



# Exploring Customary Law: Perspectives of Hazairin and Cornelis Van Vollenhoven and its Relevance to the Future of Islamic Law in Indonesia

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## Abstract

The difference between Islamic law and Western law in viewing customary law is the core problem that forms the background of this research. This article aims to explore in-depth Customary Law from the perspectives of Hazairin and Cornelis Van Vollenhoven and its relevance to the future existence of Islamic law in Indonesia. This research is a literature study applying a qualitative Juridical-Normative approach. The primary sources for this research are the original works of Hazairin (*Tujuh Serangkai tentang Hukum dan Hazairin, Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith*) and Van Vollenhoven (*Het Adatrecht Van Nederlandsch-Indie and its translated version, Van Vollenhoven on Indonesian Adat Law*). The secondary sources are all references relevant to the topic of the article. Comparative analysis is used in analyzing the data. The research findings explain that, according to Hazairin, customary law can be applied anywhere as long as it does not contradict Islamic law. In contrast, Van Vollenhoven argues that customary law does not need to consider religion because all humans have equal rights before God, thus rejecting or eliminating customs or traditions is considered undignified. The formation of national law due to culture and tradition is an important part of society. This research provides a conceptual historical-theoretical narrative related to customary law in Indonesia. Despite having different perspectives on customary law, both Hazairin and Van Vollenhoven share the vision that customary law should be made into positive law. Therefore, the existence of customary law needs to be considered by lawmakers to become national positive law.

**Keywords:** Customary Law, Islamic Law, Hazairin, Van Vollenhoven.

## Abstrak

Perbedaan antara hukum Islam dengan hukum Barat dalam memandang hukum adat sebagai problem inti yang menjadi latar belakang penelitian ini. Artikel ini bertujuan untuk mengeksplorasi secara mendalam hukum adat dalam perspektif Hazairin dan Cornelis Van Vollenhoven serta relevansinya dengan eksistensi masa depan hukum Islam di Indonesia. Penelitian ini merupakan penelitian pustaka dengan menerapkan pendekatan kualitatif Yuridis-Normatif. Sumber primer penelitian ini adalah dari karya asli Hazairin (*Tujuh Serangkai tentang Hukum dan Hazairin, Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith*) dan Van Vollenhoven *Het Adatrecht Van Nederlandsch-Indie* sekaligus dengan versi terjemahannya, *Van Vollenhoven on Indonesian Adat Law*. Sedangkan sumber sekundernya adalah segala referensi yang relevan dengan topik artikel. Dalam menganalisis data digunakan analisis komparatif. Hasil penelitian menjelaskan bahwa menurut Hazairin, hukum adat bisa diterapkan dimana saja asalkan tidak bertentangan dengan hukum Islam. Sedangkan Van Vollenhoven berpendapat bahwa hukum adat tidak perlu mempertimbangkan agama karena manusia memiliki hak yang sama di hadapan Tuhan, sehingga menolak atau menghilangkan adat atau kebiasaan adalah perbuatan yang tidak bermartabat. Pembentukan hukum nasional karena budaya dan tradisi merupakan bagian penting dari masyarakat. Penelitian ini memberikan konsep berupa narasi historis-teoretis terkait hukum Adat di Indonesia. Kendati memiliki perspektif yang berlainan terkait hukum Adat, Hazairin maupun Van Vollenhoven memiliki kesamaan visi bahwa hukum Adat perlu dijadikan hukum positif. Maka dari itu, eksistensi hukum adat perlu dipertimbangkan oleh *lawgiver* untuk menjadi hukum positif yang berlaku secara nasional.

**Kata Kunci:** Hukum Adat, Hukum Islam, Hazairin, Van Vollenhoven.



## Introduction

In the context of Indonesian legal studies, the discourse on customary law from the perspectives of Hazairin and Van Vollenhoven is crucial. These two philosophical perspectives distinguish how customary law in Indonesia is viewed through the lenses of Islamic and Western law. Customary Law was recognized in Indonesia in the early 20th century as a legal system.<sup>1</sup>

From the standpoint of Islamic law, customary law is often regarded as a valid legal source as long as it does not contradict Islamic law. However, from the perspective of Western law, customary law is considered a less important legal source compared to positive law because it is seen as conflicting with the philosophical and formalistic traditions of continental Europe. Nevertheless, Customary Law holds significant importance in the Anglo-Saxon tradition. Therefore, the Western perspective on Customary Law differs depending on the continental European or Anglo-Saxon tradition.

Based on this discourse, it is crucial to study the existence of customary law from the philosophical perspectives of Islamic Law and Western Law. To do this, we must contemplate the thoughts of Hazairin and Van Vollenhoven. This is necessary because over the years, research on customary law from the perspectives of Islamic and Western law has often been done in a partial and dualistic manner, as if they do not converge or intersect.

Studies of customary law only looked at it from one perspective. Even though most research on customary law employs empirical approaches, they do not delve deeply into the highly philosophical issues and theoretical perspectives. For instance, a study conducted by Amrita Ajen Safitri et al., on "The Existence of Customary Law in the Indonesian Legal System"<sup>2</sup> stated that customary law has existed since the Hindu kingdom era as community rules, continued during the Polynesian Malay era, and persisted until the sultanate period in the Islamic kingdom era. Then, with the onset of Western colonialism in Indonesia, customary law underwent some shifts and adjustments with the implementation of Western positive law in Indonesia. In this study, Safitri et al., did not further investigate the philosophical reasons for these shifts from the perspectives of Hazairin and Van Vollenhoven.

A similar study was conducted by Zaka Firma Aditya and Rizki Syabana Yulistyaputri on "Romanticism of the Legal System in Indonesia: An Examination of the Contributions of Customary Law and Islamic Law to Legal Development in Indonesia."<sup>3</sup> In their study, Aditya and Putri only explained that unwritten customary law and Islamic law were able to fill the legal gaps in the Indonesian civil law system. However, in their study, Aditya and Putri did not incorporate the perspectives of Hazairin and Van Vollenhoven as theoretical frameworks.

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<sup>1</sup> Dwi Rahayu Sulistyaningrum, "Bustanul Arifin and A . Qodri Azizy on The Absorption of Islamic Law Into National Law : A Discourse of Thinking," *PJLS: Peradaban Journal of Law and Society* 1, no. 2 (2022), p. 96–106

<sup>2</sup> Amrita Ajeng Safitri, Ibnu Khoirun, Syafira Puji Astutik, Mochammad Agus Rachmatullah, "Eksistensi Hukum Adat Dalam Tata Hukum Indonesia Pendahuluan Indonesia Menjadi Sebuah Negara Yang Menjalankan Sistem Pluralitas Di Aspek," *RSJ: Rechtenstudent Journal* 3, no. 2 (2022): 214–30.

<sup>3</sup> Riskisyabana Yulistyaputri Zaka Firma Aditya, "Romantisme Sistem Hukum di Indonesia : Kajian Atas Kontribusi Hukum Adat dan Hukum Islam Terhadap Pembangunan Hukum di Indonesia," *Hurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 8, no. 1 (2019): 37–54.

Various studies have also been conducted by Engrina Fauzi et al. on "Dualism in the Implementation of Inheritance Division in the City of Padang."<sup>4</sup> The research empirically examines Customary Law and Islamic Law in the context of Minangkabau society. According to them, Customary Law and Islamic Law are two entities that cannot be compromised, yet once again, Fauzi et al. fail to voice the ideas of Hazairin regarding Customary Law and Islamic Law. However, from Hazairin's perspective, the universal characteristics of Islamic Law are inherently capable of compromising with the particularities of Customary Law in Indonesia.

