even contained in the points of Pancasila. For example, magical religio, mutual cooperation, consensus and justice. Thus Pancasila is a crystallization of Customary Law.

In the practice of state life, nation and society, grounded dogmatic dimensions of culture should precede other dimensions, because in the dimension of customary culture there is a set of values. Furthermore, this value system is the basis of policy formulation and then followed by law making as juridical signs and code of conduct in daily life, which are expected to reflect the noble values possessed by the nation. concerned (Lubis, 2000). According to strategic policy objectives, what is important is the extent to which the policy formulating body and the drafters of the rule of law consistently continue to refer to the philosophical value system so that every line of policy and rule of law created is considered accommodating and responsive to the aspirations of the community, fairly with equal attention. Political wisdom with a cultural approach like this becomes a constitutional demand of all Indonesian people whose social structure is full of diversity, pluralism and heterogeneity, various sub-ethnicities, religions, customs and cultural elements (Lubis, 2000).

Legal development is not an instant process, it takes a long time, deep thinking and continuous process in accordance with the dynamics experienced by the nation itself. The

most important thing in the development of national law is to determine the soul or legal paradigm, in this case the national legal paradigm namely the paradigm of Pancasila.

The Indonesian community is a Unity in Diversity, different in entities that contain various differences, so in addition to a national view of life, there will be a local view of life or a group that is local. This local legal system shows the mechanism of a set of functions and roles that are interlinked in a continuous legal process from the past, present and future by following human behavior in people's lives. So this local legal system is bound to the ideal pattern in question is the desired customary law pattern applied by certain communities, the ideal pattern is the basic pattern that is reflected in various forms of conception, as a view of life, the ideals of life, legal ideals, legal norms and behavior, where between one and the other the initial function interlocked as a legal system.

If the law of a nation is a reflection of the nation's social life, then it becomes paradoxical with the globalization of law. Although in certain respects legal globalization is also understood, globalization of law will continue in different legal systems. However legal globalization is something that is hard to avoid, but the nation state will not simply give up their sovereignty function, and in a global system there will be no free control from the nation state because globalization is not a toll road without a mechanism. The mechanism of how the nation's public relations traffic is built is actually based on an agreement or contract, a convention, so that the difference between the former is the national law, then the limitation is an agreement between the nation states.⁹

D. Conclusion

Customary law is one of the important sources for obtaining materials for the development of national law, which leads to the unification of the making of laws and regulations without ignoring the emergence / growth and development of customary law, habits in legal development. Pancasila as a source of legal order is very meaningful to customary law because customary law is rooted in folk culture so that it can manifest the real and living legal feelings among the people and reflect the personality of the Indonesian people and nation, especially indigenous peoples. Thus customary law is philosophically a law that applies according to Pancasila as a life view or philosophy of life of the Indonesian people. For example, magical religio, mutual cooperation, consensus and justice. Thus Pancasila is a crystallization of Customary Law.

⁹ Satjipto Rahardjo, *Hukum Dalam Perspektif Sejarah dan Perubahan Sosial, dalam Pembangunan Hukum Dalam Perspektif Politik Hukum Nasional*, Editor Artdjo Alkostar dkk, Rajawali, Jakarta 1986, p. 27.

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