At this juncture, this paper aims to fill the theoretical gap left by previous studies that have not addressed the philosophical examination of Customary Law from the perspectives of Islamic Law and Western Law based on the ideas of Hazairin and Van Vollenhoven. Comparing their ideas will provide a clearer picture of the philosophical differences in the views of the position of customary law in the perspective of Islamic and Western law in Indonesia. Moreover, this research will serve as an important reference for academics, researchers, and legal practitioners who wish to understand the position of customary law from the theoretical perspectives of Islamic and Western law.

Thus, this article will focus on the thoughts of Hazairin and Van Vollenhoven in analyzing their views on customary law in Indonesia. Researchers will link it to Islamic law variables. The reason is that in presenting their theories, both Hazairin and Van Vollenhoven touch upon Islamic law. In developing the theory of customary law in Indonesia, Hazairin views customary law from the standpoint of Islamic law, while Van Vollenhoven refers to the perspective of Western legal science in the context of customary law in Indonesia. Examining differences in thought needs to be seen from the starting point, basic assumptions, or philosophical foundation of a thinker. Therefore, if there are disparities in thought between the two, it is reasonable because their philosophical foundations have been different from the outset.

## Method

This study is a literature review using a qualitative juridical-normative approach. This method was chosen because the focus of the research in this article is to analyze the principles, principles, legal rules, theories, and doctrines developed by Hazairin and Van Vollenhoven.<sup>5</sup> The primary data source for this research is books written by Hazairin and Van Vollenhoven. In this case, the books used in this research are "Islamic Law of Inheritance Bilateral According to the Qur'an and Hadith" and "Seven Compositions about Law," both written by Hazairin. Then "Het Adatrecht Van Nederlandsch-Indie" by Van Vollenhoven, which has been translated by J.F. Holleman et al. titled "Van Vollenhoven on Indonesian Adat Law." Meanwhile, the secondary data sources include all relevant references to the topic. The data analysis in this study is a comparative analysis. This concept involves comparing between legal systems or between parts of different legal systems. By identifying the differences and similarities of customary law from the perspectives of Hazairin and Van Vollenhoven, the customary legal systems offered by both can be compared.

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<sup>4</sup> Engrina Fauzi, "Dualisme Pelaksanaan Pembagian Harta Waris di Kota Padang : Perspektif Hukum Islam dan Adat," *IJTIHAD: Jurnal Hukum Islam Dan Pranata Sosial* 32, no. 2 (2016): 203–15.

<sup>5</sup> Soejono Soekanto, "Metode Penelitian Hukum," 2003.

## The core ideas of Hazairin regarding customary law in Indonesia from the perspective of Islamic law

Hazairin is a figure of renewal in customary law and Islamic law, with an honorary title for his concern for Tapanuli customs, which is not only deserving for the Tapanuli community but also for the Indonesian society at large. He is well aware that Indonesia has a diversity of customs, hence Hazairin is keenly aware of the conditions reflected in his expression in his book "Demokrasi Pancasila".

In Hazairin's understanding, customary law communities such as villages in Java, clans in South Sumatra, nagari in Minangkabau, kuria in Tapanuli, wanua in South Sulawesi, are social units that have completeness to stand alone, namely having legal unity, unity of authority and unity of environment based on collective rights to land and water for all members. The form of its family law influences its governance system and general community system. Its economic system is mainly based on agriculture, animal husbandry, fisheries, and forest product collection and water yields, supplemented by a little hunting of wild animals, mining, and handicrafts. All members are equal in rights and obligations.<sup>6</sup> As customary law is equated with customary law, namely the deposit (seepage) of morality in society. The customary rules are in the form of moral rules whose truth has been universally recognized in society. Therefore, law must be based on morality.<sup>7</sup>

Customs are considered as moral norms widely recognized by society, so the law must focus on these norms. Therefore, customary law must be recognized in the formation of law because it is an important part of national law. Conversely, Hazairin says that because Islamic law is a constantly changing law, it can be adjusted to current customs or practices as long as it does not conflict with the Qur'an, Sunnah, or Ijma'.

In fact, modern Islamic law is seeking its place in society. Islamic law plays an important role in building a just and prosperous society. However, in the modern era of globalization, Islamic law often clashes with modern law and different societal traditions. Therefore, many parties are trying to find ways for Islamic law to develop and change in line with societal progress while maintaining its values. In this regard, Hazairin takes a different position from other Islamic legal experts on how Islamic law can be used. Hazairin, who is a renewer of Islamic law in Indonesia, uses an anthropological approach to analyze classical fiqh.<sup>8</sup> This method is used to see the reality in society because the existence of Islamic law is very important for the continuity of society because Islamic law has a holistic view and is responsible for the continuity of society.

Hazairin also seeks to contextualize the Shafi'i Madhhab with existing customs to review the existence of Islamic law. He chose this madhhab because it is considered the majority madhhab and does not experience significant obstacles. This indicates that Hazairin considers the aspects that influence society's acceptance of the fiqh system to be applied. In addition, Hazairin chose the Shafi'i madhhab because it is considered capable of resolving all existing problems in society without causing new problems. He hopes that the fiqh system applied will be well-received by society and serve as a reference for the societal order in

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<sup>6</sup> Makhyatul Fikriya, "Implementasi Hukum Adat Dalam Aktualisasi Pendidikan," *Jurnal Pendidikan Tambusai* 6, no. 1 (2022): 43–45, <https://www.jptam.org/index.php/jptam/article/view/2818>.

<sup>7</sup> Adwin Tista, "Hakikat Asas Pemisahan Horizontal Dalam Hukum Adat," *Al-'Adl* 14, no. 2 (2022): 347–66.

<sup>8</sup> Mahfudz Junaedi, "Epistemologi Fikih Indonesia: Nalar Pemikiran Hazairin," *Syariat: Jurnal Studi Al-Qur'an Dan Hukum* 7, no. 2 (2021): 153–66, <https://doi.org/10.32699/syariat.v7i2.2110>.

practicing Islamic teachings. He calls this formulation "National Madhhab Fiqh",<sup>9</sup> where "Madhhab" refers to the formulation of fiqh based on the Qur'an, Sunnah, and Ijma', while "National" hopes that the fiqh formulation will be contextualized with customs in Indonesia, thus being relevant and able to be legislated and practiced by the Indonesian society.<sup>10</sup>

In realizing the "National Madhhab Fiqh," Hazairin faced many challenges, one of which was the Theory of Receptive Snouck Hourgronje. Hazairin had a controversial view of the Receptive Hourgronje theory because it was considered incompatible with the 1945 Constitution (UUD 1945), and he even regarded Snouck's receptive theory as a devil's theory.<sup>11</sup> Therefore, Hazairin refuted the Receptive Snouck Hourgronje theory with the Receptive Exit theory, which he deemed more in line with the UUD, especially with Article 29 paragraph 2 stating "that the state is based on the belief in the one and only God." According to Hazairin, Article 29 paragraph 2 of the 1945 Constitution, which guarantees the freedom of every individual to embrace religion and worship according to their beliefs, plays a significant role in Indonesia's legal system.<sup>12</sup> He argued that the receptive theory contradicts the teachings of the one and only God as found in the Qur'an, the Prophet's Sunnah, and the 1945 Constitution. Therefore, he saw Indonesia's independence as having an important role in ensuring that the applicable law does not contradict the religious values of every individual. Hazairin's gratitude is reflected in his book "Tujuh Serangkai Tentang Hukum" in the chapter "Negara Tanpa Penjara" (State Without Prison).

"With regard to the Muslim community, if before August 17, 1945, we were still bound by the Dutch East Indies Constitution (Indische Staatsregeling) Article 134 paragraph 2, which only acknowledged Islamic law as applicable when Islamic law had become customary law (receptive theory), then after August 17, 1945, that constraint was broken by the 1945 Constitution, namely the condition "accepted by Customary Law" to be able to enforce Islamic law has been eliminated. After August 17, 1945, the condition and validity of Islamic law and other religious laws are Article 29 paragraph 1 of the 1945 Constitution, namely: "The State is based on the belief in the one and only God," which is a legal framework that entails the obligation for the state to enforce religious law and religious punishment stemming from Divine Revelation, namely the statements of the messengers on behalf of Allah as Allah's messengers to humanity in general, and to the rulers in particular".<sup>13</sup>

According to Hazairin, because it is not in accordance with the Qur'an and Hadith, Islamic law must exit from customary law. He argued that the law must conform to religious teachings and must not contradict them. Consequently, he developed the Receptive Exit theory and then Receptive a Contrario, which was studied by his students to address this issue.

In the book *Receptive a Contrario*, Sayuti Thalib, a lecturer at the Faculty of Law, University of Indonesia, developed the Receptive Exit theory into Receptive a Contrario.

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<sup>9</sup> Arianto, H. Nur Ahid, "Penelitian dan Pengembangan (Studi Positivisasi Hukum Islam Di Indonesia)," *INOVATIF* 8, no. 1 (2022): 93–115.

<sup>10</sup> M. Rizki Syahrul Ramadhan, Syamsul Arifin, Miftahul Huda, "Metodologi Fikih Keindonesiaan (Studi Komparatif Perspektif Filsafat Hukum Islam)."

<sup>11</sup> Hazairin, *Tujuh Serangkai Tentang Hukum*, IV (Jakarta: PT. Tintamas Indonesia, 1974).

<sup>12</sup> Departemen Agama Indonesia, "Gema Departemen Agama," *Departemen Agama*, vol. IX (Indonesia, 1988).

<sup>13</sup> Indonesia, "Gema Departemen Agama."

According to this theory, customary law applies as long as it does not contradict religious law. To achieve a harmonious societal order and bridge religious law and customary law, he introduced this theory. Thalib stated that customary law applies to Muslims as long as it does not contradict Islamic religion and law.

Hazairin began with epistemology and methodology to demonstrate the existence of Universal Islamic Law. In his fiqh epistemology, he argued that the Quran, Sunnah, and Ijma' are sources of Islamic law. He also contended that in formulating law, reference must be made to the decrees of Allah and the Prophet through the ijthad of the Ulul Amri, and their involvement cannot be denied because through their legislation, laws can be determined.<sup>14</sup> Within Hazairin's epistemological framework, he integrates Islam and local values, starting by gathering all relevant verses and hadiths, then interpreting them as a unified and mutually illuminating whole. He also argued that his method involves the integration and interconnection of religious and social sciences. He chose the muqarrin method as the most logical in his opinion and did not use the mechanism of naskh wa mansukh.<sup>15</sup> Hazairin's belief is that Quranic verses explain each other, so there is no abrogation (nasikh) and abrogated (mansukh).

Hazairin also argued that speculative (dzanni) and definitive (qhat'i) verses must be reviewed and separated between revelation and speculation. This indicates that Hazairin recognized that there are speculative verses in the Quran that are not definitive, and he wanted to ensure that only truly definitive verses are accepted and used as legal sources. Hazairin also paid close attention to the validity and authenticity of Islamic legal sources.

Thus, when Hazairin classified speculative and definitive verses, he adhered to wisdom and reality because he believed that to find the concept of justice, it must be traced back to wisdom and reality. He believed that reality and wisdom are very important and cannot be separated from faith in God, showing that Hazairin had a highly spiritual approach based on faith in God throughout the classification process. Additionally, he emphasized that the justice of God cannot be separated from human justice, indicating that he viewed the relationship between divine justice and human justice positively.

Regarding justice, Hazairin argued that the theory of justice must be based on theoretical facts as well as empirical reality.<sup>16</sup> This shows that Hazairin not only adhered to theoretical views but also looked at the theory of justice from a practical and realistic perspective. He ensured that the theory of justice he held was in line with the conditions and situations of society. In terms of the theoretical fact that the Quran serves as a theoretical foundation for Islamic Law, he argued that values derived from societal customs must be incorporated into a single legal entity, namely Islamic Law.

Overall, according to Hazairin, the process of legal decision-making or ijthad does not only focus on efforts to study religious texts but also empirical conditions, namely Customary Law ('Urf). This method is carried out so that the formulated legal products can address issues in the field. For example, in Hazairin's interpretation of inheritance verses, he interprets inheritance verses through al-haml, contextualizing the Quran based on beliefs

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<sup>14</sup>Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith*, III (Jakarta: PT. Tintamas Indonesia, 1964).

<sup>15</sup> Muhammad Amin Nasution, "Deconstruction Towards Islamic Inheritance Law In Indonesia (A Brief Study on Hazairin ' s Bilateral Inheritance Idea )," *Al-Ussrah: Jurnal AL-Ahwal As-Syahkhsiyah* 10, no. 02 (2022): 33–45.

<sup>16</sup> Setiawan Bin Lahuri, Sandiko Yudho Anggoro, Muhammad Ridlo Zarkasyi, "Pembagian Waris Receptie Exit: Tinjauan Kritis Terhadap Pemikiran Hazairin," *ISTINBATH: Jurnal Hukum* 19, no. 2 (2022): 229–51.

first, then viewing the verses from an anthropological perspective,<sup>17</sup> as he stated, "because the hadith alone does not provide a solution, the only safe way is to interpret the verse from an-Nisa 33, which is an analysis of the verse to extract hidden or implied meanings, taking into account the most intricate details of the implications in ushul fiqh."<sup>18</sup>

### **Van Vollenhoven's main thoughts on *Adat Recht* within the Western legal system**

Van Vollenhoven is one of the significant figures in Western law advocating for the study of customary law. He never realized that various agrarian production policies in the Dutch East Indies towards colonial land lacked ethics. Policies aimed at exploiting various natural resources of the Dutch East Indies were intended to perpetuate regulations for companies to exploit agricultural products and various mineral resource developments.<sup>19</sup> These policies largely ignored the customary laws in place, reflected in policies of forced cultivation that disregarded the customary agrarian law of local communities.

However, the Dutch parliament responded to the issue after it gained international attention. They declared their moral responsibility for their colonial territories. In terms of education, irrigation, and transmigration, the Netherlands had to actualize ethical policies in their colonial territories. As a confessional ministry, Abraham Kuyper pledged:

"As a Christian State, Holland is obliged to suffuse its entire policy with a conviction of moral responsibility to the peoples of these territories, and in particular to improve the legal position of native Christians and to give more tangible support to the Christian Missions".<sup>20</sup>

As a Christian nation, the Netherlands had to sow moral policies, which undoubtedly became the true Christian mission in the Dutch East Indies. This Christian mission was also formed into the "Ethical Policy," which sparked liberation, decentralization, and the early democratization of the Dutch Colonial government. On October 2, 1901, Van Vollenhoven was appointed as Professor of Constitutional Law, Foreign Administration, and Customary Law in the Dutch East Indies to carry out the ethical policy duties. That was the beginning of his dedication. In his address, Van Vollenhoven criticized that the law applied by changing colonial policies had not caused problems. His criticism indicated that Dutch Colonial legal policies would pose significant issues.

Van Vollenhoven was tasked with examining how people in the Dutch East Indies lived side by side in various different societies. Places where people from the East and West lived side by side, but were clearly separated by their social status. There were many cultural and economic conflicts leading to legal issues specific to each group. These conflicts were related to different legal views and practices between Eastern and Western societies.

Certainly, as a Professor assigned during the ethical policy era, Van Vollenhoven did not turn a blind eye to the issues occurring in the Dutch East Indies. It is said that:

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<sup>17</sup> Afiq Budiawan, "Telaah Pemikiran Hazairin Dalam Mengelompokkan Ahli Waris Menurut Persepektif Hukum Kewarisan Islam," *Journal of Hupo\_Linea* 1, no. 1 (2020): 46–53.

<sup>18</sup> Devi Kasumawati, "Pengaruh Hukum Adat Terhadap Ketentuan Waris Pasal 183, 185, Dan 209 Kompilasi Hukum Islam Perspektif Teori Receptio A Contrario 47," *QONUN: Jurnal Hukum Dan Perundang-Undangan* 5, no. 2 (2021): 63–80.

<sup>19</sup> Willem Otterspeer, *Leiden Oriental Connections 1850-1940*, ed. Willem Otterspeer (Leiden: E.J. Brill, 1989).

<sup>20</sup> Cornelis Van Vollenhoven, *Van Vollenhoven on Indonesian Adat Law*, ed. J.F. Holleman, I (Dordrecht: Springer Science+Business Media Dordrecht, 1981).

“Van Vollenhoven did not take refuge from this maelstrom in an ivory tower of scholarship, but threw his personal life and scientific work unreservedly into furthering what he saw as a prerequisite of justice: a respect for and the recognition and where possible the promotion of the indigenous law of the Indonesians, their adat law”.<sup>21</sup>

This statement serves as evidence that Van Vollenhoven respects and acknowledges the law applicable in Indonesia, even considering Customary Law as a prerequisite for justice. The social conflicts that occurred later would change the value system of Dutch Colonial Law, spearheaded by Van Vollenhoven.

Van Vollenhoven's idea for the Dutch Colonial government to recognize customary law in the Dutch East Indies was actually contrary to the Dutch legal tradition, which adhered to European Continental principles where Roman law codes with a positivistic character were the main foundation.<sup>22</sup> Customary law, which is a living law in European societies, was not something to be considered in the European Continental tradition. Unlike Van Vollenhoven, he seems to be opposed to previous legal predecessors. In 1921, at the International Colonial Institute in Paris, he spoke about the relationship between imperial politics and indigenous customs and traditions, promoting and even convincing the international public:

"Si, dans le sens de ces conclusions, le devoir m'incombait d'indiquer la direction du droit futur de l'Empire de l'Inde, des Indes néerlandaises, de l'Indo-Chine française, des Philippines ou de Madagascar, l'étude de la coutume m'ayant appris à connaître sa valeur et à l'aimer, la tâche serait lourde, mais attrayante et sublime. Quand je connaîtrais tous les codes du monde, quand j'aurais toute sorte de science juridique, - si je n'ai pas ce respect et cet amour de la coutume orientale, je ne suis rien"<sup>23</sup>

“Knowing in detail the conclusions of this study, my conscience tells me that there is an obligation on the part of the Indian Kingdom, the Dutch East Indies, French Indo-China, the Philippines, and Madagascar. The study of custom has taught me to understand and love the values contained within it. This study is indeed not easy but very attractive and noble. Even if I know all the rules and legal knowledge in the world, without having love and respect for Eastern customs, I am nothing.”

Van Vollenhoven stated this because he saw Eastern customs as an integral part of Indonesian law and culture. He argued that since customs have values and norms, it is important for Western societies to accept and understand them. Therefore, according to Van Vollenhoven, understanding and respecting Eastern customs are part of the moral responsibility of Western society. He did not consider himself a legal expert who understands and supports the values of justice because he does not respect and love Eastern customs.

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<sup>21</sup> Vollenhoven.

<sup>22</sup> Ahmad Qiram As-suvi and Moh Zainullah, “Sociology of Law in The Perspective of Roscoe Pound and Donald Black and Its Relevance in The Indonesian Context,” *PJLS: Peradaban Journal of Law and Society* 1, no. 2 (2022): 82–95.

<sup>23</sup> Vollenhoven, *Van Vollenhoven on Indonesian Adat Law*.



"Societas Humana," as Van Vollenhoven realized, a term used by Hugo Grotius, a 17th-century Dutch philosopher and jurist, is an important concept of justice. This concept speaks to the idea that all of humanity forms one human society and shares equal rights. It denotes the existence of common interests among individuals and asserts that everyone has dignity and equal rights.<sup>24</sup> Van Vollenhoven considers this term as a portrayal of humanity originating from a unified species and forming an entity whose rights and dignity should be respected. He believes this concept aligns with the teachings of the New Testament, "with every people having its own value and significance, and every human gift and talent the right to develop its own variety."<sup>25</sup> This foundation strengthens Van Vollenhoven's progressive ideas regarding Customary Law.

Philosophically, he delves deeper into the notion that Eastern societies have equal rights before God, and the Dutch Colonial government should grant Eastern societies the right to self-expression. Westerners have an ethical mission to fulfill moral responsibilities as outlined in the New Testament. According to Van Vollenhoven, it is unjustifiable to impose specific laws, institutions, and ideas on a society. Instead, Westerners should seek to understand and develop Eastern customs through collaboration.

As a theoretical implementation, he defines Customary Law as general principles applied in society, agreed upon but not codified, and an inseparable part of the national law of a country.<sup>26</sup> Van Vollenhoven argues that the term "Adat Law" is more accurate than "Customary Law" because Adat Law encompasses uncoded laws that not only include customs but also integrate various religious laws, making it less fitting to be termed Customary Law.<sup>27</sup> Additionally, he adopts the term "Adat Law" because "They are adat on account of their uncoded state and law because they carry sanction."<sup>28</sup>

Although Van Vollenhoven was a representative of the Dutch Colonial government, he did not compromise his identity as an academic and expert in Customary Law. With a neutral assumption, he views "Receptie in Complexu" as contradicting the reality in society since Customary Law consists of original laws supplemented by provisions from religious laws.<sup>29</sup> This viewpoint reflects the fact that distinguishing Customary Law influenced by religious laws is somewhat challenging due to Indonesia's diverse and distinct religions and customs. Hence, as a Customary Law expert, Van Vollenhoven, together with Snouck Hourgronje, proposed the Receptie theory, where a new religion's law may only be accepted if it does not conflict with customary law, leading to the exclusion of Islamic Law from Dutch East Indies regulations.<sup>30</sup>

This Receptie theory also dismissed Van den Berg's Receptie in Complexu theory. Van Vollenhoven's arguments are based on his observation that Islamic Law was only applied in

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<sup>24</sup> Cornelis Van Vollenhoven, "Grotius and the Study of Law," *American Journal of International Law* 19, no. 1 (1925): 1–11, <https://doi.org/10.1017/ajil.2018.104>.

<sup>25</sup> Vollenhoven, *Van Vollenhoven on Indonesian Adat Law*.

<sup>26</sup> Nasution, "Deconstruction Towards Islamic Inheritance Law In Indonesia ( A Brief Study on Hazairin ' s Bilateral Inheritance Idea )."

<sup>27</sup> Cornelis Van Vollenhoven, *Het Adatrecht Van Nederlandsch-Indie*, I (Leiden: Boekhandel en Drukkerij J Voorheen E. J. BRILL, 1933), <http://www.jstor.org/stable/2189079>.

<sup>28</sup> Florian Wagner, *Colonial Internationalism and the Governmentality of Empire, 1893-1982*, I (Cambridge: Cambridge University Press, 2022).

<sup>29</sup> Fatahuddin Aziz Siregar, "Ciri Hukum Adat Dan Karakteristiknya," *Jurnal Al-Maqasid* 4 (2018): 1–14, file:///C:/Users/HP/Downloads/Hukum adat 2.pdf.

<sup>30</sup> Mura Hutagalung, *Hukum Islam Dalam Era Pembangunan*, I (Jakarta: Ind-Hill-CO, 1985).

a small part of Indonesia, namely in Aceh and Javanese Islamic communities.<sup>31</sup> Therefore, Van Vollenhoven and Snouck Hourgronje assumed that the original law in Indonesia was Customary Law. However, there were many opinions on Receptie, including political influences at the time.

Moreover, despite the debate, he states that Customary Law has specific characteristics not found in national or international law. According to Van Vollenhoven, Customary Law must be recognized by national law, as demonstrated by the 1937 policy change regarding religious courts; he rejected the subjugation of all forms of Indonesian law under the European legal system.<sup>32</sup> In other words, he advocated for Customary Law not to be subjugated by the European legal system; instead, Customary Law should be acknowledged by the European system.

Overall, Van Vollenhoven argues that the position of Customary Law within national law should be viewed from the social reality of the community. He also emphasizes that law should serve the homeland and its people and that Indonesian law should find its own path;<sup>33</sup> therefore, national law must find its own path. Within this framework, he reiterates that useful law is one that aligns with the realities of the society in which it is applied.

### **A philosophical review of customary law from the perspectives of Hazairin and Van Vollenhoven**

A philosophical review of customary law is crucial in understanding the dynamics of law in Indonesia. The thoughts of Hazairin and Van Vollenhoven offer two distinct yet significant perspectives on the role and position of customary law within the national legal system. Both figures provide profound and influential insights into how customary law should be treated and applied in a broader legal context. By incorporating sociological, anthropological, and theological aspects, both Hazairin and Van Vollenhoven offer rich and diverse insights into the integration of customary law with national law and Islamic law. This philosophical analysis will explore the differences and similarities in their views, as well as the relevance and implications of their thoughts in shaping a legal framework that reflects the social and cultural realities of Indonesian society.

To delve deeper, it is important to examine how the term "customary law" is defined from various perspectives. In the tradition of Islamic legal supremacy, customary law is referred to as "urf." Generally, "urf" can be interpreted as customs, namely, expressions, actions, or provisions that are known and have become customary in a particular society. Meanwhile, "adat" (customs) is an integral part of culture. Culture originates from the Sanskrit word "buddhayah," meaning intellect or mind, and "dayah," meaning capability. Customs, as an integral part of culture inseparable from other elements, including ideas,

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<sup>31</sup> Tri Novianti Rahmad Alamsyah, Imadah Thooyibah, "Pengaruh Teori Receptie Dalam Politik Hukum Kolonial Belanda Terhadap Hukum Islam dan Hukum Adat Dalam Sejarah Hukum Indonesia," *PETITA* 3, no. 2 (2021): 343–563.

<sup>32</sup> Entol Zaenal Muttaqin and Ahmad Zaini, "Kebijakan Hukum Vrijwillige Orderwepping Dan Toepasselijk Verklaring Sebagai Unifikasi Pemerintah Hindia Belanda," *Jurnal Hukum Ius Quia Iustum* 28, no. 3 (2021): 657–76, <https://doi.org/10.20885/iustum.vol28.iss3.art10>.

<sup>33</sup> Sulastriyono Sulastriyono and Sartika Intaning Pradhani, "Pemikiran Hukum Adat Djojodigoeno Dan Relevansinya Kini," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 30, no. 3 (2018): 448, <https://doi.org/10.22146/jmh.36956>.

concepts, values, norms, and regulations.<sup>34</sup> In the Indonesian Dictionary, "adat" is defined as rules (actions, etc.) that are commonly followed or practiced since ancient times; ways (behavior, etc.) that have become habitual; a manifestation of cultural ideas consisting of cultural values, norms, laws, and rules that are interconnected into a system; applicable regulations. Adat can be defined simply as traditions or customs, which are a series of inherited customs passed down from generation to generation.<sup>35</sup> According to Zainul Akmal, Munir Salim states that customs are related to the attitudes and behavior of individuals followed by others for some time, indicating its broad understanding.<sup>36</sup>

It cannot be denied that customs have continued to exist throughout human history. Old customs in the Arabian Peninsula could not be eradicated by the arrival of Islam. Established customs, which vary among different tribes, became a major force for Islam as a religion of mercy to all worlds and were universally recognized in conveying its values. The relationship between Islamic teachings and local culture is like a double-edged sword, both universal and specific, according to Ali Sodikin's terms, as quoted by Moh. Anas Kholish and Khalid Rahman.<sup>37</sup> This also applies to Islamic law, which is both universal and specific. Islamic law must be accepted, improved, and adapted due to the diversity of traditions and multiculturalism in Muslim societies. As a result, each custom has its own unique and different characteristics. However, the Quran and Sunnah, the main foundations of Islamic law, must be the primary sources in contextualizing Islamic law with the customs of society. Islam recognizes "urf" as a legitimate way to formulate law as a means to bridge these two laws.

The method of 'urf is a legitimate way to formulate a law in Islamic religion. Abu Hanifah placed 'urf in the hierarchy of legal decision-making in the Hanafi school. As a classical Islamic jurist, Abu Hanifah belonged to the Ra'yi school or rationalist stream that extensively used 'urf in various matters, albeit only in subsidiary matters. Such as the 'urf applied to issues of divorce wording, freeing slaves, contracts, and conditions.<sup>38</sup>

The conceptual landscape of Western law does not speak the same way as the conceptual framework of 'urf in Islamic law. Post-Enlightenment or the Enlightenment era, mystical traditions in the West are increasingly overshadowed by scientific intellectual traditions, including the perspectives used. Various sciences experienced advancements, leading to the emergence of various technologies that facilitate human work. Unfortunately, the perspectives of some empirical and positivist natural sciences have influenced dynamic social sciences. This influence can be seen from the classic legal codes that transformed into European territory, forming a legal tradition commonly known as Continental Europe. This legal tradition is claimed to be one of the legal traditions that provide more certainty and futuristic elements because its provisions are codified into legislation.

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<sup>34</sup> Pilemon Bukit, "Pandangan Kristen Tentang Kebudayaan Dan Adat Istiadat Di Dalamnya," *SOTIRIA: Jurnal Teologi Dan Pelayanan Kristiani* 2, no. 1 (2019): 1–15.

<sup>35</sup> Badan Pengembangan dan Pembinaan Bahasa (Pusat Bahasa), "Kamus Besar Bahasa Indonesia (KBBI)," KBBI Daring Edisi III, 2021, <https://kbbi.web.id/adat>.

<sup>36</sup> Zainul Akmal, "Eksistensi Masyarakat Adat Dalam Undang-Undang Terkait Lingkungan Hidup" XVII, no. 1 (2021): 27–35.

<sup>37</sup> Moh. Anas Kholish; Khalid Rahman, *Menjadi Muslim Nusantara Rahmatan Lil'Alamin (Ikhtiar Memahami Islam Dalam Konteks KeIndonesiaan)*, ed. Labib Muttaqin Siti Rohmah, I (Bantul Yogyakarta: Naila Pustaka, 2015).

<sup>38</sup> Moh. Anas Kholish, *Menyemai Pendidikan Fikih Beyond the Wall (Menumbuhkan Living Toleransi Di Tengah Mazhab Fikih Di Indonesia)*.

On the contrary, Yustisiaben is deeply concerned about this legal tradition. The tragedy of injustice within judicial institutions has evolved into a distinct unease about the adopted legal tradition. It seems as though justice is only granted to those who prevail in litigation. However, because law is a social science field that must always evolve, it must consider all aspects of justice seekers when discussing fairness. In legal culture, formalism does not always mean everything. However, the fact that justice is merely a matter of articles makes jurists very rigid in weighing justice. It is not surprising that many cases involve victims turning into perpetrators or vice versa. In Western legal tradition, two things can be found regarding this issue. First, the Western legal system is based on the philosophy of natural law, which emphasizes natural law and universality. As a result, every legal system is brought under a specific legal system, which in turn leads to positivism, although customary law varies from country to country.

Second, formalistically, the Western legal tradition with a Continental Europe flavor tends to focus on formalities and procedures, while customary law is more informal and uncodified. Certainly, a sense of justice is difficult to obtain with the examination of the Continental European-style Western law, more so than with Customary Law, which is living and a necessity to be formalized. Because living law, borrowing Eugen Ehrlich's term, is not legal-formal but grows, develops, and is implemented according to its legal consciousness or proportion.<sup>39</sup>

The portrayal of the legal tradition in the West seems not to breathe fresh air for justice seekers, including in Indonesia. Understanding of the Continental European-style Western law has become more cognized with the onset of colonization in Indonesia, and certainly, the legal system adopted is the Dutch legal model derived from Roman Law, namely the legal code in the Roman era referred to by Napoleon Bonaparte's Code. The inability of some colonies to reformulate their own laws is not without reason, as Daniel S. Lev said, "New states inherit much from their predecessors in the colonial era because various revolutions, even those accompanied by total destruction, cannot sweep away the remnants of the past."<sup>40</sup>

The genuine fear faced by newly liberated states from the shackles of colonization is legal vacuum. Its stigma is the fear of chaos in the transition of legal systems, including Indonesia with its Concordance principle.<sup>41</sup> That fear is a manifestation of the failure to create a futuristic legal system that can provide certainty. In the context of a futuristic and certain Western legal system, it is manifested in its concrete form, namely legislation, as positivism demands. Examining various legal issues provides some postulates for legal scholars against the anxiety of positivist understanding in reformulating existing legal systems. Among them are the emotional-academic outpourings of Eugen Ehrlich regarding Living Law, Fazlur Rahman's Living Tradition, Bernad Ter Haar's Besslisengenleer, and many other figures.

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<sup>39</sup> Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, Transaction Publisher, vol. 4 (Prancis: Transaction Publisher, 2002).

<sup>40</sup> Herlindah, Siti Rohmah, Ahmad Qiram As-Suvi, "Character-Building for Law Students: Exploring the Satjipto Rahardjo 'S Thoughts," *WASKITA: Jurnal Pendidikan Nilai Dan Pengembangan Karakter* 6, no. 2 (2022): 156–173.

<sup>41</sup> M. Ali Mansyur Qodry Azizy, Satjipto Rahardjo, Muladi, Gunawan Setiardja, Abdullah Kelib, Bustanul Arifin, Achmad Gunaryo, Adji Samekto, Erman Suparman, Ghofar Shidiq, Mahmutarom, *Membangun Kesadaran Baru Melalui Studi Hukum Kritis: Menggagas Hukum Progresif Indonesia: IAIN Walisongo Semarang Dan Program Doktor Ilmu Hukum Universitas Dipnegoro*, ed. Mu'amar Ramadhan, Ahmad Gunawan, 1st ed. (Yogyakarta: Pustaka Pelajar, 2006).

Discussion of customary law, on the one hand, is indeed a classic discussion; on the other hand, the discussion of customary law is a formulation that must be followed up because law reflects the reality of society. Van Vollenhoven and Hazairin seem to want to return the law to its roots, so both provide a solid foundation for the conceptual framework, which is offered to be made the legal supremacy in legitimate decision-making. Van Vollenhoven, a Dutch legal scholar known for his theory of the need to recognize and protect customary law in national law, bases this on the customs or Custommory, which is the main genealogy of Customary Law; religious law is recognized if it does not conflict with Customary Law. Thus, he disregards the role of religion although he acknowledges that Customary Law is inseparable from the influence of religious law; this theory is later known as the Receptie theory, refuting Van den Berg's Receptie an Contrario theory. He was also the first legal scholar to establish Customary Law as a science.<sup>42</sup> On the other hand, Hazairin is a Renewer of Customary Law and Islamic Law in Indonesia; he considers Islamic law to have a significant position in Customary Law, and Customary Law can apply if it does not contradict Islamic Law, later known as the Receptie Exit theory, refuting Van Vollenhoven's Receptie theory. However, in the same position, they both agree that Customary Law is a law that must be recognized in the legal regulations of a country.

### **Comparison of the thoughts of Hazairin and Van Vollenhoven and their relevance to the future existence of Islamic law in Indonesia**

In exploring the dynamics of law in Indonesia, the comparison between the thoughts of Hazairin and Van Vollenhoven regarding the role of customary law holds significant relevance for understanding the direction of the future of Islamic law in this country. Both figures, with diverse academic backgrounds and philosophical views, undoubtedly offer valuable insights into how customary law should be treated and applied within the increasingly evolving national legal framework.

Thus, in examining customary law in Indonesia, there are significant differences in viewpoints on one side, and there are also converging points on the other side between Hazairin and Van Vollenhoven. These two figures offer different perspectives on the meaning of customary law and how its position should be within the national legal system. They differ in their opinions on the meaning of customary law. Customary law should be oriented towards morality and not separate from national law because Hazairin considers customary law as a representation of the existing moral order in society and has been widely accepted.<sup>43</sup> Van Vollenhoven, on the other hand, views customary law as a general principle prevailing in society and undocumented. According to him, customary law not only encompasses customs but can also originate from religion and have legal consequences; these two perspectives differ in their views on customary law, although they agree that customary law is an integral part of national law.<sup>44</sup>

In discussing theories of justice, Hazairin and Van Vollenhoven offer different philosophical perspectives, although both highlight the importance of adaptation and integration of laws. Their approaches to customary law and Islamic law demonstrate

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<sup>42</sup> Dedi Sumanto, "Hukum Adat Di Indonesia Perspektif Sosiologi Dan Antropologi Hukum Islam," *JURIS (Jurnal Ilmiah Syariah)* 17, no. 2 (2018): 181, <https://doi.org/10.31958/juris.v17i2.1163>.

<sup>43</sup> Ahmadan B Lamuri, "Teori Keberlakuan Hukum Islam Di Indonesia Dan Implementasinya Dalam Legislasi Nasional," *AL-MASHADIR: Jurnal Ilmu Hukum Dan Ekonomi Islam* 6, no. 1 (2024): 1–15.

<sup>44</sup> R Michael Feener, "Islamic Jurisprudence and Adat in Southeast Asia," in *Southeast Asian Islam* (Routledge India, 2024), 61–85.

fundamental differences in how they perceive justice and how the law should be applied in Indonesia's pluralistic society.

Hazairin argues that theories of justice should be based on theoretical facts and empirical realities.<sup>45</sup> He starts from his main idea that the Quran serves as a theoretical basis for Islamic Law, which is dynamic and adaptable to other legal systems. Hazairin believes that Islamic Law should be contextualized into local customs or traditions, emphasizing that customs as part of Customary Law can be aligned with the principles of Islamic Law. According to him, the substance of both laws, namely justice, must be preserved without diminishing its ceremonial and procedural aspects. Hazairin's approach reflects the view that law should reflect the social norms recognized by the community, as supported by Eugen Ehrlich in his *Living Law*, which emphasizes that effective law must reflect the moral values of its society's living customs.<sup>46</sup>

Van Vollenhoven, on the other hand, has a broader and more universal perspective on the theory of justice. He strengthens the idea of *Societas Humana* created by Hugo Grotius, which states that all humans form one human society and have equal rights.<sup>47</sup> Van Vollenhoven argues that Easterners have the same rights before God, and that Westerners should strive to understand and collectively develop Eastern customs.<sup>48</sup> He rejects the view that a legal system must be incorporated into another legal system, emphasizing the importance of respecting and preserving the uniqueness of customary law. His view is in line with Emile Durkheim's social cohesion theory, which states that law reflects social solidarity in society, and that despite local variations, basic principles reflecting universal values such as justice and deliberation can still create unity in legal diversity.<sup>49</sup>

These two thoughts have different philosophical perspectives on how the theory of justice originates and how it should be applied in society. Van Vollenhoven emphasizes the rights and dignity of individuals in society, while Hazairin relies on theoretical facts and empirical realities. The configuration of the thoughts of these two figures about the Receptie theory allows for an understanding of their positions on customary law. Van Vollenhoven, who strengthens the Receptie theory together with Snouck Hourgronje, regards customary law as the basic law possessed by every community entity with customs and the related consequences. He sees the reality of society as the main component that must not be alienated from new laws. Van Vollenhoven also notes that religious law in Indonesia primarily develops in Islamic societies in Java and Aceh with its Sharia, while other communities use pure customary law without religious influence.<sup>50</sup> Therefore, he concludes that religious law can apply as long as it does not conflict with customary law. This view reflects a more secular approach to viewing customary law and religion as separate entities.

In contrast to Van Vollenhoven, Hazairin strongly rejects the Receptie theory. According to Hazairin, this theory attempts to abolish Islamic law from the regulations of the Dutch East Indies. Hazairin believes that Islamic law is dynamic, with the Quran as the

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<sup>45</sup> S H Serlika Aprita, *Pengantar Ilmu Hukum* (Prenada Media, 2024).

<sup>46</sup> Ehrlich, *Fundamental Principles of the Sociology of Law*.

<sup>47</sup> Herbert Lionel Adolphus Hart and Leslie Green, *The Concept of Law* (Oxford University Press, 2012).

<sup>48</sup> Vollenhoven, "Grotius and the Study of Law."

<sup>49</sup> Alireza Andalib et al., "Usefulness of Emile Durkheim's Social Solidarity Approach on Improving the Ritual Functions of Urban Spaces (Case Study: Zeynabieh and Hosseinie Azam Axis till Imamzadeh Seyed Ebrahim of Zanjan City)," *Sustainable City*, 2024.

<sup>50</sup> Bulan Ningsih Rahmat Hidayat, Asma Maulidar Afni, Ristia Ananda, "PERAN HUKUM ADAT DALAM PELAKSANAAN SYARIAT ISLAM DI ACEH," *Jurnal.Kopertais5aceh.or.Id*, 2018, 124–46.

primary source that cannot be understood as something rigid. He sees the sociological and anthropological facts of Indonesian society as inseparable from religion.<sup>51</sup> In his view, separating religious law from customary law is not the right solution. Instead, Customary Law must exit from Islamic Law, and then Islamic Law should be contextualized with Customary Law. This approach is known as the *Receptie Exit* theory, which later developed into the *Receptie a Contrario* theory. Hazairin regards religion as playing a crucial role as a constituent element of customary law.<sup>52</sup>

Hazairin's perspective on the integration of Islamic Law into Customary Law reflects his belief that effective law should reflect the social norms recognized by the community, thus becoming a driver in the normative order and behavior within society.<sup>53</sup> This view aligns with Roscoe Pound's theory of Social Engineering, which emphasizes that effective law is one that can serve as a means of social change, reflecting the moral values of its society. Pound argues that law should be rooted in the social norms recognized by the community to create a well-functioning legal system that is adaptable and accommodates the living values of society.<sup>54</sup> Hazairin believes that contextualizing Islamic Law into Customary Law can create a more responsive and fair legal system, relevant to the needs of Indonesian society.

On the other hand, Van Vollenhoven's more secular and universal perspective can be seen in line with Emile Durkheim's view of social cohesion. Durkheim argues that law reflects social solidarity within society. According to Durkheim, despite local variations, basic principles reflecting universal values such as justice and consultation can create unity in the diversity of laws.<sup>55</sup> Van Vollenhoven emphasizes the importance of respecting customs and local traditions, but he also believes that customary law should function within a broader and more inclusive legal framework.

On the other hand, Van Vollenhoven and Hazairin agree that Customary Law should be legislated within Positive Law. This view implies that useful law is law born from the community itself. Both thinkers agree that Customary Law is Uncodified, although Hazairin does not explicitly state it, but if we examine Hazairin's definition of Customary Law as a code of ethics and already a common acknowledgment, it signifies that Customary Law is unwritten. At the same level, they want to express that law is not only what is codified; uncodified law like Customary Law must be recognized as positive law applicable nationally. Their views essentially rely on the same legal system, namely Common Law, where customary practices can be a valid source of law. This view is theoretically affirmed by Soetandyo Wignjosoebroto, who also supports the idea that Customary Law is an inseparable part of the Indonesian legal system. According to Wignjosoebroto, Customary Law reflects the local community's perspective on justice and order, which is often more effective and meaningful to local communities than positive law imported from the West, thus recognizing customary law as an integral part of national law is a necessity.<sup>56</sup> A similar

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<sup>51</sup> Sayuti Thalib, *Receptio a Contrario: Hubungan Hukum Adat Dengan Hukum Islam* (Bina Aksara, 1980).

<sup>52</sup> Sayuti Thalib, "Receptio in Complexu, Theorie Receptie Dan Receptio a Contrario Dalam Pembaharuan Hukum Islam Di Indonesia," *Jakarta: Yayasan Penerbit UI [Universitas Indonesia]*, 1976.

<sup>53</sup> N. S. Timasheff, "Social Control through Law," *Thought* 17, no. 4 (1942): 731-33, <https://doi.org/10.5840/thought194217420>.

<sup>54</sup> Roscoe Pound, "Law in Book and Law in Action," *American Law Review* 44, no. 12 (1910): 225.

<sup>55</sup> Emile Durkheim, "SOCIAL TRANSFORMATION AND SOCIAL COHESION," *Introduction to Sociological Theory: Theorists, Concepts, and Their Applicability to the Twenty-First Century*, 2020, 87.

<sup>56</sup> Soetandyo Wignjosoebroto, "Dari Hukum Kolonial Ke Hukum Nasional: Dinamika Sosial-Politik Dalam Perkembangan Hukum Di Indonesia," (No Title), 2014.

opinion is also expressed by Soerjono Soekanto, emphasizing the importance of recognizing unity in customary law as part of national legal development. According to Soekanto, customary law is not only important as a cultural heritage but also as an effective legal system in regulating Indonesia's diverse society.<sup>57</sup> Unity in customary law, as advocated by Hazairin, reflects shared values that support the creation of national law capable of accommodating social and cultural diversity in Indonesia.

In summary, the thoughts of Hazairin and Van Vollenhoven on Customary Law have different points on one side, but they also have points of intersection on the other side. However, Van Vollenhoven, considered the inspiration behind the Receptive theory along with Snouck Hourgronje, is considered by Hazairin as an attempt by the Dutch East Indies government to alienate Islamic Law from National Law. Thus, the existence of Customary Law in the perspectives of Hazairin and Van Vollenhoven must be pure, not political, as advocated by Snouck Hourgronje with his receptive theory. In this framework, Hazairin and Van Vollenhoven acknowledge legal pluralism in Indonesia, relevant to the existence of Islamic law as one of the applicable legal systems. Legal pluralism, recognized by John Griffiths, states that in modern society, various legal systems operate simultaneously.<sup>58</sup> This recognition supports the existence of Islamic law alongside customary law and national law. According to Griffiths, legal pluralism reflects the complex social and cultural reality, where Islamic law plays a significant role in regulating the lives of Muslim communities in Indonesia. In line with Griffiths, Lon L. Fuller also emphasizes in his theory of legal integration. He argues that effective law must reflect the moral values of society, supporting the integration of Islamic law into the national legal system.<sup>59</sup>

Therefore, Hazairin's perspective on integrating customary law into the national legal system can be applied to Islamic law. The integration of Islamic law into the national legal system will undoubtedly enrich and strengthen the national legal framework with strong moral and ethical values of Islam. This view is consistent with the legal sociology of Donald Black, who emphasizes that law cannot be merely a set of rules separate from the life of society.<sup>60</sup> Instead, law must reflect the values embraced by the community. According to Satjipto Rahardjo, good law must reflect moral integrity, consistency, and must be accessible and understood by the people.<sup>61</sup> In the context of Indonesia, this means that national law must accommodate the Islamic values held by the majority of the population.

The integration of Islamic law into the national legal system is not just about adding another layer of law, but about enriching the legal system with the principles of justice, balance, and humanity advocated by Islamic law. Islamic law brings concepts of justice (*al-'adl*), balance (*al-mizan*), and consultation (*ash-shura*), which if applied can help create a more responsive and fair legal system. According to Philip Nonet and Philip Selznick, law must be able to respond to the needs and aspirations of society. Integrating customary law and Islamic law into the national legal system allows national law to become more relevant

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<sup>57</sup> Soerjono Soekanto, "Perspektif Teoritis Studi Hukum Dalam Masyarakat," 1985.

<sup>58</sup> John Griffiths, "What Is Legal Pluralism?," *The Journal of Legal Pluralism and Unofficial Law* 18, no. 24 (1986): 1-55.

<sup>59</sup> Lon L Fuller, "Human Interaction and the Law," *Am. J. Juris.* 14 (1969): 1.

<sup>60</sup> Donald Black, "STUDIES ON LAW AND SOCIAL CONTROL: Toward a General Theory of Social Control" 1 (1984).

<sup>61</sup> Satjipto Rahardjo, *HUKUM PROGRESIF SEBAGAI DASAR PEMBANGUNAN ILMU HUKUM INDONESIA: MENGGAGAS HUKUM PROGRESIF INDONESIA. IAIN Walisongo Semarang Dan Program Doktor Ilmu Hukum Universitas Diponegoro*, ed. Ahmad Gunawan dan Mu'amar Ramadhan, 1st ed. (Semarang: Pustaka Pelajar, 2006).



and sensitive to social realities, reducing the gap between state-made law and legal practices that exist within society.<sup>62</sup> These concepts have the potential to address various complex social problems with a holistic and community-based approach.

Furthermore, the integration of Islamic law can support the aspirations of Indonesian Muslim communities to have a legal system that is not only modern but also aligned with their religious beliefs. This can enhance the sense of justice and legal compliance among Muslim communities. Recognizing and applying Islamic law in the context of national law can also reduce tensions between state law and religious law, creating greater social harmony and justice.

On the other hand, Émile Durkheim also states that law is a reflection of social solidarity within society. In this context, basic principles of law, such as justice and consultation, become embodiments of the social values recognized by the community. In Muslim communities in Indonesia, these principles not only form the basis of Islamic law but also serve as social bonds that unite various Muslim communities across different regions.

Hazairin's empirical approach and Van Vollenhoven's descriptive approach can also be used to study Islamic law. Field research and documentation of Islamic legal practices can provide a deeper understanding of how Islamic law is applied and how it can adapt to the social and cultural context of contemporary Indonesia. Bronislaw Malinowski, an anthropologist, supports the importance of ethnographic research to understand customary law within specific social and cultural contexts. Malinowski argues that law should be seen as an integral part of dynamic social life, not just a set of rigid rules.<sup>63</sup> This approach is also relevant for the study of Islamic law, which requires a deep understanding of how it is applied in the daily lives of Muslim communities. By applying empirical and descriptive approaches, researchers can understand the cultural, social, and political contexts in which Islamic law is implemented, thereby generating legal solutions that are more accurate and relevant to Indonesian Muslim communities.

## Conclusion

Hazairin and Van Vollenhoven have different views on the position of customary law in the perspective of Islamic and Western law. In the context of contextualizing Islamic law, Hazairin argues that customary law can be applied anywhere as long as it does not contradict Islamic law, as Islamic law is rahmatan lil'alamin. He believes that Islamic law is dynamic and must be adapted to local traditions to create justice relevant to the social norms of Indonesian society. On the other hand, Van Vollenhoven argues that from a Western Legal perspective, customary law does not need to consider religion because all humans have equal rights before God. He rejects the act of erasing or rejecting customs or traditions as something undignified, emphasizing the importance of respecting local customs and traditions within a broader and more inclusive legal framework. Although they have different approaches, they both agree that customary law plays an important role in shaping national law, acknowledging that culture and tradition are integral parts of society. They also agree that customary law, although not codified, functions as positive law that can be used as a basis for decision-making. Thus, their thought systems are closer to the principles of Common Law or Anglo-Saxon, where law evolves from the traditions and practices of

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<sup>62</sup> Philip Selznick Philippe Nonet, *"Hukum Responsif: Pilihan Di Masa Transisi,"* ed. Bivitri Susanti Editor (Perkumpulan untuk Pembaharuan Hukum Berbasis Masyarakat dan Ekologis, 2003).

<sup>63</sup> Russell Smith and Bronislaw Malinowski, *Crime and Custom in Savage Society* (Routledge, 2018).

society, providing flexibility in its application to reflect the needs and values of society dynamically. At this point, both Hazairin and Van Vollenhoven emphasize the importance of customary law in the context of Indonesian national law, albeit through different lenses. Their approaches provide diverse yet complementary philosophical foundations for understanding and developing a legal system that is fair, inclusive, and responsive to the needs of Indonesia's diverse society. *n.*

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